

## Law Bulletin

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### REPRESENTATIONS AND WARRANTIES INSURANCE

Let alone the commercial discussions surrounding a potential M&A transaction, securing any potential risks which may arise after the transaction phase is one of the most complicated topics of M&A deals. In this respect, negotiations on contractual representations and warranties (the “**R&Ws**”) and indemnification structure are often the most challenging and time-consuming stages of an M&A transaction. These negotiations typically result in escrow or holdback structures, leading to significant delays in signing of the transaction agreements. As a result, parties may experience “deal fatigue” while their interest in proceeding with the transaction fades with each obstacle they encounter. Accordingly, M&A practitioners have been seeking alternative solutions to surpass such holdbacks.

Over the last few years, an insurance product, namely the warranty and indemnity insurance (the “**W&I Insurance**”) has emerged as an alternative option for both the sellers and buyers of an M&A transaction. W&I Insurance provides coverage against the risks associated with breaches of contractual R&Ws by the seller under the transaction agreements. Seller-side W&I insurance policies provide direct protection to a seller for any losses suffered as a result of the buyer’s valid claims for breach of a warranty or an indemnity covered in the share purchase agreement. Buyer-side W&I insurance policies, on the other hand, aims to indemnify the buyer for any loss arising from a breach of warranty or an indemnity covered in the respective transaction agreement. Despite the increasing popularity of W&I insurance in common law jurisdictions, many European countries, including Turkey, still have certain drawbacks in integrating the W&I insurance concept to the insurance sector and accordingly to M&A transactions.

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## Overview of Insurance Regulations in Turkey

Turkish insurance sector is regulated by the Ministry of Treasury and Finance (the “**Treasury**”). The Insurance Law numbered 5684 (the “**Insurance Law**”) is the primary piece of legislation setting forth the legal framework applicable to the insurance sector. The Insurance Law regulates insurance activities which may be carried out by insurance companies as well as their incorporation, management, operation, oversight and audit.

As per the Insurance Law and the secondary legislation, insurance activities may only be carried out by (i) insurance companies incorporated in Turkey, or (ii) foreign insurance companies’ branch offices incorporated in Turkey (the “**Turkish Insurance Entities**”). Furthermore, legal entities/individuals residing in Turkey may take out insurance only from the Turkish Insurance Entities, save for certain exceptions set under the Insurance Law (e.g., life insurance, transportation insurance). This restriction does not apply to foreign individuals/entities residing abroad and they can take out insurance from foreign insurance companies as well, regardless of the jurisdiction applicable to the respective M&A transaction.

Turkish Insurance Entities must obtain a license for each insurance branch in which they wish to issue policies. The Communiqué on Insurance Branches (the “**Communiqué**”) lists all the insurance branches in which the Turkish Insurance Entities may issue policies. Accordingly, only the insurance policies which are specifically listed in the Communiqué may be offered by the Turkish Insurance Entities.

In addition, the Insurance Law grants the right to issue new kinds of unconventional insurance policies to the Turkish Insurance Entities, provided that (i) such policies fall within the scope of an insurance branch listed under the Communiqué, and (ii) the Treasury grants its approval for the newly developed insurance product.

## W&I Insurance in Turkey

Being a newly introduced product to the insurance sector, W&I insurance is not yet regulated as an insurance branch in the Communiqué. Having said that, a limited number of local market players were able to obtain the Treasury’s approval for their W&I insurance products by arguing that their W&I Insurance products fall within the scope of “general liability” or “financial loss” branches. Accordingly, only a limited number of Turkish Insurance Entities are currently entitled to issue policies for W&I Insurance coverage.

It is worth emphasizing that the Treasury’s approval is only granted for the specific products developed by the respective applicants. Accordingly, save for the recently developed W&I Insurance products which remain as an exception, the Turkish insurance market does not have an established practice regarding the W&I Insurance policies. Due to such lack of an established market practice and a clear legal framework, the Turkish Insurance Entities are still reluctant to issue these kinds of policies, including those already obtained the Treasury’s approval to issue W&I Insurance products. As a result, the options offered to legal entities/individuals residing in Turkey are still very limited when it comes to W&I insurance.

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M&A professionals and market players in the insurance sector believe that the individual initiatives taken by local market players and a growing need to incorporate the insurance sector to M&A transactions will pave the way for the Treasury to develop a legislative framework for W&I insurance which will motivate the Turkish Insurance Entities to develop and issue tailor-made W&I Insurance policies for transactions in Turkey.

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