

REFURBISHED PRODUCTS AND PRODUCERS' LIABILITY

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The Regulation on Sale of Refurbished Products (the "Regulation") concerns procedural and substantive rules for the renewal and resale of the products enumerated in the list enclosed thereto. The list is currently minimal, only comprised of cell phones and tablets. The Consumer Protection Law no. 6502 ("Consumer Protection Law") was amended on 24.03.2022 to be effective as of 01.10.2022 in order to offer a statutory foundation for this Regulation.

Although the Regulation relies on the Consumer Protection Law, this refurbishment process is closely linked to the producers' liability as regulated under the Law no 7223 on Product Safety and Technical Regulations ("Product Safety Law"). This link has gotten denser with the recent amendment to the Consumer Protection Law. The amendment will likely lead various products to be put on the list enclosed to the Regulation.

The amendment, embodied as Art 57/A of the Consumer Protection Law aims at regaining the products which have not completed economic life to the commercial life after undergoing refurbishments in terms of hardware, software and functionality. Accordingly;

- The types of the products to be refurbished shall be determined later on by a regulation,
- The refurbishment shall be carried on by enterprises authorized by the Ministry of Customs and Trade ("Refurbishment Centres"),
- The consumers shall be provided, attached to the refurbished products, with a warranty not less than one year.

Given that such provisions have been in effect in a detailed manner under the Regulation since 2020, the amendment to the Consumer Protection Law aims to fill a gap on the legislative level rather than introduce a novelty.

Indeed, the Regulation has stipulated a triangular system comprised of the authorized buyer, Refurbishment Centre and authorized seller. These roles can either be exercised by separate enterprises or be assumed by only one enterprise. Such enterprises

- by acting as the authorized buyer, can purchase second-hand products;

- by acting as the Refurbishment Centre, can refurbish the product according to the applicable technical standards or Turkish Standards Institute requirements and
- by acting as the authorized seller, can resell the refurbished products to another consumer.

The warranty which is also mentioned in the enactment would be provided by the Refurbishment Centres. In this respect, Refurbishment Centre would be ensuring, among others, that

- the product is properly repaired and the parts are replaced (as needed) and
- the product meets the appropriate functional standards.

Given these regulations, it is necessary to revisit each one of the topics of contractual defect liability regulated under the Consumer Protection Law and product liability regulated under the Product Safety Law:

1) Contractual Liability Arising Out of Defective Products and Services

The Regulation holds the Refurbishment Centre and authorized seller jointly liable for the consumers' statutory rights, including rights under the warranties and after-sale services.

On the other hand, the Consumer Protection Law further holds the producer and importers jointly liable together with the seller for the consumers' elective rights to free-of-charge repair and replacement. However, if applied as is in the matters that fall under the Regulation, this provision may give rise to unfair consequences for the reasons explained below.

Firstly, the first sale of the product and the further sales (as refurbished products) are subject to prescription/warranty periods with different durations and different starting points. Holding producers/importers jointly liable with the resellers/Refurbishment Centres would put them to carry contractual obligations for an unforeseeable future and for circumstances beyond their controls. This goes against the fundamentals of the concept of statute of limitations.

Secondly, when being offered for a resale, a refurbished product would contain certain marks indicating that it is "refurbished" and it comes with specific repairs and replacements. Consumers informed of the refurbishment should not be allowed to direct any claim to the producer/importer for refurbishment-related defects. Hence, Art 5 of the Regulation, for this purpose, provides that the warranties initially provided by producers or importers shall remain in force if they have given consent to the refurbishment process.

That being said, whether or not the defect is related to the refurbishment process would often be a controversial issue. Producers and importers who face consumer claims for free-of-charge repairs or replacements would need to prove, as stipulated under Art. 11/2 of the Consumer Protection Law, that the defect

occurred after they put the product on the market, in particular in the course of the refurbishment process.

Another justifying reason for producers and importers avoiding such consumer claims would be the fact that requested repairs and replacements would be unreasonably burdensome as per Art. 11/3 of the Consumer Protection Law. Indeed, the refurbished product in question would be a unique item, having certain parts repaired and replaced. It may also be the case that the producer may have ceased its serial production long ago. It would not always be reasonable and fair to expect producers/importers to replace such products with new ones or repair them using original spare parts. Due to these concerns, Turkish courts, in case of a dispute, may redirect the consumers to exercise their other alternative rights against the authorized seller and Refurbishment Centres to claim reimbursement upon rescinding the sale contract or to claim a reduction in the purchase price.

In view of the above, the consumers' remedies to be exercised producers/importers should be granted only if these producers/importers have given consent to the refurbishment process. Supporting this conclusion, the Regulation, for the purposes of enlightening the consumers about their available rights, requires the refurbished product packages to bear a mark stating "Refurbished Under the Producer's Approval" if such approval exists.

2) Non-Contractual Product Liability

The Regulation holds the Refurbishment Centres liable for compensation claims arising from bodily injuries and damages caused by the refurbished products (Art. 12/9). This liability corresponds to the product liability regime set forth by the Product Safety Law. Product liability can be invoked not only by the consumers party to a contract, but also third parties who sustained a loss from the refurbishment process. This is why such liability is often evaluated as a type of tortious liability.¹

Refurbishment Centres should be evaluated "dealers" in terms of the Product Safety Law, i.e. "enterprises involved in the supply chain (other than producers and importers) by releasing the products to the market". That being said, dealers bear the product liability just like producers and importers normally do if the dealers,

- Release the product under their trade name or trademark or
- Change the product in a way effecting its conformity with the product safety regulations and technical requirements

as stipulated under the Regulation and amendments to the Consumer Protection Law.

For this reason, Art 12/9 of the Regulation conforms with the liability regime under the Product Safety Law. Notably, Product Safety Law does not allow any

¹ For more details on this subject matter please see "Liability without Fault: A New Era for Product Liability" by Pelin Baysal, Ilgaz Önder (<https://www.baysaldemir.com/files/Liability-without-Fault-Baysal-Demir.pdf>)

agreement by and between parties that would contract out the strict liability imposed on the producers/Refurbishment Centres.

Having sustained damage arising out of the refurbished product, a person can succeed in its claim if it manages to prove the existence of the loss and its causal nexus with the non-conformity with the product. As a feature of strict liability, this person is not required to determine and prove whether the non-conformity has occurred within the sphere of the original producer or the Refurbishment Centre. This is why the claimant may find more than one potentially liable counterpart to direct its claims in such cases. These producers, a term that includes Refurbishment Centres in the context of product liability, can avoid liability only if they prove that their activities did not cause the alleged non-conformity. If both the actual producer and the Refurbishment Centre fail to meet their burden of proof, the court may hold these jointly liable for the claimed compensation. They may further recourse to each other as per their internal shares of liability.

The legislative endeavours concerning refurbishment and resale of products indeed serve to meet particular needs in the market. However, these developments need to equally consider Consumer Protection Law and Product Safety Law to ensure the coherence among different sources of law. This coherence would lead the producers/importers who are remote to the refurbishment process to better judge their liabilities and obligation towards the consumers and third parties.

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