



## Q&A on the E-Commerce Within the Scope of Covid-19 Pandemic

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Worldwide spread of coronavirus and its increasing effects in Turkey has led to the lockdowns on the certain age groups in our country. It is known that the persons who are not affected by these lockdowns are also staying home during the pandemic in order to contribute to the sanitation, save for the obligatory cases. The Government takes important steps to reduce the social activities, as well.

These developments in the world and Turkey have been visibly affecting the shopping habits of the society. Nowadays, using the electronic commerce [“e-commerce”] websites to shop becomes a prevalent method of shopping. Thus, the increasing interest on e-commerce and the exceeding amounts of purchase order than the anticipated escalated the problems in this field.

In this regard, this article aims to explain the existing or contingent issues regarding the commerce and suggest solutions accordingly.

### 1. What is the legal consequence of clicking to “Agree” in distant contracts, even without reading it, in the electronic environment?

Article 48/1 of the Consumer Protection Law No. 6502 [“CPL”] defines the distant contract. In this respect, distant contract stands for all sorts of contracts parties of which did not come face to face.

Content of the distant contracts is strictly regulated and restricted by the lawmaker. In general, distant contracts are named after the type of the service that consumer gets from the seller/provider. For example, in case where a product is bought through an e-commerce website, the contract which is constituted between the seller and the buyer is called a “distant sales contract”.

The most significant characteristic of the distant contracts is that they are established without the simultaneous presence of the parties. In most cases, consumer does not have the right to make changes on the contract and the contract is not established until consumer clicks to “Agree”. In this respect, most of the consumers tend to “agree” the contracts without reading. This matter has been considered by the lawmaker as well, and several regulations have been put in place to protect the consumer.

Within this scope, it is not possible to include the following provisions to distant contracts: provisions which holds consumer responsible in cases where the seller/provider did not fulfill his/her responsibility, provisions releasing seller/provider from liability in cases where the consumer suffers damages, provisions allowing the seller/provider to terminate the contract without stating any reason, provisions imposing disproportionate sanctions on the consumer who did not fulfill his/her

obligation, provisions enabling the seller/provider to alter the contract unilaterally. In Turkish law, while such provisions will remain null, persons who use such provisions would be sanctioned as per Article 77 of the CPL, as well. Nevertheless, it should be noted that distant sales contracts should be read carefully by consumers. For example, if a certain shipping firm is indicated in the contract for the exercise of the right of withdrawal and if the consumer does not use that shipping firm, it may cause the consumer to be responsible of the back charges. Hence, consumer should be careful on the withdrawal right-related provisions.

**2. What are the rights of consumers in case the order could not be delivered due to the overordering in e-commerce websites?**

In the first place, it should be examined if a certain time for delivery is stated in the relevant distant sale contract. It should be noted that according to Article 48/3 of the CPL, the delivery period cannot exceed 30 days in sales of products under any circumstances. If the product is not delivered within this period, the consumer is entitled to terminate the contract, and if s/he exercises this right, then the seller/provider is obliged to pay the sale price back together with its interest within 14 days.

**3. If it is realized that the product is out of stock later than the consumer's order, will the seller be released from his/her responsibility to deliver?**

While a reasoning implying that the product is out of stock does not exculpate the seller from responsibility, such behavior also leads to imposing administrative fine against the seller. However, in these days, partial impossibility may be argued due to the Covid-19 measures if it is not possible for seller to carry the products from the storage to consumer's address. In such case, the seller should inform the consumer within 3 days in writing [via e-mail, SMS, etc.] and should refund.

**4. Is there any sanction imposed on the sellers who make significant increases in the prices of products that are subject of an increasing demand?**

It should be noted that there is a complaint mechanism regarding this issue through the Directorate General of Consumer Protection and Competition Surveillance's application called "HFA-Bildirim" ["Unfair Upcoding Notice" in Turkish]. In addition, with the Regulation "Altering the Regulation on Commercial Advertisement and Unfair Commercial Practices" which entered into force by being published in the Official Gazette dated 31.08.2018 and numbered 30521, the following subparagraph has been added under the chapter "A-Deceptive Commercial Practices" of the Appendix named "Practices Constituting Example for the Unfair Commercial Practices": "increasing prices of a product or service without stating any valid reason and by pretending to be affected by raises in the input costs or exchange rates". Thus, sellers making unreasonable excessive price increases have become subject to the serious sanctions.

**5. What are the options of consumers regarding price increases in advance of a formal discount to manipulate the discount size?**

In principle, when there is a discount on the price of a certain product, the strikethrough price should refer to the latest price of this product before the discount. In cases where sellers do not sell the product for the crossed-out price during regular season, it may be deemed as an act of false advertising and the seller may face harsh penalties upon a complaint by a customer.

Under Article 54 of CPL, sellers are under the responsibility to prove that the discounted prices of the products and/or services are lower than the pre-discount prices. For example, a seller who claims that the price of a certain product was reduced to 7 TL from 10 TL between 1.1.2020 - 1.2.2020 is responsible to prove that its price was 10 TL on 31.12.2019. However, it should be also noted that the seller is not obliged to apply the pre-discount price for a certain period. This may appear as a legal loophole.

**6. What would e-commerce websites' slowing down due to reasons such as overloading mean for customers?**

This question should be approached from a different perspective as it applies not only to e-commerce websites but to banks as well. Ever since coronavirus entered the public discourse, there has been a perception that certain legal obligations have been relieved, suspended, and/or can be mitigated due to Covid-19. However, it can be said that this perception is far from the reality. On the contrary, there may be additional obligations due to Covid-19. For instance, an e-commerce website must foresee the increase on the volume of transactions whilst people are not able to leave their houses. It is also not difficult to estimate that this situation is going to persist in the following months. Therefore, websites should make the necessary investments in order to prevent any disruption due to the increasing traffic. Especially sellers who shut down their physical locations and now divert buyers to their websites must be prepared for possible setbacks in the shipment process and grant safeguards for issues that may occur. In this sense, cooperating with more than one delivery service company appears to be a preferable option and in fact, could be considered requisite as per due care of a prudent merchant.

**7. Are minimum cart amount practices compliant with law?**

As long as the consumer is informed about the minimum cart amount, the practice will be compliant with law.

**8. Who is responsible in case that the credit card is copied during the payment on delivery?**

Provided that the card was copied during the payment at the door, the e-commerce website along with the shipping firm will be held liable to the consumer since the courier is acting as the auxiliary of both.

**9. Is it possible for the personal data or credit card information of consumers to be stolen as a result of the hacking of an e-commerce website?**

An e-commerce website is obliged to fulfill certain procedures and retain numerous certificates to be able to store credit card information or personal data of costumers. In particular, it is crucial for an e-commerce website to operate in accordance with Payment Card Industry Data Security Standard ["PCI DSS"] to securely store credit card information. In practice, e-commerce websites generally agree with companies that are qualified and permitted to carry out credit card payment transactions. When the consumer inserts credit card information on the website, such information is being dealt with by these companies and then being processed across banks. In other words, when the card information has been filled in on the e-commerce website and the payment button is clicked, the e-commerce website does not store the credit card information in its database but directs it to the payment intermediary company and subsequently the Bank undertakes the process. Likewise in card storage, e-commerce websites generally agree with companies with qualification in this regard. In payment transactions, the e-commerce website examines the fourth to last and sixth to last digits of the credit card. Unless the website is storing card information on its own servers, the information should be safe in the event of hacking. It is clear that when there is a data security breach, e-commerce sites that do not take the required measures within the technological possibilities will be held liable.

**10. What is the "right of withdrawal" in distant sale contracts?**

The right of withdrawal in distant sale contracts is regulated in Article 48 of CPL. Pursuantly, consumers enjoy the right of withdrawal within fourteen days without having to present any additional reason nor pay a penalty. The main purpose of granting the consumer the right of withdrawal is the protection of the consumer. However, while protecting the customer, the sellers' rights should also not be infringed. Therefore, the lawmaker has only granted a fourteen-day period rather than an unlimited period regarding the use of this right. In addition, in cases that may constitute an abuse of the right, the person who requests to use the right of withdrawal against the good faith principle is not protected.

**11. What are the cases where the right of withdrawal cannot be used?**

Right of withdrawal is not applicable in contracts discharged immediately in the electronic environment. For instance, the right of withdrawal cannot be invoked regarding computer programs which are purchased online or computer programs operating through a purchased license key. In essence, the right of withdrawal cannot be made invoked regarding non-monetary assets that are delivered immediately.

Additionally, tailor-made products cannot be subject to the right of withdrawal. For instance, a cup that is produced with a specific customer's name written on it can no longer be returned utilizing the right of withdrawal.

Moreover, the right of withdrawal does not apply to periodicals such as newspapers and magazines in cases where the packaging has been unsealed. At this point, it is crucial to stress that opening the tape or packaging of the product alone does not mean that the right of withdrawal cannot be used in every case. Therefore, a differentiation must be made, special regulations notwithstanding. For example, if unsealed packaging adversely impacts the benefit expected from the product or raises sanitary concerns, the right of withdrawal cannot be invoked.

Products where prices change according to financial fluctuations in the market cannot be subject to withdrawal either. In addition, the right of withdrawal is not applicable for perishable products and goods that may expire.

**12. Is it possible to face problems while returning a product by using the right of withdrawal due to the coronavirus pandemic?**

Especially in a situation where shipping firms shut down their branches in times of the pandemic, it may become increasingly difficult for the consumer to return the product, or the consumer may not be able to use the right of withdrawal within the period stipulated by law as he/she chooses to stay home due to the pandemic. The validity of the period stipulated by law remains debatable in cases where the consumer cannot leave her/his domicile due to the contraction of the disease or stay-at-home restrictions. We believe the inability of the consumer to use her/his right of withdrawal in such a situation

should be regarded as temporary impossibility and not a waiver of the right. Pursuantly, one can accept that the duration pertaining to the right of withdrawal will be on “freeze” up until the conclusion of this extraordinary period. Moreover, the consumer cannot request to have a courier dispatched in order to return the product unless the contract contains a commitment from the supplier/seller regarding this issue.

**13. Is it possible to hold the e-commerce website responsible in cases where a person who solely shops from online platforms and who does not get involved with sick people catches Covid-19 from the delivery of his/her online shopping?**

A liability may arise depending on whether the cargo attendants comply with social distancing rules. Furthermore, provided that the product has been exposed to an infected environment during its expedition to the customer, the seller may be held responsible in detectable cases.

**14. How should the practice of scanning chips instead of getting a signature and TR ID number due to the Covid-19 epidemic during product delivery be evaluated in terms of personal data protection law?**

Since it is necessary for the shipping companies to record the information of the person to whom the delivery is made, for their own activities, scanning ID chips is in compliance with the law, provided that the e-commerce company informs the customer beforehand. The courier should also give notice regarding why they process such data, using the layered privacy notice method and the shipping firm (since Personal Data Protection Board has decided that shipping firms are deemed to be data controllers within the scope of their activities.) must provide the consumer guidance in the privacy notice – e.g., explaining the reason of data processing verbally and specifying the website which contains the details of data processing. – Regarding ID card chip scanning, the main problem lies in whether religious data is stored in the chip alongside name, surname, and identification number. If religious data is registered on the shipping firm's screen when the chip is read, explicit consent is required to process this data.

**15. How would the problems that shipping firms may encounter due to the Covid-19 outbreak be reflected on e-commerce?**

It is indisputable that the burden borne by shipping firms is going to affect e-commerce companies. This may be the underlying reason for many enterprises to require a minimum cart amount in order to limit the number of shipments. It should also be noted at this point that as per Article 43 of Road Transportation Act, shipping firms are obliged to deliver the product in question to its recipient, in compliance with the means of delivery, within 2 days for citywide transportations running from the day they receive the product, within 3 days for inter-city transportations, and 15 days concerning international transportations. It will not be acceptable for shipping firms to deliver products late due to the high workload.

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