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CONSUMERS PROTECTION AGAINST GENERAL TERMS IN BANKING CONTRACTS AS UNFAIR COMPETITION PRACTICES ACCORDING TO TURKISH LAW

Abstract: *In Turkish legal system, codifications related to consumer protection against the commercial practices of banks have been one of the most significant developments stemming from the harmonisation with the European Union regulations since the beginning of the new millennium. The Turkish Consumer Protection Act, the Code of Obligations and the Commercial Code are the most prominent codifications which include the provisions related to consumer protection and regulate the practices of general terms and conditions in banking contracts. General terms and standards are considered to include typical examples of unfair competition. In order to prevent and counteract such unfair competition practices, the legislator has envisaged sanctions which are embodied in both private and criminal law provisions.*

Keywords: *consumer protection, unfair competition, general terms and conditions, banking contracts, Turkish Commercial Code, Turkish Code of Obligations, Turkish Consumer Protection Act, banking legislation, harmonisation with EU law.*

1. Introduction

The subject matter of this paper is the protection of consumers as a vulnerable group against general terms and conditions in banking contracts which are, under the new Turkish legislation, regarded as unfair competitive practices. The codification operations for the protection of consumers against the general contract terms demonstrate significant developments in Turkish law, in particular since the early 2000s. In the aftermath of being given the status of a candidate

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county for EU membership in 1999 and subsequent accession process, Turkey has exerted impressive efforts to harmonize its legislation with the EU law. As a result of these codification efforts, the new Turkish Code of Obligations¹ and the new Turkish Commercial Code² entered into force in 2012. It is noteworthy that both codes include provisions regulating general terms and standards, which can be designated as reform rules. These two general codes were followed by the Consumer Protection Act³, enacted in 2013, which specifically regulates the unfair terms and conditions in consumer contracts and sanctions for unfair competition practices.

The Turkish Code of Obligations (TCO) regulates general terms and standards as well as specific sanctions for stipulating unlawful general terms and conditions in contracts. The Turkish Consumer Protection Act (TCPA) specifically regulates the unfair terms and conditions in consumer contracts and the sanctions stemming thereof. The Turkish Commercial Code (TCC) regulates the general terms and standards contrary to the honesty rules which are designated as different types of unfair competition. Besides, both civil and criminal sanctions are also applicable in respect of general terms and conditions which may be regarded as a type of unfair competition practices of banks. According to Article 55 of the Turkish Commercial Code, the use of general terms and conditions which are contrary to honesty rules constitutes an infringement of the rules related to unfair competition.

In particular, the author focuses on the infringement of unfair competition rules resulting from the use of dishonest general terms and conditions in banking contracts between banks and consumers. The main reason for these unfair practices is the stronger economic (financial) position of banks in comparison to the weaker position of customers as a vulnerable group in banking contracts. It is obvious that this is not in compliance with the new understanding which was formatted in the aforementioned legislative acts. This article has been inspired by the need to explore this contradiction in detail. The author discusses the new legislative approach to this subject matter. First, the author provides an overview of different types of general terms and conditions which are perceived as examples of unfair competition practices in the banking sector. In addition, the author analyzes the specific conditions constituting a violation of fair competition as well as the results of civil and criminal sanctions applied to unfair competition practices stemming from dishonest general terms and conditions in banking contracts.

1 Turkish Code of Obligations, Official Gazette, 04.02.2011, N.27836.

2 Turkish Commercial Code, Official Gazette, 14.02.2011, N.27846.

3 Turkish Consumer Protection Act, Official Gazette, 28.11.2013, N.28835.

2. Regulation of General Terms and Standards in Turkish Law

In Turkish legal system, general terms and standards are regulated in a scattered way in the legislation relating to private law (Havutçu, 2003: 165). As a result of this approach, general terms and standards are expressed by various concepts in Turkish legislation. For example, the concepts such as unfair terms, general procedural terms and general transaction terms are favoured by the legislator in different sources of law. This legislator's choice of concepts led to criticism in the legal doctrine (Havutçu, 2003: 1) but the criticism is not related only to the doctrinal points of view. In addition, these concepts generated numerous problems in law practice. First of all, it is necessary to examine the principles of regulation of general terms and standards in different codifications related to private law in general.

2.1. General Terms and Standards in the Consumer Protection Act (2013)

2.1.1. Definition of Unfair Terms

In the new Consumer Protection Act (No.6522) of 2013, the phrase “unfair terms” is used for the concept of “general terms and standards”. The unfair terms in consumer contracts are regulated in Article 5 specifically under the heading “General Principles”.

Unfair terms are defined in Article 5 Subtitle 1. According to this definition, unfair terms are the contractual provisions which are included in the agreement without being negotiated with the consumer, which create an imbalance against the consumer in terms of rights and obligations arising from the parties' agreement, in a manner that is contrary to the honesty rules (Havutçu, 2003: 71). Namely, in order to be regarded as unfair terms, the contract provisions shall be as follows:

- the contract provisions included without being negotiated with the consumer,
- provisions creating an imbalance against the consumer in respect of the parties' obligations and rights arising from the contract,
- provisions contrary to the honesty (good faith) rules.

2.1.2. The Sanction Against Unfair Terms

If a contract provision is qualified as an unfair term, this provision is determined as null and void. However, the remaining provisions of contract will maintain their legal validity. In addition to this, both contracting parties shall remain bound by the contract, except for the unfair terms which are already voided.

2.1.3. Presumptions Regarding the Application of Consumer Contracts

a. There is an absolute presumption in this case. According to this presumption, the party preparing the text of the contract cannot assert that he does not want to be bound by the contract without the terms which are already deemed to be absolutely void⁴.

b. In case a contract term has been pre-determined and if a consumer is unable to influence the content of the contract due to the standard characteristic of contract, it is assumed that the contract has been signed without being negotiated with the customer. If a party who prepares the text of the contract claims that a standard term was subject to negotiation separately, such party is obliged to prove it⁵.

c. In case the contract terms are provided in writing, the contract must be written in clear and comprehensible language which the customer can easily understand. Otherwise, if a term of a contract is not clear and comprehensible or if it is ambiguous and carries multiple meaning, it shall be interpreted in favour of the consumer⁶.

d. The contracts which are prepared by persons or institutions whose activities are subject to prior approval under the law or permission by competent authorities are subject to this Consumer Protection Act regardless of the nature of such contracts. The Banking Act (No.5411) regulates that banks shall be established as public limited companies. Moreover, in order to perform their banking activities and banking transactions, banks have to obtain permission of the Banking Regulation and Supervision Agency. Thus, in considering the provisions of banking contracts as unfair terms and the legal results which are bound to these contradictions to law, the provisions related to legal measures (Article 5, CPA) shall apply.

e. The fairness or unfairness of a contract term shall be determined at the moment of drawing up the contract. In the process of determining the unfair terms of contract, the characteristics of goods and services which are the subject matter of the contract and the conditions that existed at the time of drawing up the contract shall be taken into account.

2.1.4. The Role of the Ministry

The Ministry of Customs and Trade has an active role to prevent the use of unfair terms in contracts. According to Article 5 s.8 CPA, the Ministry is responsible

4 Article 5. Consumers Code, Official Gazette, N.28835.

5 Article 5, Consumer Act, Official Gazette, N.28835.

6 Article 5, Consumer Act, Official Gazette, N.28835.

and authorized to take necessary measures in order to remove the unfair terms from the text of contracts which are prepared for the purpose of general use or prevent the practice of unfair terms.

2.2. General Terms and Standards in Turkish Code of Obligations (2012)

2.2.1. Description and Elements of the Concept

In the Turkish Code of Obligations (No. 6098) of 2012, general terms and conditions are regulated in Articles 20 -25 TCO. The legislator first describes the concept and then refers to the provisions regarding the legal basis of general terms and standards. Article 20 S.1 TCO specifies that “General terms and standards are the pre-contract provisions which are prepared and supplied by one contracting party in order to be applicable for future use in a number of similar contracts.” According to this description, a contract term may be qualified as a general term and standard if:

1. It is unilaterally drafted by a contracting party
 - a. to apply in the future for a number of similar contracts,
 - b. as a pre-drafted contractual provision,
 - c. without negotiations.
2. It is offered to the other party.

2.2.2. Determining General Terms and Conditions

It is not necessary for general terms and conditions to be contained in the text of the contract. They can be located in the annex, too. In addition, the content, method and mode of drafting provisions do not hold key for nor constitute a significant difference for the characterization of the general terms and standards⁷.

General terms and conditions may also be included in the contracts drafted for the same purpose. In case the texts of contract are used for the same purpose, the fact that the provisions are not identical does not prevent their inclusion in the contract as general terms. In order to clarify those terms, it does not make any sense that the contracts or separate agreements are to be adopted by means of discussion. As a result, the contract provisions still contain general terms and standards.

The provisions concerning the general terms and conditions can be also applied to the contracts which are prepared by the individuals and organizations whose

7 Article 20, Turkish Code of Obligations, Official Gazette, N.27836.

activity is subject to a prior approval by the law or permission of the competent authorities. An example of such entities and organizations are banks. Therefore, the general terms and conditions in banking contracts are also subject to provisions of Article 20 TCO and others.

2.2.3. The Legal Consequences of General Terms and Conditions

There is no violation of law if the general terms and conditions are included in the contractual provisions. A violation of law occurs if the contract comprises illegal general terms and standards which are contrary to the interests of the opposite party. However, there is no infringement if, during the execution of the contract, the party who drafts the contract clearly informs the opposite party about the existence of these conditions, thus providing it with an opportunity to learn the content of these terms, and the opposite party agrees to these provisions. In this case, the general terms get the validity even if they are inconsistent with the interests of the other party. Otherwise, the general terms and conditions contained in the contract shall be deemed as *unwritten* (null and void)⁸. So, the illegal general terms in the aforementioned provisions shall be “considered to be *unwritten*”. Another possibility that would constitute a violation of law is the case when the general terms and conditions are contrary to the nature of business practices and essential elements of the contract, in which case such terms are deemed *unwritten*.

2.2.4. The Effect of Being Deemed Unwritten in Contract

In case the sanction of being deemed *unwritten* is applicable to general terms, only the contract provisions which are deemed *unwritten* are considered to be invalid. The other provisions keep their validity. Contract is still applicable but only in terms of the valid provisions. In this case, the party who prepares the contract provisions cannot argue that he would not be a part of contract without the provisions deemed *unwritten*⁹.

2.2.5. The Interpretation of General Terms and Conditions

The general terms and standards in a contract must be clear and comprehensible (Havutçu, 2003: 148). Otherwise, when general terms and conditions are neither clear nor understandable, or if they are ambiguous, these terms shall be interpreted in favour of the opposite party, i.e. against the party who drafted the contract¹⁰.

8 Article 21, Turkish Code of Obligations, Official Gazette, N.27836.

9 Article 22, Turkish Code of Obligations, Official Gazette, N.27836.

10 Article 23, Turkish Code of Obligations, Official Gazette, N.27836.

2.2.6. The Prohibition of Amendment of General Terms and Conditions

Article 24 TCO provides that the party who prepares the contract is not allowed to make any unilateral amendments to the contractual provisions containing general terms and conditions, against the interest of the other party. In addition, the party is also prohibited to include new terms without a negotiation with the other party.

2.3. General Terms and Conditions in the Turkish Commercial Code (2012)

In the Turkish Commercial Code (No. 6102) of 2012, the institute of unfair competition is regulated in Article 54 and more. In Article 55 TCC, the legislator enumerates more than twenty unfair competition practices (Ayhan, Özdamar, Çağlar, 2012: 277) and designates the general terms and conditions as typical examples of unfair competition (Karahana, 2013: 213). This provision is considered as a significant amendment. Thus, general terms and conditions have been regulated in the TCC as types of unfair competition practices for the very first time in Turkish legal system. The legislator intends to prevent unfair competition practices in the banking sector by regulating the specific circumstances when general terms and conditions constitute unfair competition and by prescribing relevant sanctions (nullity of contract) for such unfair competition practices (Karahana, 2013: 218).

In that context, it is first necessary to examine the concept of unfair competition and then the general terms and standards as a specific type of unfair competition.

Unfair competition is regulated in two main legislative acts: the Turkish Code of Obligations (TCO) and the Turkish Commercial Code (TCC).

2.3.1. Unfair Competition in the Turkish Code of Obligations (2011)

In the Turkish Code of Obligations (TCO), unfair competition is regulated as a special tort. According to Article 57 TCO, an individual who loses the circle of customers or faces the danger or risk of a possible loss, as results of the propagation of news which is not true,, or announcement of the same kind or any behaviour which is contrary to integrity rule, may request from the perpetrator to put an end to this violation and to compensate the damage in case of existence of fault (Arkan, 2013: 312).

The provision in Article 57 TCO is a general provision (Teoman, Ülgen, Helvacı, Kendigelen, Kaya, Nomer, 2009: 451). It is applicable to all unfair competition practises in both commercial or non-commercial cases. However, the legislator has reserved specific provisions in the TCC (Article 54 TCC and more) relating to unfair competition in commercial businesses. In other words, the provisions

related to unfair competition may be applied only to unfair competition practices related to commercial matters.

2.3.2. Unfair Competition in the Turkish Commercial Code (TCC)

2.3.2.1. Principles and Content of Unfair Competition Provisions

Article 54 of the Turkish Commercial Code (TCC) specifies the purpose of provisions related to unfair competition, which is to ensure the competition atmosphere which is fair and uncorrupted for the benefit of all the market participants. In addition, Article 54 S.2 TCC contains the fundamental provision which defines the concept of unfair competition (Arkan, 2013: 316). According to this definition, the acts and commercial practices which effect relations among the competitors or between customers and providers, which are deceptive, misleading and contrary to integrity (*bona fide*) rules are unfair and illegal (Karahan, 2103: 216). Therefore, according to the TCC provisions, unfair competition may occur not only among competitors but also between the customers and manufacturers which produce goods or provide services (Arkan, 2013: 316). Thus, in order to be qualified as unfair competition, a commercial activity or a competition practice is, first, required to effect the relations among the competitors or between the customers and suppliers. In addition, it has to be deceptive or it has to imply a violation of integrity rules in other ways.

2.3.2.2. Sample Situations which will form Unfair Competition

Article 55 TCC enumerates more than twenty examples of competition practices which constitute unfair competition. This list is by no means exhaustive. These leading competition practices that constitute unfair competition may be categorized under six main titles. These are:

- a. Using advertisements and sales methods against the integrity rule,
- b. Inducing the customer to breach or to terminate the contract,
- c. Taking advantage of other people's products without authority,
- d. Disclosing the manufacturing and business secrets in violation of the law,
- e. Spoiling the business terms and standards,
- f. Applying general terms and conditions which are against integrity rules.

The sixth subtitle constitutes a reform in the Turkish law system because the legislator for the first time regulates the general terms and conditions contrary to integrity rules which can result in unfair competition. In addition, in Article 54

TCC (and others) determine the private and criminal law sanctions which apply in case of violation of legal provisions (Karahan, 2013: 243). Thus, the legislator aims to prevent the suppliers (such as banks) from abusing the competition right. Therefore, in the next section of our study, we will focus on examining this issue within the scope of the general terms and standards in banking contracts.

3. General Terms as Unfair Competition Practices in Banking Contracts

3.1. Legal Conditions of Being Unfair Competition for General Terms

Article 54 TCC regulates that the most significant legal condition for establishing the presence of unfair competition is the application of general terms and conditions which are contrary to the integrity rules. This contradiction is not only necessary but also sufficient (Çeker, 2013: 152). Therefore, it is clear that the legislator intends to regulate a new type of sanction for the illegal practice of general terms and standards in the banking sector. In addition, in Article 55 TCC the legislator gives two examples which clarify the legal conditions. These are:

- the use of pre-written general terms in substantial violation of integrity rules and legal provisions which are applicable directly or through interpretation, with an aim to deceive the opposite contracting party, or
- the use of general contract terms envisioning the distribution of rights and liabilities substantially contrary to the nature of the agreement.

The legislator has not listed such practices of general terms as prohibited practices (Poroy, Yasaman, 2012: 343). That is why any kind of competition practices involving general terms which are contrary to integrity rule shall be considered as unfair competition.

In case of being deemed *unwritten*, it is not necessary to prove whether general terms and standards constitute the violation of unfair competition rules or not. It means that general terms and conditions which are not deemed *unwritten* are not subject to the violation of rules of unfair competition. Besides, even if the general terms and conditions are valid, the counterpart of the contract may be protected against the party who drafts the contract provisions by relying on the unfair competition provisions in Article 54 TCC and more. In addition to the sanction of nullity (deeming the general terms and conditions *unwritten*), the customers could be thus protected against the banking contracts.

3.2. Civil Law Provisions

3.2.1. Civil Liability Actions

Article 56 TCC sets forth five types of legal actions that may be filed for unfair competition, based on the conclusion of general terms and conditions that constitute unfair competitive practises. These legal actions are listed as:

- a.** *Declaratory judgment action* to determine whether the unfair competition exists.
- b.** *Restraining or Preventive action* against a possible unfair competition.
- c.** *Restitution action* in order to abolish the factual situation and eliminate the negative effects of unfair competition, where the customer can claim the correction of false or misleading statements which resulted in unfair competition (Bahtiyar, 2013: 147); the customer can also claim the destruction of vehicles and goods in case of being inevitable for prevention of the violation of unfair competition.
- d.** *Compensatory action for pecuniary damages* in case of fault.
- e.** *Compensatory action for non-pecuniary damages* in case of fault.

3.2.2. Relevant Parties Who Have Right to Sue

Article 56 TCC also designates the persons who are entitled to file legal actions related to unfair competition. It includes the following entities:

3.2.2.1. Competitors

In case of banking contracts, a competitor bank may pursue all legal actions listed above against another bank whose use of general terms and conditions constitutes a violation of integrity rules. In order to file a legal action against another competitor bank, the bank is required to have sustained some kind of harm in terms of customers, credits, professional reputation, commercial activities or any other economic interests (Çeker, 2013: 167). In addition, the legal action may be based on the fact that the bank has faced face same kinds of danger or possible risk.

3.2.2.2. Customers

Customers may file legal actions against the banks which use general terms and conditions that constitute unfair competition. In order to sue, customers do not have to show that the actual economic damage occurred (Arkan, 2013: 328). Therefore, a customer may file a lawsuit even if he/she has not been actually

harmed. A possible risk or danger of damage in terms of any economic interests of customers can be considered legally sufficient.

3.2.2.3. Professional and Economic Associations

The TCC regulates that professional and economic associations can also file lawsuits in unfair competition cases. The legislator does make an exhaustive list. Thus, a legal action may also be initiated by NGOs which aim to protect the benefits of their members (Bahtiyar, 2013: 148). The Chambers of Commerce may be an example of this situation. In addition, the statutes of customer associations founded for the protection of customers' rights and interests envisage that such associations may be claimants in consumer disputes (Karahan, 2013: 250). At this point, a significant exception should be noted. Namely, professional and economic associations, including the consumer protection associations, may not claim pecuniary or non-pecuniary damages on behalf of the association members or customers.

3.2.3. Relevant Parties Who May Be Sued

Article 56 TCC specifies three relevant parties who may be sued and appear in the capacity of a defendant in a civil lawsuit.

3.2.3.1. Perpetrator of Unfair Competition

In case of banking contracts, bank employees who commit illegal acts that constitute unfair competition practices can appear as defendants in lawsuits. For example, it refers to directors and other bank personnel who are authorized to sign banking contracts which include general terms and conditions that constitute unfair competition practices. The liability of employees is related to private tort in the field of commercial law. This liability can be also characterised as contributory liability.

3.2.3.2. Employer as a Defendant

A bank as a legal entity may be held responsible for unfair general terms and conditions that constitute unfair competition practices. In this case, there is a significant condition which implies that the unfair competition practice should occur during the provision of services in the relation between a bank and a customer. Another condition for claiming damages is that a competent individual (employee) should be at fault. In case where the bank has strict liability for unfair competition, it is irrelevant whether the fault of the bank as a legal entity exists or not. In other words, there is no need to prove that the bank was

at fault. At this point, the plaintiff has an optional right. He/she is entitled to file a legal action against the perpetrator or the bank depending on his/her choice. The responsibility of the perpetrator and the bank can also be characterised as joint liability.

3.2.3.3. Press, Publishing, Communication and Information Organizations as a Defendant

Unfair competition claim can be initiated against all kinds of press, publication, communication and information companies and other organizations which violate the rules of fair competition, good faith and fair dealing in the course of performing their activities. Thus, if unfair general terms are stipulated as a condition of an advertisement (agreement) supplied by the bank, the legal personality of bank as the owner of the advertisement or announcement will bear liability for any violation of unfair competition rules.

3.2.3.4. The Publication of Judicial Decisions

In order to prevent further unfair competition practices and to improve deterrence, Article 59 TCC provides the possibility to publish the judicial decisions rendered by the court, provided that the winning party of the case has requested its proclamation (Kayar, 2012: 276). In that case, the publication expenses will be paid by the losing party. The type, form and scope of announcement is decided by the court (Teoman, 2009: 472).

3.2.4. Limitation of Civil Liability

Article 60 TCC regulates the limitation rule which applies in case of civil liability. This Article prescribes two different limitation periods which may run concurrently. The first option refers to the one-year limitation period starting from the moment of being informed about the act of unfair competition. The second option refers to three years' limitation period starting from the moment when the unfair competition practice occurs. The statute of limitations shall apply upon the expiry of both limitation periods.

3.3. Criminal Law Provisions

3.3.1. Criminal Liability of Individual Perpetrators

Apart from being subject to civil liability, unfair competition may be subject to criminal liability as well. The legislator prefers applying criminal sanctions in order to prevent unfair competition practices involving the use of general terms

and conditions which are contrary to integrity rules (Kayar, 2012: 280). An unfair competition practice constitutes a crime only if it is explicitly stipulated in the TCC. For this reason, general terms and standards that result in unfair competition, as envisaged in Article 55 TCC, constitute a criminal offence as well. One of the key elements of crime is intent, which implies that the offender must commit the crime intentionally. The perpetrator of unfair practices (involving general terms and conditions) is sentenced to two years' imprisonment as the maximum punishment. The competent court may also order a judicial fine instead of imprisonment. In order to be subject to criminal law, the criminal offence of unfair competition has to be initiated by the aggrieved party, who is required to submit a criminal complaint to the Public Prosecution Office. Thus, in case of banking contracts, customers (as the aggrieved party) have the right to file a criminal complaint with the Public Prosecutors' Office within a six-month time limit, starting from the moment they became aware of unfair competition practices against them. In this case, only the bank employees (individuals) can be charged as as perpetrator, sentenced and punished.

3.3.2. Criminal Liability of Legal Entities

Criminal liability of legal personalities is specifically regulated in Article 63 TCC. According to this Article, if the act of unfair competition is committed by a legal entity during the performance of activities in their own field, the sanctions regulated in Article 62 TCC are applied for the members of the legal bodies or partners who act on behalf of the legal personalities. In case of banking contracts, members of board of directors, general director(s) and commercial representatives of banks are subject to criminal punishment due to unfair competition practices, such as those involving general terms and standards. In case of unfair competition committed within the framework of banking activities, security measures may also be imposed on banks as a sanction.

4. Conclusion

The subject matter of this paper the protection of consumers as a vulnerable group against general terms and conditions in banking contracts

The consumers appearing in the role of customers in banking contracts are considered to a vulnerable group as related to the legal personalities of banks. Thus, the legislator has been required to institute relevant legal measures as instruments which would protect consumers from unfair general terms and conditions in banking contracts, which are contrary to the customers' interest. In Turkish legal system, these measures are scattered across several legislative acts. This choice of the legislator is absolutely problematic, and it may be obser-

ved as a lack of the Turkish legal system. Hence, in terms of *de lege ferenda* (as the law shall be), it would be much more appropriate if all provisions regulating consumer protection against unfair general terms and conditions in banking contracts were collected in a single code.

In Turkey, protection of consumers against unfair general terms and conditions in banking contracts is provided in two ways. First of all, under specific circumstances the general terms and conditions are subjected to a sanction of being deemed *unwritten* (null and void). This sanction is regulated in both the Turkish Code of Obligations (TCO) and the Consumer Protection Act (CPA). Second, the Turkish legislator additionally provided for consumer protection against the general and standard terms which are not deemed *unwritten*; they are not void and they get validity. Besides, the legislator actualized the protection requirement by envisaging provisions on unfair competition, which are contained in the Turkish Commercial Code (TCC). According to the unfair competition provisions in the TCC, general terms and conditions are considered as typical unfair competition practices in case they are contrary to the integrity rules (good faith and fair dealing). Although the general terms and conditions are not void in this case, they can result in a violation of strictly prohibited unfair competition rules. A legal action for the violation of unfair competition rules may be pursued in both civil and criminal law. In civil law, a consumer can sue the bank to stop the execution of the banking contract which constitutes unfair competition. Besides, consumers can also seek pecuniary and/or non-pecuniary damages from the bank as compensation for unfair competition practices involving general terms and conditions in banking contracts. On the other hand, the unfair general terms and conditions which are contrary to competition rules may be subject to criminal law sanctions. In case the general terms and conditions included in banking contracts constitute a violation of unfair competition rules, the bank employees (such as: the general director, members of board of directors or commercial authorized representatives who put the contracts into effect) appearing in the capacity of the perpetrator may be sentenced to up to two years' imprisonment or a fine, depending on the plaintiff's claim. The competent court may also impose security measures against the bank as a legal entity.

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**ЗАШТИТА ПОТРОШАЧА ПРОТИВ ОПШТИХ УСЛОВА УГОВАРАЊА КАО
ПРИМЕРА НЕЛОЈАЛНЕ КОНКУРЕНТСКЕ ПРАКСЕ БАНАКА У ПРАВУ ТУРСКЕ**

Резиме

Предмет ове студије је заштита потрошача, као угрожене групе, против општих термина и услова банкарских уговора који, према новим прописима у турском праву, представљају пример нелојалне конкурентске праксе. Кодификацијски захвати усмерени на заштиту потрошача против општих термина и услова уговарања представљају значајан напредак у турском праву, нарочито током првих година 21 века. Као признање за импресивне напоре уложене у процесу хармонизацију свог правног система, Турска је 1999. године добила кандидатуру за чланство у Европској унији. Као резултат законодавних захвата и настојања, донети су нови Закон о облигационим односима и нови Закон о трговини, који су ступили на снагу 2012. године. Треба напоменути да оба закона садрже одредбе о општим терминима и условима уговарања које имају реформски карактер. Закон о заштити потрошача усвојен је 2013. године. Одредбама овог закона експлицитно су регулисани општи услови уговарања у потрошачким уговорима као и санкције за нелојалну конкурентску праксу.

Турски Закон о облигационим односима дефинише опште услове уговарања и прописује специфичне санкције за незаконите опште термине и услове уговарања. Турски Закон о трговини такође препознаје опште термине и

услове уговарања који су у супротности са правилима поштене праксе и који се сматрају врстом нелојалне конкуренције. Осим тога, грађанске и кривичне санкције се такође могу применити на опште услове уговарања који се сматрају врстом нелојалне конкурентске праксе у банкарском сектору. Према члану 55. Турског Закона о трговини, примена општих услова уговарања који су супротни правилима поштене праксе представља повреду правила о забрани нелојалне конкуренције.

Аутор се посебно бави повредама правила забране нелојалне конкуренције у банкарским уговорима између банака и потрошача, у случајевима када је до повреде дошло услед употребе непоштених општих термина и услова уговарања. Главни разлог оваке непоштене праксе је јача економска позиција банака у односу на потрошаче као слабију страну у банкарским уговорима. Ова контрадикторност навела је аутора да анализира ову тему, у односу на нову концепцију формулисану у поменутиим законским актима. У овом раду, аутор детаљно разматра нови приступ овом проблему. Аутор најпре даје преглед разних врста општих термина и услова уговарања који представљају примере нелојалне конкуренције у банкарском сектору. Осим тога, анализирају се услови повреде принципа поштеног уговарања као и резултати грађанских и кривичних санкција које се примењују у погледу нелојалне конкурентске праксе.

Кључне речи: *права потрошача, заштита потрошача, нелојална конкуренција, општи термини и услови уговарања, банкарско право, непоштена банкарска пракса, банкарски уговори, потрошачко право, Закон о трговини, право Турске.*