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The Implementation of the EU Consumer Protection Directives in Turkey

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I. OVERVIEW

The first Turkish Consumer Protection Law ("CPL") was issued in 1995 by Parliament, triggered by the establishment of a Customs Union between Turkey and the European Union ("EU") in the same year, obliging Turkey to adapt its legislation specifically in the areas of consumer protection, anti-trust law and intellectual property law.[1] Nevertheless, shortly thereafter, reform was needed, due to the European Council's granting Turkey official status as an accession state in 1999. This act obliged Turkey to adopt the entire *acquis communautaire.*[2] In the area of consumer protection law, the legislature attempted to comply by passing a 2003 revision, which both transformed directives issued in the interim as well as making important changes to the existing law.[3]

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1. Tüketicinin Korunması Hakkında Kanun [Consumer Protection Law], *in* RG 08.03.1995, sayı 22221. In the explanatory memorandum of the law, reference was made to the first and second consumer programs of the EU, 1975 O.J. (C 92) 1; 1981 O.J. (C 133) 1, and the Council Resolution of 23 June 1986 concerning the future orientation of the policy of the European Economic Community for the protection and promotion of consumer interests, 1986 O.J. (C 167) 1. During the preparation of the law, there was no discussion as to whether to integrate the consumer protection provisions into the Code of Obligations, or whether a special regulation was preferable because the working out of the consumer law in Turkey falls within the competence of the Ministry of Industry and Trade which did not consider a cooperation with the Ministry of Justice. For a critical evaluation of this, *see* Yeşim Atamer, *Tüketici Hukukunun Gelişimi: Dünü, Bugünü ve Yarını [The Evolution of Consumer Law and Future Tendencies], in* TÜKETICININ KORUNMASI SEMINERI 21 et seq. (Ceylan ed., 2007).

2. *Cf.* HEIDERHOFF, GRUNDSTRUKTUREN DES NATIONALEN UND EUROPÄISCHEN VERBRAUCHERVERTRAGSRECHTS (2004); RÖSLER, EUROPÄISCHES KONSUMENTENVERTRAGSSRECHT (2004); WEATHERILL, EU CONSUMER LAW AND POLICY (2005); HANS-M. MICKLITZ & NORBERT REICH, THE BASICS OF EUROPEAN CONSUMER LAW (2007).

3. Tüketicinin Korunması Hakkında Kanunda Değişiklik Yapılmasına Dair Kanun [Law amending the Law on Consumer Protection], Nr. 4822, RG 14.03.2003, sayı 25048. For a critical appraisal regarding the proposal to amend the Law on Consumer Protection, *see* Yeşim Atamer, *Tüketicinin Korunması Hakkında Kanunda Değişiklik Öngören*

The aim of this article is, first, to provide a short, general overview of the Turkish Consumer Protection Law and, second, to explain the implemented directives on advertising, unfair commercial practices,[4] sales contracts,[5] product liability,[6] unfair terms,[7] time-share[8] package-holidays,[9] door-to-door[10] and distance contracts,[11] consumer credit[12] and actions for an injunction.[13] Only those provisions will be considered that serve the implementation of these directives.[14] As far as is necessary in this context, the EU Draft Directive on Consumer Rights will also be

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Tasarının Sözleşme Hukukunun Bazı Yönleri Açısından Avrupa Birliği Mevzuatıyla Karşılaştırılması [A Comparative Analysis of EC-Law and of Certain Contract Law Related Issues within the Draft Law Amending the Consumer Protection Act], 21 MHB no. 1-2 (2001), at 1-32.

4. *See* Council Directive 84/450/EEC, On Misleading Advertising, 1984 O.J. (L 250) 17; Council Directive 97/55/EC, 1997 O.J. (L 290) 18 (amending Directive 84/450/EEC so as to include comparative advertising; Council Directive 2005/29/EC, 2005 O.J. (L 149) 22 (concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ("Unfair Commercial Practices Directive")).

5. Council Directive 99/44/EC, On Certain Aspects of the Sale of Consumer Goods and Associated Guarantees, 1999 O.J. (L 171) 12.

6. Council Directive 85/374/EEC, On the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Products, 1985 O.J. (L 210) 29, *altered by* Council Directive 1999/34/EC, 1999 O.J. (L 141) 20.

7. Council Directive 93/13/EEC, On Unfair Terms in Consumer Contracts, 1993 O.J. (L 95) 29.

8. Council Directive 94/47/EC, On the Protection of Purchasers in Respect of Certain Aspects of Contracts Relating to the Purchase of the Right to Use Immovable Properties on a Timeshare Basis, 1994 O.J. (L 280) 83. This Directive is currently under revision. The European Parliament has approved the proposal for amendment on 22 October 2008. *See* http://ec.europa.eu/consumers/rights/docs/timeshare_position_en.pdf.

9. Council Directive 90/314/EEC, On Package Travel, Package Holidays and Package Tours, 1990 O.J. (L 158) 59.

10. Council Directive 85/577/EEC, To Protect the Consumer in Respect of Contracts Negotiated Away from Business Premises, 1985 O.J. (L 372) 31.

11. Council Directive 97/7/EC, On the Protection of Consumers in Respect of Distance Contracts, 1997 O.J. (L 144) 19; Council Directive 2002/65/EC, Concerning the Distance Marketing of Consumer Financial Services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC, 2002 O.J. (L 271) 16.

12. Council Directive 87/102/EEC, For the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Consumer credit, 1987 O.J. (L 42) 48; Council Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008, On Credit Agreements for Consumers and repealing Council Directive 87/102/EEC, 2008 O.J. (L 133) 66.

13. Council Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998, On Injunctions for the Protection of Consumers' Interests, 1998 O.J. (L 166) 51.

14. The analysis of Professor Micklitz is based on the English translation of the relevant provisions and bylaws, which were provided by the Ministry of Industry and Trade in 2004.

discussed.[15] The Draft intends to unite four directives: door-to-door selling, distance contracts, consumer sales and unfair terms. Beyond conceptual changes, the Draft attempts to eliminate the concept of minimum harmonization and to replace it with the concept of full harmonization.

II. STRUCTURE AND APPLICATION OF THE CONSUMER PROTECTION LAW[16]

A. Structure

The Turkish Consumer Protection Law is divided into five parts, in which substantive and procedural questions of consumer protection are regulated. In the first part (Art. 1 *et seq.*),[17] the aim and scope (Art. 2) of the law are set out as well as definitions of the terms used in the law (Art. 3). The second and main part is dedicated to the rules about protection and the information of the consumer. In the current version, this part contains rules on the following: consequences of the delivery of defective goods (Art. 4); inadequate performance of services (Art. 4/A); contractual duties of traders on displayed goods (Art 5); unfair terms in consumer contracts (Art. 6); installment sales (Art. 6/A); time-share agreements (Art. 6/B); package holiday contracts (Art. 6/C); campaign sales (Art. 7); door-to-door sales (Arts. 8, 9); distance sales (Art. 9/A); consumer credit contracts (Art. 10); credit card transactions (Art. 10/A);[18] mortgages (Art 10/B); marketing of print media (Art. 11); subscription agreements (Art. 11/A); labeling duties and content (Art. 12); producer and importer guarantees (Art. 13); instruction manuals (Art. 14); post-sale repair services (Art. 15); commercial advertising and announcements (Art. 16); advertising oversight committee (Art. 17); warnings about damaged and dangerous goods and services (Art. 18); quality control (Art. 19) and education of the consumer (Art. 20).

The third part, entitled "consumer organizations," introduces two new institutions into Turkish law. First, Article 21 forms the consumer

15. *Proposal for a Directive of the European Parliament and of the Council on Consumer Rights*, COM (2008) 614 final (Oct., 8, 2008); *see also* Hans-M. Micklitz & Norbert Reich, *The Commission Proposal for a Directive on Consumer Rights*, 46 COMMON MKT. L. REV. 471 (2009).

16. *See also* Yeşim Atamer, *Die autonome Umsetzung der Verbrauchsgüterkaufrichtlinie 1999/44 in der Türkei – Zugleich ein Beitrag zum Stand des Konsumentenschutzes in der Türkei*, 2005 ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT [ZEuP] 566, 568-76.

17. Provisions without another indication are those of the Turkish CPL.

18. In 2006, a separate law on Banks and Credit Cards was issued (RG 01.03.2006, sayi 26095) but preserves the condition in the CPL.

council, an institution which must be convened at least once annually by the industry and trade ministry. The council includes representatives of various ministries, state and non-state organizations. Second, Article 22 establishes the dispute resolution committee for consumer law disputes, which must be formed in every state and commune, and whose usage is obligatory for disputes with a value under approximately 426 Euros before a claim can be brought in the consumer court.

The fourth part of the Consumer Protection Law is dedicated to procedural issues and administrative sanctions. In Article 23, the establishment of specialized consumer courts is provided for,[19] in which not only consumers but also consumer organizations[20] and the ministry have standing. The advantages of this are the relief of process charges and the usage of the Article 507 ff. Turkish Civil Procedure Law setting out a simpler and therefore expedited process. The jurisdiction of the courts at the domicile of the defendant and, alternatively, the courts of the consumer's domicile are recognised (Art. 23(3) CPL).

The fifth and final part of the law contains various rules, including a competence norm, which empowers the Industry and Trade Ministry to issue regulations to implement the CPL (Art. 31 CPL), and the prescription that, regarding questions left open in the CPL, the "general provisions" should apply (Art. 30 CPL). This article must be interpreted as referring to the Turkish law of obligations and the civil code.[21]

The legislature conceptualized the CPL as a regulatory framework and left most of the minutiae to the Industry and Trade Ministry (Art. 31 CPL). Though faster regulation is made possible by the capacity to issue regulations,[22] from the consumer protection point of view, this is not a

19. By August 2008 the High Council of Judges and Prosecutors had established 26 consumer courts, of which 8 are seated in Ankara, 7 in Istanbul, and 3 in Izmir. In the towns where there is no special court, the civil courts of first instance are responsible, to resolve consumer disputes. Traders have no right to file a case at consumer courts, even if they sue against a consumer. *See* Y3HD 15.11.1998, 11141/12254, printed in ZEVKLILER & AYDOĞDU, TÜKETICININ KORUNMASI HUKUKU [LAW OF CONSUMER PROTECTION], 930-31 (2004).

20. Consumer organisations are, pursuant to Article 3(p) CPL, "Clubs, associations or their umbrella organizations, which were established with the goal of protecting consumers."

21. *See* ZEVKLILER & AYDOĞDU, *supra* note 19, at 493. The Turkish law of obligations (Borçlar Kanunu), which became effective in 1926, is an almost word-for-word translation of the Swiss law of obligations. *See* Yeşim Atamer, *Rezeption und Weiterentwicklung des Schweizerischen Zivilgesetzbuches in der Türkei*, 72 RABEL J. COMP. INT'L PRIVATE L. (RabelsZ) 723-54 (2008) (discussing the reception of the Turkish law).

22. Until today, Regulations have been issued in particular fields: defective products, abusive clauses, time-shares, package holidays, distance sales, door-to-door sales and campaign sales (all published in RG 13.06.2003, sayı 25137), commercial advertisements

welcome development because it largely defeats the goal of collating all relevant consumer regulations in one code. Further, the prescriptions give rise to administrative law questions including, for example, regarding the hierarchy of norms.

B. Scope of application

1. Consumer Transactions

According to Article 2 of the CPL, the law covers all trade in goods and services in which the consumer is on one side of the transaction. In Article 3(1), the "consumer" is defined as follows: "[t]he consumer is every natural or juridical person, who procures, uses, or benefits from goods or services for a purpose that is neither commercial nor professional." Thus, the Turkish legislature connects the status of consumer to the presence of functional characteristics.[23] That is, the classification of a transaction depends entirely on its function and purpose, not on the characteristics of the contracting person.[24] The status of consumer is established for the particular transaction and is created by the same. The moment of classification is at the time of concluding the contract.

In the examination of whether a natural person qualifies as a consumer, the purpose of the transaction is determinative. Pursuant to Article 21 of the Turkish Commercial Code ("TCC"), there is a presumption that tradespeople are acting in the course of their trade.[25] This presumption can be rebutted by a businessman who is a natural person if he evidences that his contracting partner was or must have been aware of the private character of the trade.

In contrast to the laws of the EU, a juridical person can also enjoy protection under Turkish consumer law. However, it is important to make a distinction. For juridical persons who carry the title of a tradesperson, the presumption of Article 21 cannot be rebutted.[26] For

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(published in RG 14.06.2003 sayı 25138), structure and function of the advertising council and consumer credit (both published in RG 01.08.2003 sayı 25186).

23. *See* Ozanoğlu, *Mukayeseli Hukuk ve Tüketicinin Korunması Hakkında Kanun Açısından Tüketiciyi Koruyan Düzenlemelerin Kişi Bakımından Uygulama Alanı* [*The personal scope of application of the CPL*], *in* KEMAL OĞUZMAN'IN ANISINA ARMAĞAN 667 et seq. (Barlas, Kendigelen & Sarı eds., 2000).

24. Ozanoğlu, *Tüketici Sözleşmeleri Kavramı* [*The material scope of application of the CPL*], AÜHFD 55, 72 (2001).

25. According to Article 14 TCC a tradesperson is someone who runs a business entirely or partly in his own name.

26. Alike, the Turkish Court Y11HD 26.6.1997, YKD 1997, 1564, 1566 (In this case, a stock company bought a car, which proved defective). This case was confirmed

juridical persons in civil law—e.g. societies and foundations—there is no obstacle to their classification as consumers.[27]

The other contracting party must be a person who, in the framework of their commercial or professional ability, offers the consumer wares or services. The contracting party can be a natural or juridical person, who, according to the type of trade, is classified as a seller (Art. 3(1)f), service provider (Art. 3(1)g, or creditor (Art. 3(1)k).

2. Goods

In its version of Article 3(1)c, CPL rewrites the term "goods" to be much broader, to reflect the CPL of the EU. Since the revision, not only movables but also intangible goods and land qualify as wares.

The term "movables" is not defined in the CPL. Pursuant to Article 762 of the Turkish Civil Code ("TCivC"), moveable physical things, as well as forces of nature which can be legally owned and which are not, according to Article 704 TCivC, part of the land, are chattels. It must therefore be taken into account that the provision of services like electricity, gas, and water are within the scope of the CPL.[28]

Subsequent to the revised Article 3(1)c, intangibles intended for use in the electronic medium are also goods. The legislation mentions, in particular, software, sound and picture data, without furnishing an exhaustive list. In this way, the lawmakers wanted to secure that the consumers in internet transactions for digital products would be protected by the law.[29]

With the revision of 2003, real estate intended for use as accommodation also qualifies as wares.[30] Precisely which properties are

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in the Senate of the Turkish Court, YHGK 11.10.2000, E.2000/19-1255, K.2000/1249, published at www.kazanci.com.

27. Y11HD 26.6.1997, YKD 1997, 1564, 1565; *see also* ZEVKLILER & AYDOĞDU, *supra* note 19, at 81.

28. On the other hand, Directive 1999/44 excludes from its scope electricity, water and gas; they are not put up for sale in a limited volume or set quantity (Art. 1(2)b Directive). *Cf.* Draft Directive on Consumer Rights, art. 2 (4) b, c.

29. Consider Article 1(2)b Directive 1999/44, which describes its subject as "tangible movable item." Thus, only a *corpus mechanicus*, in which an immaterial good is crystallized, can be a consumer good. *See, e.g., Luna Serrano, in* Grundmann/Bianca (Hrsg.), EU-Kaufrechts-Directive, Kommentar, 2002, Art. 1 Rn.32-33. These would be cassettes, CD's, records, etc. The wording of the Turkish definition however does not presuppose such materialization.

30. In the explanatory memorandum of the law, the reason is given that an unfair distinction is created, where credit transactions for a private car purchase are protected by CPL, though credit transactions for a house are not (4822 Sayılı Kanunun Madde Gerekçeleri, m.3). In the case law before the change of the law: Y11HD, 14.01.2002, E.7701/K.244, *printed in* ZEVKLILER & AYDOĞDU, *supra* note 19, at 976. Out of 29 decisions on sale contracts, which were decided after the 2003 Revision and were publicized in the databank "www.kazanci.com," not a single one involving defective

covered will have to be further clarified by the judicature. Problems might arise, for example, in the case of a transaction regarding a second house. It is conceivable that only the transaction regarding the first home or holiday home will qualify as a consumer contract and the others count as business, denying the purchaser the status of consumer.

III. ADVERTISING AND UNFAIR COMMERCIAL PRACTICES

A. Overview

The rules on unfair commercial practices, to use the terminology of Directive 2005/29/EC, are found in various places in the CPL. They follow the classic separation between "marketing methods" and "advertising." Dubious marketing tactics seem to play an important role in Turkey. One rule in particular was needed for campaign sales (Art. 7), which was further distinguished in the Campaign Sales Regulation.[31] Special prescriptions can also be found on "periodica" (Art. 11 CPL). However, the main section is taken up by advertising rules. Article 16, the Advertising Regulation ("AdvertR"),[32] Article 17, and the Advertising Council Regulation ("AdvertCouncilR"),[33] specify the control, competence, and organisation of the oversight committee. The Turkish legislature has taken it upon itself to implement Directive 84/450/EC on misleading advertising and Directive 97/55/EC on comparative advertising. Directive 2005/29/EC on unfair commercial practices was adopted after the CPL and could not, as a result, be considered in the implementation. Nevertheless, it provides the standard against which Turkish law must be measured today.

B. Definitions and Scope of Application

Article 3(1) CPL defines the "advertiser" and Article 3(m) defines "advertising agency." Article 4(d) and (e) of the AdvertR repeat the terms and add definitions of media organisations and commercial adverts in Article 4(f) and (h) respectively. The division of potential addressees in the client of the adverts, that is the trader who will benefit from the advertisement, and the advertising agency, which executes the advert, is extraordinary. Normally the trader is in the foreground of the rules about fair competition. The trader is considered responsible for the actions of

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delivery of real estate can be found, which indicates that the disputes are concentrated on movables.

31. *See supra* note 22.

32. *See id.*

33. *See id.*

the advertising agent. On the contrary, the Turkish rule establishes legal responsibility for the advertiser, the advertising agency, and the media (Art. 21 of the AR).[34]

The material scope of the rule is broad. Article 4(h) encompasses commercial advertising as well as marketing methods. Different from the Directive 2005/29/EC, what is not apparent is the extent to which marketing after the conclusion of the contract is also encompassed by the provisions (Art. 3(1) of the Directive).[35] Conversely, no products or services are exempted from its ambit.

Adverts for financial services also fall within the ambit of the Turkish law, like adverts geared towards the health and safety of the consumer. The Directive takes unique approach. Advertisements for financial services fall within the ambit, pursuant to Article 3(9), but the directive defines only minimum requirements, which the member states can go beyond. For the particularly relevant area of consumer credit, the EC, in the interim, set up more severe requirements in Article 4 of Directive 2008/48/EC. These concern information about credit costs. It is politically contentious in most member states whether more extensive measures are necessary. A big problem in practice is caused by "baiting." Banks advertise lavishly with interest rates that no one (or only a minimal percentage of applicants) receives because they do not pass the credit check. As is well known, the level of interest levied depends on the score of the individual consumer.[36] The Turkish law contains special rules on consumer credit. These can be found in Articles 7(e) and (f) of the AR. They specify the prohibition on misleading advertising but are less clear regarding what information is necessary pursuant to Article 4 of EC Directive 48. Here, there is a need for harmonization.[37]

Health related advertisements seem to have a particular weight in Turkey. It is not surprising, therefore, that they are explicitly mentioned in both Article 16(2) CPL and Article 5 of the AR. According to Article 16(2), advertisements should not endanger the life of the consumer or, more specifically, pursuant to Article 5(1)c of the AR, advertisements should not include any presentation or prescriptions that do not follow

34. The law establishes a separate liability for the named institutions. Article 21(4) creates a special regulation for the "media," and probably the television companies are intended, who will be held liable for malfeasance of intermediaries.

35. *See* Busch, *Ein europäischer Rechtsrahmen für das Lauterkeitsrecht?—Der Vorschlag der Europäischen Kommission für eine Direktive über unlautere Geschäftspraktiken*, 2004 EUR. LEGAL FORUM [EuLF] 93.

36. Germany discusses whether or not there should be a provision in the Directive, which makes clear that the interest rates offered in the adverts are also achieved in practice.

37. *See infra* part XI.C.

safety rules and describe hazards to to human users. On the contrary, in Article 3(3), the Directive largely excludes health-related advertisements from its scope because the Community does not have regulatory competence when it comes to health.[38] Also in contrast to the Directive, the Turkish rule extends as far as environmental advertising (Art. 19 AR).

C. *The Yardstick of the Average Consumer and Particularly Vulnerable Groups*

The CPL lists in Article 16(2) the diverse target groups. The determinative factor with respect to the yardstick of control can be found in Article 5(e) of the AR. This takes account of the perception of the advertisement from the perspective of the average observer, or it evaluates the influence of the advertisement on the consumer without reference to the average consumer.[39] This formulation might well be traced back to the jurisprudence of the European Court of Justice ("ECJ"), which created out of Art. 28 EC, the construction of the average, informed, circumspect and sensible consumer.[40] Even if it only makes an appearance in the preamble to the Directive and not in the text itself, this concept is the yardstick against which every advertisement in Europe must be measured.[41] The Turkish law is special in only one respect: it makes reference to the "transparency" of the advertisement. According to Article 5(e)1-3, written information in advertisements and posters must be legible and the message must be announced in a comprehensible and clearly formulated manner.

The protection of particularly vulnerable groups of consumers, in the sense of Article 5(3) of the Directive, can be found repeatedly in the Turkish law. In Article 16(2) CPL, children, the elderly and disabled people are named as protectees. These requirements are made concrete in Article 6(d) and (e) as these groups—including patients—may not be

38. On the difficult questions as to when an advert is health-related, *see, e.g.*, the interpretation of the Cosmetics Directive, Micklitz *in* MÜNCHENER KOMMENTAR ZUM LAUTERKEITSRECHT, Band 1, 2006 (MünchKommUWG), Teil III, K para 77 ff.

39. For the specification of the term "average consumer" in jurisprudence, *see* INAL & BAYSAL, REKLAM HUKUKU VE UYGULAMASI 26-28 (Werberecht und Praxis 2008).

40. *See* Case No. C-470/93, Mars, 1995 E.C.R. I-1923; Case No. C-210/96, Gut Springenheide, 1998 E.C.R. I-4657; Case No. C-303/97, Sektkellerei Kessler, 1999 E.C.R. I-513; Case No. C-220/98, Lifting-Crème, 2000 E.C.R. I-117; Case No. C-465/98, Darbo naturrein, 2000 E.C.R. I-2297.

41. *See* Thomas Wilhelmsson, *Misleading Practices*, *in* HOWELLS, MICKLITZ & WILHELMSSON, EUROPEAN FAIR TRADING LAW: THE UNFAIR COMMERCIAL PRACTICES DIRECTIVE ch. 5(b)(iii) (2006) (stating that the average consumer is not the measure of things); Helm, *Der Abschied vom verständigen Consumer* 2005 WRP 931 (advocating for the restoration of the German consumer model).

portrayed in advertisements. Article 18 of the AdvertR is dedicated entirely to the protection of children and minors. Going much further than the Directive, the restrictions and provisions on advertising applying to children are formulated there.[42]

D. Unfair Advertising

To betray the result: Turkish law contains no crystal clear ban on unfair advertising. Nevertheless, a whole plethora of rules can be found in the law and regulations, which, taken together, come close to prohibiting unfair advertising.

The starting point is Article 16 (1) CPL, which is to the following effect: advertisements and modes of advertising must correspond faithfully to the laws, rules of the Board of Advertising, as well as the moral, the public order and individual rights. This command is elaborated in Articles 5 and 6 of the AR. Article 5(a) repeats Article 16(1) CPL almost word for word. More interesting is 5(b), which states that the advertisement must be in conformance with the principle of fair trade, in so far as it is recognized in working convention and in public opinion. Fair trade is understood as an expression of economic and social responsibilities. Article 5(f) aims to prevent measures which injure human dignity, and 5(g) those which violate individual rights. Article 5(g) and (h) ought to be read in context, which reveals that the law is concerned with the protection of the individuals' private sphere. Article 5(j) augments the basic principles of Article 5 in order to establish a broad prohibition on discrimination. Advertisements may not discriminate on grounds of language, religion, race, political conviction or sex. These rules are clearly the product of a multicultural society, but the influence of the EC prohibition on discrimination is apparent.[43]

Article 6 of the AdvertR concerns itself with public morals. Advertising, so goes the credo, may not violate principles, which can be understood as an expression of public morality. For instance: immoral expressions and pictures, sexual abuse and pornography, the misuse of fear and superstition, the misuse of expressions and pictures which concern children, old people, the disabled and patients. The panorama of the laws is rounded off through Article 7(a), which forbids, in a general form, advertising that betrays the trust of the consumer or exploits his inexperience or ignorance.

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42. The rules ought at the very least to be inspired by the provisions of the International Chambers of Commerce, http://www.iccwbo.org/id925/index.html.

43. On the significance of the rule on prohibition of discrimination especially for private law, *see* Basedow, *Grundsatz der Nichtdiskriminierung im Europäischen Privatrecht*, 2008 ZEuP 230-51.

The difficulty with the Turkish regulations lies in the mixture of bans and prohibitions of unfair trade with moral precepts, which reach deep into the social conditions in Turkey.[44] The Directive establishes a mere ban on unfair trade. This is crystallized on the basis of two criteria: professional care and significant influence on the commercial conduct of the consumer. It leaves to the member states competence in questions of taste, decency, as well as with respect to social, cultural and linguistic characteristics. Difficulties arise where national moral standards are deployed as arguments to restrict advertising in a manner that goes beyond the ban on unfair trade. Here, with respect to the harmonization of the Turkish law with the provisions of the Directive 2005/29/EC and the general clause formulated there, it is desirable to draw a sharp distinction between, on the one hand, "unfair" trade, and, on the other, "immoral" trade.[45]

E. Misleading Actions and Omissions

Article 16(2) CPL establishes, amongst other things, a ban on deceptive and misleading adverts that is reiterated in Article 7(c) of the AR. In contrast to Directives 84/450/EC and 2005/29/EC, the Turkish law requires an actual deception of the consumer, not merely the likeliness to deceive. Article 7(c)1-8 lists the criteria that must be taken into consideration when investigating such deception. The provisions, which hearken back to Article 3 of Directive 84/450/EC, must, in the course of the implementation of Directive 2005/29/EC, be made coherent with reference to the far more comprehensive rules in Article 6.

It is not immediately apparent from the Turkish law the extent to which misleading omissions in terms of Article 7 Directive 2005/29/EC are covered. Nor is it clear whether Turkish law in any way establishes a general mandate that information must be provided. Article 16(1) CPL points in this direction, where it positively requires that advertising be "true" and "correct." Interestingly, in the AR, the relevant passage in Article 5(a) and 7(a) only refers to advertisements being "correct" and "fair." No explicit mention of a prohibition on misleading information is made. Here, Article 7, Directive 2005/29/EC creates confusion in the interpretation of the ban on misleading information and the mandate to

44. *See e.g.*, for decisions of the advertising council, forbidding the advertisement of sexual stimulants on the basis of this provision, INAL & BAYSAL, *supra* note 39, at 21-22.

45. *See* Micklitz, *Das Konzept der Lauterkeit in der Richtlinie 2005/29/EG*, *in* Liber Amicorum Bernd Stauder 297 et seq. (Thévenoz & Reich eds., 2006).

provide information. It will be interesting to see how member states implement these rules.[46]

F. Comparative Advertising

Comparative advertising has been, to date, only cursorily regulated. Article 16(3) CPL legalizes comparative advertisement in the same way as Directive 97/55/EC. Article 11 of the advertising regulation defines the borders of the permission: comparative advertising should only be allowed if the name of the products, services or marks are not mentioned; if the product is of the same quality; and if fair and not misleading competition is respected.

In this regard the Turkish regulation is lagging behind the provisions of Directive 97/55/EU,[47] which permits the mentioning of names on certain conditions. Basically, the Directive involves a two-stage analysis. Comparative advertisement should improve rational decision-making. This concerns mandates to avoid violations regarding price comparison, comparison on the need and the intended usage purpose and on the comparison of characteristics. If these mandates are fulfilled, it is necessary to approve the comparison. The Directive forbids discrediting or denigration, the dishonest exploitation of reputation, the imitation of an advertisement and is intended to prevent the danger of confusion of products.[48]

This two-stage test is only partially replicated in Turkish law. Unlike the Directive, Article 11 does not define the provisions regarding the strengthening of the decision-making capacity, but formulates a far-reaching limitation of the scope of comparative advertising. Articles 14, 15 and 16 of the regulation on advertising forbid the exploitation of reputation, imitation of adverts, and denigration. These three articles belong to the complex of comparative advertising, which is clear from the subtitles of the regulation on advertising. Nevertheless, they lack any reference to the provision on comparative advertising and, as a result give the impression, that general standards are set out, which mainly regulate the relations between tradesmen based on conventional understandings. Lastly, it should be noted that Article 13 allocates the burden of proof in the context of comparative advertising. Here Article 6 of the Directive 97/55/EC was clearly the template.

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46. The Commission has set up a website on which the status of the implementation can be followed, http://ec.europa.eu/consumers/rights/index_en.htm.

47. *E.g.*, INAL & BAYSAL, *supra* note 39, at 56 et seq. (providing a critical perspective).

48. *See generally* Micklitz, *supra* note 38, at Teil III, F ¶ 297 ff.

G. *Aggressive Advertising*

Because the last changes to the Turkish consumer law date from 2003, it is not entirely correct to rely on the provisions of Articles 8 and 9 of the Directive 2005/29/EC, which regulate aggressive advertising—that is harassment, intimidation or undue influence.[49] Nevertheless, the concept of the aggressive advertisement is not fundamentally new as rules feature in all the relevant regulations of the member states, including Turkey, which concern this phenomenon.

Many scattered rules can be subsumed under the umbrella of aggressive advertising. Article 16(2) CPL forbids the misuse of experience and knowledge, the threatening of the life or safety of property, the incitement to force and encouragement to commit crime. Article 5(j) mandates that advertising measures do not disturb public order or have content that incites, encourages or supports violence. Article 7(a) prohibits the abuse of consumer trust. In these provisions there are bans on three elements of aggressive advertising: harassment, intimidation, and undue influence.

H. *Enumeration of Forbidden Trade Practices*

The regulatory technique of the Turkish law is not yet in harmony with the provisions of Directive 2005/29/EC. To that extent, a list of forbidden measures, like the one contained in Appendix I, is wanting. Although the thirty-one prohibitions of the Directive do not appear in the Turkish law, they do represent important starting points. That is a result of the fact that the Turkish regulations are in part far more detailed than both the European template and also the rules of many member states. This is due to the conviction that particular shortcomings in advertisements require special rules.

Without categorizing them under unfairness or misleading or aggressive advertising, the following prohibitions from the regulation can be listed in chronological order: Article 5(h) reference to private life without prior consent; Article 5(e) before and after pictures of the treatment of patients; Article 6(b) sexual abuse or pornographic scenes; Article 7(b) subliminal advertisements; Article 7(d) advertisements with guarantees that contain nothing more than the enforceable statutory rights of performance; and Article 7(g) the misrepresentation of scientific or technical results.

Even this overview shows how difficult it is to set up lists of prohibitions for diverse cultures. None of the known states has adopted

49. *See* Howells, *in* EUROPEAN FAIR TRADING: THE UNFAIR COMMERCIAL PRACTICES DIRECTIVE ch. 6 (Howells, Micklitz & Wilhelmsson eds., 2006).

special rules about advertisements with patients. Obviously the rule about comparison is aimed at the "before and after" treatment comparisons. This affects, above all, cosmetic surgery. The same goes for sexuality. The rules of the member states differ considerably. The Directive instructs that taste and decency ought to be taken into account, but different interpretations exist and so varying rules are needed.

I. Distribution Methods, Gifts, Campaign Sales and Periodicals

Article 8 of the Advertising regulation also governs sales-boosting measures. Article 8(a) regulates gifts, wares, or services, as well as bonus systems designed to keep the consumer buying. Article 8(b) concerns gambling and lotteries. The legislature's role is not to set up prohibitions but, rather, to license and regulate the permissibility of the gambling. In essence, it must be insured that the consumer has a clear picture of the conditions in which he takes part. This goal also informs 8(c), which expressly mandates that the advertising measures reflect a realistic picture.

The regulation of Article 11 CPL is directly related to Article 10 of the AR. The goal of 11(1) is to delimit the gifts in the area of periodicals to certain objects, which serve further education, e.g. books, DVDs, encyclopedia, talking books, etc. The background to the regulation is the mid-1990s newspaper subscriptions war. Big newspapers offered subscribers, for instance, washing machines as gifts. With the help of Article 11 CPL, smaller undertakings should be protected, which cannot afford such gifts. Similar rules could be found in the old German law on unfair competition ("UWG") in the provisions of section 6. These so-called middle class protection rules were in the course of the ECJ-led liberalization of advertising demolished bit by bit. They are no longer featured in the UWG of 2004.[50]

Article 9 of the AdvertR defines the restrictions on direct-marketing. Here the goal is not discrediting or prohibiting but to formulate basic conditions that must be fulfilled by sellers before getting into direct contact with the consumer; that is, advertisement for door-to-door sales. Traders must indicate that the goods will be delivered to the address of the consumer, that the products and the price will be declared on the spot, and that the consumer has the possibility to send the goods back to the vendor. This provision can be explained against the

50. They also became the subject of a preliminary hearing before the ECJ; especially the interpretation of the prohibition on price comparison. *See* Case No. C-126/91, Yves Rocher, 1993 E.C.R. I-2361.

backdrop of the shortcomings, which have led to the relatively comprehensive and strict regulation of door-to-door sales.[51]

Campaign sales are a peculiarity of the Turkish market. They are regulated in Article 7 CPL as well as in the Campaign Sales Regulation. Article 7(1) CPL contains a definition, and 7(2) establishes a ministerial duty of certification. The majority of provisions are aimed at the form of the contract, which in this context, are of no interest. Directly relevant is Article 7 of the Campaign Sales Regulation. Article 7(1) refers to Articles 16 and 17 CPL, regulating the advertising of campaign sales. Article 7(2) prohibits the mention in the advert of the ministerially approved certificate, and 7(3) mandates that there is a price in the advert itself—be it cash or pro-rata, as well as the details of the beginning and the end of the campaign.

Lastly, the provisions of Article 10 of the AdvertR and Article 9 of the Directive 97/7/EC on distance-ordering should be mentioned with respect to the delivery of unsolicited goods. This regulation bans the usage of advertisements that give the impression that the consumer can, by the delivery of unsolicited goods, be forced into a contract. It is incomplete because it only bans advertisements of this type; it does not make clear that the consumer cannot be forced into a contract by the delivery of unsolicited goods. This is valid if the wares are so valuable that the consumer feels himself obliged to trade, either by rejecting the offer or by sending the items back at his own cost.[52]

Leaving the rules on the delivery of unordered goods to one side, there remains the question of compatibility with EC law with respect to the regulation of gifts and lotteries and all sales boosting measure including campaign sales. As is well known, originally the EC wanted to issue a particular arrangement on sales boosting measures.[53] The EC failed to achieve this vision not least because the regulating clause of the Directive 2005/29/EC proved itself farther-reaching and likely to achieve consensus in the member states. However, the problem remains that the Directive only cursorily considers sales promotion measures. General regulations are absent. Instead some marked and incriminating practices are listed as forbidden methods. But the Directive aims at complete regulation. To this extent, the question whether the members states are at liberty to control sales promotion measures with the large (ban on unfair advertisements) or smaller (ban on misleading consumers) general

51. *See infra* part IX.A.

52. It must yet be discussed whether the Consumer has a duty to store, especially when he cannot exclude that there has been an errant delivery. *See* Kramer, *in* MÜNCHENER KOMMENTAR ZUM BGB § 241a para. 6 et seq. (5th ed., 2007) (focusing especially on paragraphs 21 und 22).

53. *Communication on Sales Promotion*, COM (2001) 546 final (Oct. 2, 2001).

clause, and whether the few listed acts in the Annex of the Directive restrict the member states in prohibiting practices that go above and beyond those enumerated, will have to be answered. Precisely this question is in issue in a preliminary ruling pending before the ECJ.[54]

J. Control of Dishonest and Misleading Advertisements

Article 17 leaves the control of dishonest and misleading advertisements in the hands of the Advertising Council, which is trusted with the investigation—ex officio—and the declaration of advertising malfeasance.[55] The decision is executed pursuant to Article 17(1)2 by the ministry.

The yardstick of the control is Article 16 CPL together with the relevant regulations. Article 8 of the AdvertCouncilR supplements this by referring to the international advertising rules, in essence those of the International Chamber of Commerce in Paris.

The Advertising Council is comprised of 29 members, including a representative of a consumer organisation. Each member is elected for three years. The Council meets at least once a month and, when necessary, more often. The decision lies with the incumbent Director of the Industry and Trade Ministry. There is voting on the resolutions of the Advertising Council at which time fourteen members must be present. Majority voting is determinative and where votes are equal, the vote of the director is decisive. The resolutions of the council are publicized. They serve the education of consumers and the protection of their trade interests (Art. 17(10) CPL and Art. 13 ACR). The Council can delegate its work to subgroups (Arts. 19 and 20 ACR). In particular, the evaluation of particular problems can be delegated to subgroups.

The Advertising Council can decide to suspend the advertisement for three months or to censor it entirely. They also have the power to fine the advertising agency and the advertiser. The Ministry executes these measures. The vendor can appeal the decision of the Ministry in law.

From the Community perspective the control measures are unproblematic. It is notable that neither the law nor the regulation introduce a preliminary procedure, although there ought to be

54. Joined Cases 261 & 299/07, VTB-VAB NV v. Total Belgium NV; Galatea BVBA v. Sanoma Magazines Belgium NV (Requests for preliminary ruling of Rechtbank van Koophandel Antwerpen (Belgien) submitted on June 1 and June 27, 2007, respectively); *see also* J. Stuyck, E. Terryn & T. van Dyck, *Confidence through Fairness?*, 43 COMMON MKT. L. REV. 141 (2006).

55. For a critical analysis of the decisions of the Advertising Council, *see* INAL & BAYSAL, *supra* note 39, at 80 et seq.

correspondence between the Ministry and the advertiser in practice prior to any punishment.

IV. SALE OF CONSUMER GOODS AND ASSOCIATED GUARANTEES

A. Overview

Sale of consumer goods was already dealt with in the first version of the law in 1995 (Art. 4), before the issuance of Directive 1999/44. The reason was that the conditions of the Turkish contract law with respect to a sale contract did not fit consumer transactions. There was no right to repair, the limitation period was only a year and purchasers had a duty to examine the goods, which seemed more suitable for commercial sales.[56] The legislature was also deciding to put disputes about consumer sales contracts under the special jurisdiction for consumer disputes which was introduced with the CPL. In 2003, Article 4 CPL was revised, and harmonisation with the Directive 1999/44 was advised. The success was, however, as we will see, limited.

Article 4 CPL is concerned only with the rights of the consumer in case of delivery of goods which are not in conformity with the contract. Other aspects of the sale contract were not included so that, pursuant to Article 30 CPL, a return to the Law of Obligations provisions is necessary. All in all, the most important aspects of the Sales Directive—like conformity with the contract (Art. 2 Dir. 1999/44), the right of the consumer in the case of unconformity (Art. 3 Dir. 1999/44), the time limits (Art. 5 Dir. 1999/44)—are adopted in Article 4 CPL. The terms on guarantees (Art. 6 Dir. 1999/44) are handled separately in Article 13 CPL.

Since the horizontal directive on consumer contract law plans to set also the delivery time and the moment of the transfer of risk for all member states, in this respect, another piece of legislation will be required.[57] The Turkish law sets out in Article 183 Law of Obligations, that in principle, the risk in a sale of goods contract transfers to the buyer at the conclusion of the contract, whereas the draft directive fixes the time of delivery as the decisive moment.[58]

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56. For the background of this norm, *see* Bucher, *Der benachteiligte Käufer*, SJZ (1971), at. 1-6, 17-24.

57. *See Proposal for a Directive of the European Parliament and of the Council on Consumer Rights*, at 29, COM (2008) 614 final (Oct. 8, 2008)..

58. *See* Yeşim Atamer, *Satım Sözleşmesinde Hasarın İntikal Anı - Hukuk Tarihi, Karşılaştırmalı Hukuk ve Milletlerarası Hukuk Açısından BK m.183'ün Farklı Okunması Gereği [The passing of risk in the sales contract: the need to reinterprate Art. 183 turkish Law of Obligations in the light of legal history, comparative law and international law]*,

B. Prerequisites of a Warranty According to Article 4 CPL

A warranty is given when non-conforming goods are delivered. According to Article 4(1):

> goods, which do not match, or fail to match in large part, the quality which was stated on their packaging, labeling, their instructions for use, or in their adverts or announcements or which were declared by the seller, or the quality set out in standards or technical regulations, or goods which have a physical, legal or commercial defect, which decrease or eliminates their value in light of their intended purpose or the purpose for which they are used or the purpose for which they were purchased by the consumer, shall deemed to be non-conforming.

This corresponds largely to the definition from Article 2 Directive 1999/44, which stipulates that goods show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect. Different from Article 2, the legislature has neither made clear from whom the public statement must come in order to bind the vendor, nor has it given the vendor the possibility to free itself of this responsibility for public statements.[59] The equivalence of incorrect installation and incorrect installation instructions with a physical non-conformity is also wanting in the Turkish law. Admittedly, the Turkish Court of Appeal considers non-conformities that are caused by incorrect installation to be covered by Article 4 CPL.[60]

Deviating from Article 2(3) of the Directive, Article 4(5) CPL provides that the consumer cannot make use of legal remedies if he knew of the non-conformity at the time of the conclusion of the contract. Although Article 197 Turkish Law of Obligations excludes liability not only for known non-conformities but also for non-conformities which the buyer could have noticed with customary care,[61] in the Turkish literature it is frequently represented that the different wording in the CPL was

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in KEMAL OĞUZMAN'IN ANISINA ARMAĞAN 131-67 (Barlas, Kendigelen & Sari eds., 2000).

59. *See* Magnus, *in* GRABITZ, HILF & WOLF, DAS RECHT DER EUROPÄISCHEN UNION (Band III 34. EL 2008), RL (EC) 1999/44 Art. 2 para 55 et seq.

60. Y13HD, 8.3.1999, E.1999/528, K.1999/1657, published in www.ajanstuba.com.tr (defective installation of a solar power system). *See also infra* part IV.D. The direct claim against a producer, from whom defective instructions for construction normally originate.

61. If the vendor assures the purchaser of the freedom from defect or a particular quality, he is notwithstanding the careless ignorance of the consumer, liable (Art. 197 TLC).

intentional so that the warranty is only not available for those non-conformities about which the consumer positively had knowledge.[62]

Article 4(2) CPL sets out that the consumer must convey to the vendor the non-conformity, within thirty days of delivery of the wares, in case he wishes to invoke his legal rights. The condition contains no comment on how to adjudicate on hidden non-conformities. Thus, the Turkish rule is, in many respects, a departure from the Directive. The first deviation lies in the length of the time limit—Article 5(2) of the Directive foresees a two month limit. The more important divergence, however, is that the consumer must inform the vendor, not on discovery of the defect, but after thirty days of delivery of the goods. The literature tries to interpret this provision as consumer-friendly. *Aslan* takes the view that the thirty-day limit is only applicable to defects that become apparent within this period.[63] For all defects that become apparent after that time, because of lack of regulation in the CPL, Article 198 (2) and (3) Turkish Law of Obligations will find application. Pursuant to this rule, the consumer has to give notice immediately after the discovery of the defect.[64]

The buyer bears the burden of proof regarding the existence of the defect at the time of the transfer of risk in a case where he has already taken delivery of the goods.[65] The switching of the burden of proof in Article 5(3) Directive finds no equivalent in the Turkish law.

C. Remedies According to Article 4 CPL

Article 4(2) CPL recognizes the same remedies as Article 3 Directive, repair, replacement, price reduction, and rescission of the contract. No ranking of these remedies is assumed. Other than in Article 3 Directive, no stages are established; the buyer can immediately have

62. *E.g.*, Özel, *Tüketicinin Korunması Açısından Ayıplı Maldan Doğan Sorumluluk Kapsamında Yapımcının Sorumluluğu Sorunu [Product liability in connection with warranty for consumer goods]*, *in* KEMAL OĞUZMAN'IN ANISINA ARMAĞAN 771, 778 (Barlas, Kendigelen & Sari eds., 2000), p. 771, 788; Serozan, *Tüketiciyi Koruma Yasasının Sözleşme Hukuku Alanındaki Düzenlemesinin Eleştirisi [Critique of the CPL provisions concerning contracts]*, YASAHD, 1996, at 579, 588; Karahasan, *Tüketicinin Korunması [Consumer Protection]*, XV YASAHD 42, 47 (1996).

63. ASLAN, TÜKETICI HUKUKU [CONSUMER LAW] 141 (2006). Zevkliler and Aydoğdu assume it is the consumer's responsibility to examine the goods. *See* ZEVKLILER & AYDOĞDU, *supra* note 19, at 121.

64. Y13HD 20.6.2005, E. 2005/5982, K. 2005/10357 (www.kazanci.com).

65. YAVUZ, TÜRK BORÇLAR HUKUKU, ÖZEL HÜKÜMLER [LAW OF OBLIGATIONS, SPECIAL PART] 100 (2007); DEMIRELLI, DIE SACHMÄNGELHAFTUNG DES VERKÄUFERS BEIM KAUF BEWEGLICHER SACHEN NACH DEUTSCHEM UND TÜRKISCHEM RECHT MIT EINEM BLICK AUF DAS INTERNATIONALE PRIVAT - UND ZIVILVERFAHRENSRECHT 164 (1990).

the contract rescinded or ask for price reduction.[66] Further, the details in Article 3(3) Directive 1999/44 regarding the usage of the right to subsequent performance are missing. However, this does not have much effect on the results to be expected under Turkish law. Claims for performance in case of impossibility or disproportionality (Art. 3(3)) or of rescission in case of a slight non-conformity (Art. 3(6)) with the contract can be restricted through the general prohibition on abuse of rights (*abus de droit*) in Article 2(2) Turkish Civil Code. If the suggested horizontal Directive on consumer contracts law is adopted,[67] there is another problem: in Article 26(2) of the Draft, the consumer is given only a claim to subsequent performance, but the choice between repair and replacement is left to the vendor. The consumer seems to have lost his right to choose in this respect.

Article 4(2) CPL mentions the gratuitous nature of repair but not of replacement. In doctrine as well as practice it is nevertheless acknowledged that a replacement must also be provided free of charge.[68] The Supreme Court has developed a practice, in connection with replacement in car purchase contracts, that arguably contradicts the *Quelle* decision of the ECJ.[69] Pursuant to this approach, the vendor must deliver a new car from the same year. However, if the vendor no longer has such a vehicle and cannot perform, according to Article 24 of the Dept Enforcement and Bankruptcy Law, the price should be reimbursed. The Supreme Court has declined to enforce delivery of a new model. The indirect result of this decision is that the costs of the substitution, at least of a new model, are borne by the consumer.

In case of rescinding the contract, both partners must give back any part of the performance/payment received. The return of the non-conforming goods must take place simultaneously with the return of the payment.[70] The high senate of the Supreme Court does not apply the principle expressed in Article 208(1) Turkish Code of Obligation that the

66. It is an open question whether the limitations foreseen for the right of election of the purchaser in the TLC also apply to the right of election of the consumer. *See* Atamer, *supra* note 16, at 566, 587.

67. *See Proposal for a Directive of the European Parliament and of the Council on Consumer Rights*, COM (2008) 614 final (Oct. 8, 2008).

68. *See* ASLAN, *supra* note 63, at 199 & n.68.

69. Case No. C-404/06, Quelle AG v. Bundesverband der Verbraucherzentralen und Verbraucherverbande, NEUE JURISTISCHE WOCHENSCHFIRT [NJW] 2008, at 1433. *See also* Schneider & Amtenbrink, *"Quelle": The possibility, for the seller, to ask for a compensation for the use of goods in replacement of products not in conformity with the contract,* REVUE EUROPÉENNE DE DROIT DE LA CONSOMMATION 2/2007-2008, at 301-09; Herresthal, *Die Richtlinienwidrigkeit des Nutzungsersatzes bei Nachlieferung im Verbrauchsgüterkauf*, NJW 2008, at 2475-78.

70. Y13HD 24.3.2003, E. 2003/845, K. 2003/3235 (www.kazanci.com).

buyer must provide compensation for usage to consumer contracts.[71] The vendor does, however, owe the buyer the interest on the purchase price.[72]

D. Liability and Recourse

Pursuant to Article 4(3) CPL, "the producer, vendor, dealer, middle man, importer, and the creditor according to Article 10(5) or 10/B(9) [are liable] jointly to the consumer for the non-conforming goods and for the remedies mentioned in this article. Lack of knowledge of the non-conformity does not absolve from liability." In contrast to the Directive and many European legal orders,[73] the Turkish CPL establishes with this provision a strict liability not only of the seller but also of the producer and all actors in the distribution chain.[74] The direct liability is based on a statutory obligation and is justified by the idea that especially the producer must account for the trust a certain product has earned in the market.[75]

Although Article 4 of the Directive 1999/44 foresees that the national laws must contain the possibilities for recourse of the last vendor,[76] this problem is entirely ignored by Article 4 CPL. If the last vendor is liable because of a non-conformity, which was caused by someone earlier in the distribution chain, the recourse against this person can fail for various reasons: either because exclusion or restriction of liability clauses have been stipulated, or because the limitation period for claims of the last vendor against the previous seller has expired. Because, under Turkish law, commercial sales are subject to a six months limitation period (Art. 25 of the Turkish Commercial Code) and because this period begins upon delivery of the goods in most cases, the last vendor or the middle man must bear the risk of delay between delivery and resale.

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71. YHGK 22.6.2005, E. 2005/4-309, K. 2005/391 (www.kazanci.com).

72. *See, e.g.*, Y13HD, 24.4.2003, E.194/K.5005 (printed in: ÖZDAMAR, TÜKETICININ KORUNMASI HAKKINDA KANUN [THE CONSUMER PROTECTION LAW] 277-78 (2004)

73. *See* lastly, the Communication from the Commission to the Council and the European Parliament on the implementation of Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees including analysis of the case for introducing direct producers' liability. COM (2007) 210 final (May 25, 1999).

74. For the liability of the creditor in joined transactions *see infra* part XI.F.

75. On this direct claim and the problems that it causes, *see* Yeşim Atamer, *Third Persons' Liability for Non-Conformity in Sales Contracts and Sellers' Right of Redress in Turkey*, *in* EUROPEAN PERSPECTIVES ON PRODUCERS' LIABILITY—DIRECT PRODUCERS' LIABILITY AND THE SELLERS' RIGHT OF REDRESS 579-600 (Ebers, Janssen & Meyer eds., 2009).

76. *See* MICKLITZ & REICH, *supra* note note 2, § 4.19 - 4.22.

E. Limitation Periods

Pursuant to Article 4(4) CPL, the claims of the consumer of movables expire two years after delivery, and those of a fixed property expire in five years. This tracks Article 215(3) Turkish Code of Obligations, which regulates purchase of real estate. If the vendor intentionally or negligently failed to mention the non-conformity, he cannot rely on the limitation period (Article 4(4) CPL). In such a case, the regular limitation period of ten years is valid (Article 125 Turkish Code of Obligations).

F. Guarantees

Unlike Article 6 of the Directive, Article 13 CPL introduces the duty of producers and importers to provide a guarantee certificate for all industrial products made public by the Industry and Trade Ministry.[77] The guarantee must last at least two years and begins on delivery of the goods to the consumer. The guarantee must include claims for repair, replacement, price reduction and rescission (Art. 13(3)) and must be certified in writing[78]; the vendor is responsible to deliver the certificate to the consumer.

The extent to which such an obligation to provide guarantees makes sense next to the direct claim enjoyed by the consumer need not be discussed here. In practice, one does not take the trouble to clarify whether the claim is based on the producer's obligatory guarantee or the statutory obligation between the producer and the consumer.[79] Of course, there is a risk that such a forced guarantee will interfere too much with the economic liberty of the importer/producer. Aside from that, there is the danger that such a requirement constitutes a trade restriction in the sense of Article 28 EC, because all European imports that are offered on the Turkish market would have to provide such a guarantee with the necessary content.

77. A list is provided in the annex of the Garanti Belgesi Uygulama Esaslarına Dair Yönetmelik [Regulation regarding guarantee certificates], RG 14.06.2003, sayı 25138.

78. In Article 7 of the Regulation, *supra* note 77, the obligatory content of the certification duty is governed. The issued certificates must be confirmed by the Ministry.

79. *See supra* part IV.D.

V. Product Liability

A. Overview

In Article 4, the Turkish legislation considers not only the rights of the buyer in case of delivery of non-conforming goods but it also tries to introduce strict liability for defective products into Turkish law; this attempt, unfortunately, fails absolutely.[80] The consumer's claims arising under a sales contract due to delivery of non-conforming goods was confused with the tortious claim for damages of a person injured by a defective product. This confusion was underlined by the 2003 Regulation on liability for defective goods ("ProdLR"). Although the regulation represents a far-reaching translation of the product liability Directive,[81] it was enacted on the basis of Article 4 CPL and correspondingly gives a claim only to the consumer.[82] The legislation did not address a claim to damages against the producer of the goods, which was independent of the sales contract regarding these goods.

Article 4 (2) CPL states that the consumer can claim damages from the producer for death and/or bodily injury and/or for damage to other goods in use. This is the only expression that relates to product liability in the CPL. All other questions are dealt with in the Regulation, an approach justifiably highly-criticized in Turkey, because strict liability can only be introduced by law and not by regulation.[83]

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80. For relevant criticism on the old Artitcle 4 CPL, *see* Özel, *supra* note 62, at 771, 812; Serozan, *supra* note 62, at 579, 592.

81. That the Regulation serves the implementation of the Product Liability Directive, can be taken from the Turkish National Program for the Implementation of the Acquis Communautaire (RG 24.07.2003, sayı 25178 mükerrer, 1-884), where, in section 23.2.1, this Regulation is portrayed as an implementation measure of the Directive 85/374/EC.

82. The court decided, for example, in November 2003, that the complaint about damages for bodily injury, which was caused by the explosion of a gas bottle, did not fall within the competence of the Consumer Court, because the bottle was designed for use in the workplace. *See* Y13HD 18.11.2003, E.2003/7553, K.2003/13850, published in ÖZDAMAR, *supra* note 72, at 227. A faithful interpretation of this precedent would lead to the result that the applicability of the product liability Regulation excluded non-consumers and therewith created only a claim for consumers.

83. *See* AKÇURA KARAMAN, ÜRETICININ AYIPLI ÜRÜNÜN SEBEP OLDUĞU ZARARLAR NEDENIYLE ÜÇÜNCÜ KIŞILERE KARŞI SORUMLULUĞU [LIABILITY OF THE PRODUCER FOR DAMAGES CAUSED BY DEFECTIVE GOODS TO THIRD PERSONS] 139 et seq. (2008); KIRCA, ÜRÜN SORUMLULUĞU [PRODUCT LIABILITY] 94 et seq. (2007); HAVUTÇU, TÜRK HUKUKUNDA ÖRTÜLÜ BIR BOŞLUK: ÜRETICININ SORUMLULUĞU [A LACUNA IN TURKISH LAW: PRODUCT LIABILITY] 117 et seq. (2005).

B. Product

Due to the aforementioned misconception, neither the law nor the Regulation contains a separate definition of the term "product." The legal definition for "goods" is[84] also determinative in this context (ProdLR Art. 4(2)c), with the result that, on a natural reading, the producer of real estate and intangibles is also strictly liable for damage caused due to a defect. Although for digital products, which are not incorporated in a thing, the decision of the legislature is understandable; for real estate, this is not the case. *Kirca* suggests that in the case of product liability a teleological interpretation is needed.[85] Correspondingly real estate would only be within the scope of the Consumer Protection Law in the context of purchase, loan or time-share transactions, but not regarding the application of the product liability provisions.

C. Producer

According to to Article 4(1)d ProdLR, the "producer" includes the producer of the end product; the producer of any raw material or component of a product; every person who offers the product for sale by putting his name, trade mark or other distinguishing feature on the product; and every person who imports the product for sale. This definition corresponds largely to that of Article 3(1) and (2) of Directive 85/374. There, the producers of the raw material, component parts, and the final product are included as well as the importer. The commercial purpose of the import is emphasized by the aim of the sale.[86] An exclusively private motivation for the import will not suffice to be held liable.

The implementation of Article 3(3) Directive 85/374 is wanting. The secondary liability of the supplier for the event that either the producer/importer of the product cannot be identified or is not nominated in time by the supplier, has been left out without justification.

D. Defect

Pursuant to Article 5 ProdLR, a product is "non-conform[ance] when it does not provide the safety which a person is entitled to expect taking into account all the circumstances and including the presentation of the product, the reasonable use of it and the time the product was put

84. *See supra* part II.B.2.

85. KIRCA, *supra* note 83 at 192; HAVUTÇU, *supra* note 83, at 120-21.

86. Although the law mentions only the sale purpose, the provision should be interpreted so that an import with e.g. the aim of rent or leasing is covered too.

into circulation. A product cannot not be considered defective for the sole reason that a better product is subsequently put into circulation."

Due to the aforementioned misconception of the Turkish legislature with respect to product liability, the Regulation uses the term "non-conformity" instead of the term "defect." The problem has falsely been seen as one of non-conformity with the contract. In practice, these terms are also not kept distinct and the different origin of the provisions is not considered.[87] This, however, is particularly important for the identification of a "defect," which would trigger producer liability. In that situation, only objective standards like safety expectations are decisive, whereas non-conformity is judged subjectively, taking into account the individual contract between the parties. Moreover, the existence of a defect is judged at the moment of putting the product into circulation and not the time of transfer of risk, as is the case for the ascertainment of non-conformity. But beside this terminological mistake, the definition in Article 5 ProdLR corresponds with that of Article 6 of the Product Liability Directive.

E. Liability

The producer is liable pursuant to Article 6 ProdLR, independent of any fault. The defective product must cause the death of a person, injury to body or health, or damage to property. This is enshrined in both Article 4 CPL and Article 6(1) ProdLR. Unlike Article 9 Directive 85/374, there is no limitation in the ProdLR regarding the scope of damaged property. Only in Article 4 CPL does the expression "damage to other goods in use" seem to indicate a limitation. Using an interpretation consonant with European law,[88] one could conclude that this expression, first, only covers damage to things other than the defective good and, second, only to items that are intended for private use or consumption, since the term "goods" is particularly defined in CPL and is mainly aimed at consumer goods.[89] The prerequisite for liability that the item of property has to have a higher value than 500 Euro (Article 9 Directive 85/374) was not introduced to Turkish law.[90]

The burden of proof with respect to the damage, the defect, and the causal link between defect and damage is borne by the claimant, pursuant to Article 6 (2) ProdLR. The principle of joint liability from Article 5

87. *See also* HAVUTÇU, *supra* note 83, at 24 et seq.

88. On the question of how far Turkish courts are bound to produce an interpretation in alignment with the Directive, *see* Atamer, *supra* note 16, at 582 n.84.

89. *See also* HAVUTÇU, *supra* note 83, at 141-42.

90. Immaterial damage can be claimed separately pursuant to Article 49 Turkish Code of Obligations.

Directive 85/374 is adopted by Article 6 (3) ProdLR. The same section states that the liability of the producer can only be reduced where the damage was partly caused by the injured party or any person for whom the injured person is responsible.

The exonerating grounds, listed in Article 7 Directive 85/374, are partly include in the ProdLR Article 7. An important mistake, however, has been made in the implementation of lit. (d), because the Regulation considered it enough that, in the production process, the binding technological standards are adhered to. These standards are, however, minimal requirements for production, so the producer is free to adopt higher standards.[91] Therefore, with a EU-law conforming interpretation, the producer should only be allowed to exonerate himself if the defect arose because he adhered to mandatory legal provisions.

Although the Regulation burdens the injured party with the so-called development risk and allows the producer to avoid liability (Art. 7(1)), Article 6(4) introduces a duty to observe the product after putting it into circulation. That means that if the state of technology and science allows for the ascertainment of the defect within ten years after the product has left the manufacturing process, the producer will not be able to exonerate himself, so long as he cannot prove that he exercised the necessary care, to prevent the damage caused.[92]

F. Exemption From or Limitation of Liability and Temporal Limitation of Liability

In line with Article 8 ProdLR, the liability of the producer cannot be excluded or limited in advance. Contradictory terms in contracts are null.

The strict liability of the producer is limited in time. In conformity with the Directive there is a three year limitation period for any damages claim from the day the injured party has become aware or should reasonably have become aware of the damage, the defect and the identity of the producer (Art. 9 ProdLR). The claim expires after the passing of a term of ten years after putting the product into circulation (Art. 10 ProdLR).

VI. UNFAIR TERMS

Directive 93/13 on unfair terms in consumer contracts was incorporated into the CPL in the 2003 revision and is regulated in Article

91. *See also* KIRCA, *supra* note 83, at 177.

92. *See* HAVUTÇU, *supra* note 83, at 144 et seq. (discussing the duty to follow-up the goods).

6. Contemporaneously, the Ministry issued an Administrative Regulation on Unfair Terms in Consumer Contracts ("UnfairTR").[93] These rules offer, parallel to Directive 93/13, protection only against terms that were not individually negotiated in consumer contracts (Art. 6(1) CPL; Art. 4D UnfairTR).

When contract terms are negotiated, under Turkish law, the principle of freedom of contract dominates (Art. 19 Turkish Law of Obligations). This excludes a general control, even where terms strongly disadvantage one of the parties.[94] The burden of proof with respect to negotiation is principally borne by the consumer. This burden transfers if the contract terms are pre-formulated and especially where they are contained in a standard contract (Art. 6(3) and (5) CPL / Art. 5(1) and (3) UnfairTR). In such a case it falls to the trader to prove a negotiation on the contract or the terms.

The fact that some clauses are negotiated does not exclude that the rest of the contract counts as a standard contract (Art. 6(4)CPL/ Art. 5(2) UnfairTR).[95] These rules are consonant with Article 3 Directive 93/13.

If it is established that certain clauses were not negotiated, they are subject to judicial control and are regarded as unfair if contrary to the requirement of good faith they cause an imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer. Unlike Article 3(1) Dir. 93/13, Article 6(1) CPL and Article 4(d) UnfairTR do not prescribe that this imbalance must be "significant." Nevertheless in Turkish law, a minor imbalance will not suffice to evaluate a contract clause as unfair. Article 2 Turkish Civil Code, which covers the rule of good faith and generally prohibits an "obvious" abuse of rights (*abus de droit*), can guide in the matter—the abuse of freedom of contract must also be obvious, that is the imbalance must be considerable. The "grey list," that is, the list of contract terms given in the annex of Directive 93/13 and may be regarded as unfair, is incorporated almost word for word in the Regulation so that judges can

93. RG 13.06.2003, sy. 25137. On the control of standard terms under Turkish law, see Bozbel, *Allgemeine Geschäftsbedingungen im türkischen Recht*, RECHT DER INTERNATIONALEN WIRTSCHAFT [RIW] 2004, p. 183 ff.; Akdag-Güney, *Die Umsetzund der Verbraucherrichtlinien in der Türkei am Beispiel der missbraeuchlichen Klauseln*, 2009 ZEuP 109-37; *see also* Yeşim Atamer, *Genel İşlem Şartlarının Denetiminde Yeni Açılımlar: TKHK m.6, Tüketici Sözleşmelerindeki Haksız Şartlar Hakkında Yönetmelik ve Yeni Borçlar Kanunu Taslağı m.18 a-f [New perspectives regarding control of standard contract terms: Art. 6 CPL, UnfairTR and Art.18 a-f of the Draft Code of Obligations]*, *in* KOCAYUSUFPAŞAOĞLU IÇIN ARMAĞAN 291-331 (Seliçi et al. eds., 2004).

94. On the limits of contractual freedom in Turkish-Swiss law, *see* Yeşim Atamer, SÖZLEŞME ÖZGÜRLÜĞÜNÜN SINIRLANDIRILMASI SORUNU ÇERÇEVESINDE GENEL İŞLEM ŞARTLARININ DENETLENMESI [CONTROL OF STANDARD FORM CONTRACTS IN THE CONTEXT OF RESTRICTION OF FREEDOM OF CONTRACT] 143 et seq. (2001).

95. *See* Atamer, *supra* note 93, at 298-99.

refer to it when assessing the level of imbalance between the rights and obligations of the parties.[96]

Pursuant to Article 6 UnfairTR, in the evaluation of unfairness the same criteria are determinative as in Article 4 Directive 93/13. The nature of the goods or services for which the contract was concluded has to be taken into account as well as all circumstances attending the conclusion of the contract and all other terms of the contract or of another contract on which the main contract is dependent. But the contract terms regarding price/performance relationship are, in principle, exempt from any kind of judicial control. An exception is given only in case of transgression of the "principle of transparency": the duty to formulate the terms in plain, intelligible language (Art. 6(1) UnfairTR).[97] Where there is ambiguity as to the meaning of a clause, the interpretation most favourable to the consumer shall prevail.

If the unfairness of particular terms is established, they are void (Art. 7 UnfairTR). The contract itself remains valid, so long as this is possible with the remaining clauses. Under Turkish law the grounds of invalidity must be considered by a judge of its own motion, that is *ex officio*:[98] this is consistent with the case law of the ECJ in *Océano Grupo*, *Cofidis* and recently *Mostaza Claro*.[99]

A complaint with respect to the declaration of nullity of unfair terms in standard contracts can be lodged by consumers, consumer organisations and the Ministry[100] (Art. 23 CPL in connection with Art. 8 UnfairTR). The court can order the omission of these terms in the future or provide for other fitting legal remedies.

Taking the provisions together, Directive 93/13 has been implemented with only few changes into Turkish law and there is no need for reform. It is worth asking whether a reform would be necessary if the horizontal directive on consumer rights[101] is adopted. The draft directive not longer prescribes the judicial control of terms that have not

96. *See* Bozbel, *supra* note 93, at 183, 187.

97. *See* Atamer, *supra* note 93, at 317-18; *see also* Micklitz, *in* HANDBUCH DES EU-WIRTSCHAFTSRECHTS, 22. EL (Daueses ed., 2008), H V ¶¶ 223-28 (discussing the principle of transparency).

98. SEROZAN, MEDENI HUKUK, GENEL BÖLÜM [CIVIL LAW, GENERAL PART] ¶¶ II 16 et seq. (2005).

99. Case Nos. C-240/98 to C-244/98, Océano Grupo, 2000 E.C.R. I-4951; Case No. C-473/00, Cofidis, 2002 E.C.R. I-10875; Case No. C-168/05, Mostaza Claro, 2006 E.C.R. I-10421.

100. Consumer organisations are, pursuant to Article 3(p) CPL, "Associations, foundations or their umbrella organization founded with the aim of protecting consumer interests."

101. *See supra* note 15.

been "individually negotiated," but of those that are "pre-formulated."[102] This would signify a narrowing of the scope in comparison to 93/13 because clauses can be imposed even though they were not written up in advance. Article 3 of the present directive only prescribes that a contractual term cannot not be considered negotiated if it has been drafted in advance. But a prerequisite of pre-drafting is not sought for.[103]

VII. TIME-SHARE CONTRACTS

A. Overview

Time-share contracts are regulated in Article 6/B CPL. The mode of regulation is similar to that of the package-holiday contracts. In the law, only the basic contractual definitions are governed, the rules on duties to provide information, the right to withdrawal, as well as rules on the performance of the contract are all in the relevant Administrative Regulation on Time-Share ("Time-ShareR"). This mode of regulation begs the question whether or not the legal rule should, at the very least, define the basic requirements of the duty to inform and the right of withdrawal.

B. Definition and Scope

Article 6/B CPL or Article 4 Time-ShareR defines the time-share contract as a contract or group of contracts with a minimum duration of three years, which gives the contracting party the usage of an immovable for a minimum of a week annually. Thus Article 6/B is consistent with Article 2(1) of the Time-share Directive 94/47/EU. The user is given no proprietary right, but obviously only a claim in contract. Unlike Article 4(c) of the Directive, the Turkish law contains no legal definition of immovable.

The very narrow definition of Time-share contracts has led to a series of evasive strategies by insincere vendors, which cause many problems in practice.[104] The European Commission is, in the course of

102. Article 30 (1), *Proposal for a Directive of the European Parliament and of the Council on Consumer Rights*, at 32, COM (2008) 614 final (Oct. 8, 2008).

103. *See* GRABITZ, HILF & WOLF, *supra* note 59, A5 RL (EC) 93/13 Art. 3 ¶¶ 22 et seq.

104. *See* the report of the European Consumer Law Group, *available at* http://212.3.246.142/docs/1/OIMOOBLCHEFDNOKAPNLJMMCLPDBK9DW1T39DW3571KM/BEUC/docs/DLS/2004-01577-01-E.pdf; *see* ANALYSE VERBRAUCHERPOLITISCHER DEFIZITE BEIM ERWERB VON TEILNUTZUNGSRECHTEN, (Pfeiffer & Hess eds., 2006), SCHRIFTENREIHE DES BUNDESMINISTERIUMS FÜR ERNÄHRUNG, LANDWIRTSCHAFT UND CONSUMERSCHUTZ, ANGEWANDTE WISSENSCHAFT, Heft 515 (providing the German perspective).

its reform of consumer law,[105] trying to issue a new directive on Time-share Contracts along with the package-holiday contracts. One of the main points of the reform will be the extension of the material scope of the Directive 94/47/EC.[106]

The Time-ShareR defines, in Article 4 the personal scope. The parties are described as supplier and consumer. The Directive in turn uses expressly in Article 2(3) and 2(4) the terms vendor and purchaser. It is questionable whether a person counts as a purchaser, if professionally active in the real estate business, but acquires the time-share for private purposes. Since the Directive does not distinguish abstractly between private and business person, rather concentrates on the purpose of the contract, this type of contract must also fall within the personal scope of application.[107] To this extent, the term "purchaser" in the context of time-share contract is not entirely identical with that of "consumer."

C. Information Duties, Form Requirements and Performance

Article 10 Time-ShareR governs pre-contractual duties to provide information. The vendor must provide the consumer with a brochure, which, apart from a general description of the property, must provide minimum information. Though the Time-ShareR in (a)-(e) provides a list of duties, it is not complete and does not tally perfectly with the provisions of Article 3(1) of the Directive.[108]

On a natural reading of Article 10 TimeShareR, parties can later conclude a contract which deviates from the terms of the brochure. But pursuant to Article 3 Directive this possibility to make changes to the brochure rests on circumstances which are out of the control of the supplier. Article 10 of the Turkish Regulation mentions here a somewhat unfortunate translation of *force majeure*, which nevertheless gets to the

105. *Green Paper on the Review of the Consumer Acquis*, COM (2006) 744 final.

106. The Directive is currently under revision. The European Parliament approved the proposal for amendment on 22 October 2008, http://ec.europa.eu/consumers/rights/docs/timeshare_position_en.pdf. As the final version is not yet available, the paper uses the old Directive as a blueprint.

107. *See also* GRABITZ, HILF & WOLF, *supra* note 59, at A 13 RL (EC) 94/47 Art. 2 Rn.109 (explaining this result through a comparison with the *di Pinto* decision of the E.C.J. on door-to-door sales, Case No. C-361/89, 1991 E.C.R. I-1189)). As they explain, the court qualified a trader who concludes a transaction relating to his business (irrespective of its experience in that specific business) as a non-consumer. Therefore, traders, who are active in the time-share business but transact for private purposes, must in turn be treated as consumers, independent of their business experience.

108. *See* GRABITZ, HILF & WOLF, *supra* note 59, at A 13 RL (EC) 94/47 Art. 3 ¶ 110 et seq.; Micklitz, *in* REICH & MICKLITZ, EUROPÄISCHES CONSUMERRECHT § 19.14.-19.18 (2003).

heart of the matter. It is more problematic that, in Article 10 Time-ShareR there is no indication that the vendor has to communicate or point out these changes to the consumer. This subverts the aim of pre-contractual information, as the consumer would mostly not notice that the final contract terms are deviating from the brochure.

Article 5 Time-ShareR mandates written form and enjoins the supplier to provide the consumer with a contractual document. It is not clear, what written form means. In particular, it is not clear whether Article 5 requires a personal signature or whether an electronic signature and document will suffice.

In Article 5 the minimum content of the contract are set out, which again, do not tally with the far more detailed rules in the Time-share Directive. The rule of Article 4 Directive is not implemented, according to which, the purchaser has a choice of which language the contract and the brochure are written. If the Consumer has a residence in a member state of the EU, he can demand that the language of his member state is used.

D. Withdrawal and Ban on Advance Payments

Article 6(1) Time-ShareR grants the consumer a ten day right of withdrawal, calculated from the conclusion of the contract. The Time-ShareR makes no indication whether calendar or working days are intended or whether the consumer is bound to a particular form when exercising the right of withdrawal. Article 5(2)2 of the Directive is not implemented, pursuant to which the time period is respected if the consumer has dispatched the notification within the ten days. The proof can only be made if the letter is sent by registered post. The original draft by the Commission is still included this requirement.[109]

Article 6(2)1 Time-ShareR concerns itself with the difficult issues raised by the request made by the supplier for an advance payment. That provision forbids the supplier, consistent with Article 6 Directive to demand an advance payment within the ten day withdrawal period. This rule refers back to the circumstance that many vendors do not repay the advance payment to purchasers who exercise the right of withdrawal.[110] But this ban is relativized in the Time-SharingR. In Article 6(2)2 Time-ShareR an advance payment can be demanded if the contract is made directly on the piece of property concerned in the time-share. This

109. 1992 O.J. (C 222), 8.

110. On the parallel problem in distance contracts below K and the pending decision before the ECJ, *see* Case No. C-71/02, Gysebrecht; *see also* REICH & MICKLITZ, VOLLHARMONISIERUNG DURCH DIE HINTERTÜR - ZUR KRITIK DER SCHLUSSANTRÄGE DER GAIN TRESTENJAK VuR 348 et seq. (2008).

exception is based on the false conception, that the right of withdrawal only protects the consumer until he can take a look at the property and therefore contradicts with the provisions of the directive.

Article 7 Time-ShareR governs the legal consequences in the case of an inadequate provision of the information, which has to be conveyed to the consumer according to Article 5 Time-ShareR. Article 7 differentiates three situations: (1) the consumer demands the missing information but does not receive it (2) the consumer receives the missing information and (3) the consumer receives within three months no full information but does not ask for it. The rights of the consumer differ according to the situation. In situation 1, the consumer can withdraw from the contract within the ten day period. In (2), the right to withdraw is triggered from the time at which all the information is provided. In (3), the contract ends automatically after the elapse of three months. To this extent, but only to this extent, the Time-ShareR makes clear that the consumer must bear no costs and any payments can be recouped. It stands to reason that this consequence must also apply to the first variant, but this is not made clear in the wording.

The treatment of the right to withdraw in Article 7 Time-ShareR is not entirely consistent with the directive. It is partly more strict, at least in so far as the contract automatically ends after three months, if the supplier neglects his duty to provide information. It is however, narrower in the sense that the consumer, in the first variant, must take action. However, on close inspection, this strengthening of the provision does not burden the consumer, because he will always have the possibility to wait for the supplier to deliver the missing information within the three months period. The Directive follows a different model. The right of withdrawal is first limited to ten days, but is extended in the case of missing information to three months plus an additional ten days. The Directive does not prescribe an automatic cancellation of the contract.

E. Linked Transactions

Article 8 Time-ShareR concerns itself with financing through the supplier or through a third party. Consonant with Article 7 Directive, Article 8 Time-ShareR stipulates that the withdrawal of the time-share contract automatically dissolves the credit relationship. Nevertheless, the withdrawal must be communicated to the creditor. The Time-ShareR does not make clear whose responsibility it is to contact the creditor.

The Turkish consumer law rule is, in two ways, different from Article 7 of the time-share directive. First, the Time-ShareR covers only the complete financing whilst the Directive also covers partial financing.

Second, the Time-ShareR establishes an information duty about the exercise of the right of withdrawal. In fact, Article 7 leaves it to the member states to sort out the details of the dissolution of credit contracts in national law. However, these rules ought not to depart from the precepts of the Directive to the disadvantage of the consumer. This is the case with both situations, especially when one assumes that the consumer must inform the creditor.

VIII. PACKAGE-HOLIDAY CONTRACTS

A. Overview

The term, package-holiday contracts was introduced into the CPL in the 2003 revision. Although the draft revision included no such provision, in Parliament, at the last moment, Article 6/C (like Article 6/B on the time-share contract) was added, which also only provided a definition of the contract and left the regulation of other details to the Ministry. The latter reacted immediately, issuing the *Administrative Regulation on Package-holidays* ("Package-HolidayR") in June 2003.[111] Just like the Regulation on product liability, this Regulation has been criticized because it is contrary to the hierarchy of norms, since all questions of contractual liability are governed, without there being a corresponding provision in the CPL to that effect.[112]

B. Definition

The definition of the package-holiday contract is largely consistent with that of Article 2(1) of the Directive 90/314: it must have a combination of at least two services (transport/accommodation/other tourist services) for a period of longer than twenty-four hours or include an overnight stay in a package price sold or offered for sale.[113] Unlike the Directive, the CPL and the Regulation protect only consumers. The specific consumer definition of Article 2 Directive 90/314, which includes also persons buying a package tour for business purposes,[114] was not adopted. On the other hand the terms "organizer" and "retailer" are defined parallel to the Directive, covering both, the person who

111. *See supra* note 22.

112. For a suggestion on how a rule on the CPL could be drafted, *see* Yeşim Atamer, *Paket Tur Sözleşmelerine İlişkin TKHK m.6/C'nin Revizyonuna İlişkin Teklifler [Article 6/C of Consumer Protection Law on Package Tours – Proposals for Revision]*, *in* PROF. DR. UĞUR ALACAKAPTAN ARMAĞANI 87-101 (M. Inceoğlu ed., 2008).

113. *See* Yılmaz, *supra* note 63, at 516-17; ZEVKLILER & AYDOĞDU, *supra* note 19, at 204-07.

114. *See* GRABITZ, HILF & WOLF, *supra* 59, at A 12 RL (EC) 90/314 Art. 2 ¶ 18.

organizes package holidays and offers them to sale as well as the person just offering for sale packages put together by an organizer.[115]

C. *Information Duties, Form Requirements, Transfer and Alteration of the Contract*

Article 12 of the Package-HolidayR prescribes that the organizer has a duty to give a brochure to interested consumers, and lists the information it must contain. This tallies, for the most part, with the terms of Article 3 Directive 90/314. Article 5 Package-HolidayR on the other hand contains the information that must be communicated at the conclusion of a contract. But the legislature overshot, and introduced a contractual form, the absence of which will render the contract void. Differently, Article 4(2)b Directive 90/314 only prescribes that the information has to be communicated to the consumer in writing or made available in some other form—it is not a validity requirement.

Parallel to Article 4(3) Directive 90/314, Article 7 Package-HolidayR governs the possibility of a contract transfer in the event that the consumer is unable to travel. The prerequisite of a "reasonable notice" before the journey starts has been concretized by the Regulation as "7 days before the beginning of the journey," so that the consumer can, at this point, at the latest, inform the organizer of his intention to transfer. The transferee and the transferor are jointly liable to the organizer for the payment of the balance due and for any additional costs arising from the transfer.

Principally, when it comes to package-holidays, the contractually set prices may not be raised with the exception that the price hike is based on alterations in the duties or taxes on air- or sea ports or variations in the exchange rate (Art. 6 Package-HolidayR). The organizer or the provider must in this case notify the consumer immediately and give him the possibility to either cancel the contract, to accept the changes or to choose an alternative trip, if the organizer is in the position to offer one. The possibility to raise the price due to alterations in fuel costs is not provided for in the Package-HolidayR. Missing is also a term parallel to Article 4(4)b of the Directive which prohibits a price increase less than twenty days prior to the stipulated departure date, which is criticized in the literature.[116] But the general prohibition on the abuse of rights (Art. 2 Turkish Civil Code) could also improve matters here, after which a notification at too short notice would be denied any effect.

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115. In order to avoid repetition, only the term "organizer" will be used in the text, but it should be understood to include the retailer.

116. ASLAN, *supra* note 63, at 592.

The question, how far contractual terms other than the price can be changed before departure, is not openly regulated in the current version of the Package-HolidayR.[117] Since Package-HolidayR prescribes written form, and Article 12 of the Turkish Code of Obligation also extends this to any alteration of the contract, one must conclude that every alteration, even minor ones can only be made with the agreement of the consumers.[118] The rule on price is an exception.

D. Cancellation of the Organizer Before Departure

Article 8 Package-HolidayR governs the option of the organizer to cancel the contract before the beginning of the trip. He can do so on the condition that he refunds the consumer the payment already made in less than ten days after his cancellation. The organizer also has a duty to pay damages to the consumer for any damages caused by his cancellation. This duty can be escaped only if he proves that the cancellation was made due to the failure to reach the minimum number of participants, or because of *force majeure*, and that the consequences could not have been avoided even if all due care had been exercised.

E. Remedies in Case of Non-Performance

Article 9(1) and (2) Package-HolidayR is almost an exact translation of Article 4(7) Directive 90/314 and give the consumer the right, in the case of non-performance, to avoid the contract. However, this is only allowed after the organizer is given the chance to cure the non-performance. If the alternative performance is worth less than what is promised in the contract, the difference must be paid to the consumer.

It is problematic that the Regulation regarding the consumer's duty to notify any non-performance to the organizer is based on a false concept. Article 11 Package-HolidayR prescribes (apparently inspired by provisions from the law of sale) that the consumer must inform the provider of the non-performance within thirty days from its discovery. Thus the right of the organizer to offer cure is jeopardized and Article 5(4) Directive 90/314 not implemented. However one could deduce a duty to notify at the earliest opportunity by reference to the general duty to mitigate the damage (Art. 44 Turkish Code of Obligations).[119]

In case no cure can be offered or this is not in the interests of the consumer, he can demand repayment and avoid the contract. In this

117. *See* GRABITZ, HILF & WOLF, *supra* note 59, at A 12 RL (EC) 90/314 Art. 4 ¶ 39 et seq.

118. In this sense, *see* ASLAN, *supra* note 63, at 541.

119. *Seealso id.* at 534.

case, the paid sum must be returned within ten days, and if damage can be proved, compensation must be paid too. Unlike the Directive the Regulation gives the organizer no possibility to demand an adequate compensation for the performance already made.

The Regulation contains no provision regarding a claim based on wasted holiday time. In the literature, it is debated, whether such a claim can only be raised in connection with a claim for injury to the person, or if it is indeed, independent thereof.[120] Since in Article 49 Turkish Code of Obligations a claim for non-material damage for the violation of the general right of personality is given irrespective of the gravity of the fault and the damage, there is often a claim according to both opinions. Even if the consumer is not injured itself but his/her child, and therefore it is impossible for him/her to enjoy the holiday—like in the *Leitner* case of the ECJ[121]—a claim for non-material damage will be given under Turkish law based on the violation of the right of personality.

F. Liability and its Exclusion

Pursuant to Article 9 Package-HolidayR, the organizer is liable for all possible kinds of non-performance. Whether this non-performance was caused by the organizer himself or by any third person, who was involved in the performance of one of the obligations arising out of the package-holiday contract is irrelevant. Also the nature of the relationship between the organizer and the third person, whom fulfils the contract is of no consequence. If the organizer has used a third person to perform its obligations he will be liable for any non-performance.[122] The organizer can only be exculpated in two circumstances, namely if the breach of contract was caused by the conduct of the consumer or *force majeure.*

Article 10 Package-HolidayR goes further than Article 5(2) Directive 90/314 in that a contractual exclusion of liability or a limitation of liability is entirely forbidden. Although the reference to the limitation of liability in international conventions is missing, this should be no

120. *See, e.g.*, GENÇ ARIDEMIR, SÖZLEŞMEYE AYKIRILIKTAN DOĞAN MANEVI TAZMINAT [NON-MATERIAL DAMAGE IN CASE OF NON-PERFORMANCE] 168-75 (2008); BÜYÜKSAĞIŞ, YENI SOSYO-EKONOMIK BOYUTU ILE MADDI ZARAR KAVRAMI [THE CONCEPT OF DAMAGE IN ITS NEW SOCIO-ECONOMIC DIMENSION] 402-09 (2007). In 2001, the High Senate of the Turkish Court of Cassation recognized a claim for non-material damage where the baggage of a married couple on a trip to Prague was lost and they were not able to attend the Opera and Ballet performances as intended. Cf. HGK 12.12.2001, E. 2001/11-1161, K. 2001/1052, printed in BÜYÜKSAĞIŞ, at 408-09.

121. Case No. C-168/00, Simone Leitner, 2002 E.C.R. I-02631.

122. *See* ASLAN, *supra* note 63, at 521.

problem because these conventions rank higher than the provisions of the Directive in the normative hierarchy and therefore take priority.

G. *Guarantee in Case of Insolvency of the Organizer*

In the revision of 2003 no provision was included in the CPL or the Regulation regarding a guarantee to ensure the refunding of the paid sums in case the organizer goes insolvent. This neglect was changed in 2007 through an alteration to the *Law pertaining to travel agents and the association of travel agents*. Pursuant to Article 12 of this law, the tour organizer must conclude liability insurance. This policy must cover the liability of the organizer to the consumer for the case that the promised obligation cannot be performed or cannot be performed in its entirety. The reason for breach of contract can lie in illiquidity or the commencement of insolvency proceedings against the travel agent, but can also be another reason. Consequently, the insurance duty is far more comprehensive than that of Article 7 Directive 90/314. Nevertheless, the minimum level of insurance is set at the price of the package-holiday, which limits claims and contradicts the Directive. The consumer is given a direct claim against the insurer.

IX. DOOR-TO-DOOR SALES

A. *Overview*

Door-to-door sales produce a plethora of problems in Turkey. The comparatively comprehensive rules in Article 8 and 9 of the CPL and the Door-to-door Sales Administrative Regulation ("Door-to-doorR") testify to this.[123] It is not the case that large direct sale firms conduct themselves in a negative manner. Rather, the smaller, regional Turkish firms are the source of the problem. Two strategies always cause furor. The representatives wait until men go to work and then tempt women with gifts and/or they induce the consumer to sign a contract with lacking information about the product and the possible modes of payment. In the struggle against these means, the legislator does not restrict itself to the usage of civil law; rather it uses also public legal controls, in which the sales companies are obliged to fulfill registration requirements. Many rules can only be understood against the background of the fact that the traders try to evade the legally mandated withdrawal period by delivering the product during this period. In such case the only option remaining for the consumer is to send back the product, which requires different

123. The following information results from that put at the disposal of the authors by the Turkish Ministry of Industry and Trade.

legal precautions, in comparison to the exercise of a withdrawal before the delivery.

The EC has regulated door-to-door sales since 1985, although here, the transnational context, which is necessary for triggering the competence provision of Article 95 of the EC Treaty is not strongly manifested.[124] It was issued at a time when unanimous voting was needed and is, after the Product Liability Directive, the second oldest EC consumer directive. The cursory drafting of its provisions has spawned many preliminary hearings before the ECJ.[125] At the moment, like most other consumer contract directives, it is being examined. The suggested revision of the consumer-acquis is showing its first results. The draft horizontal regulation of consumer contracts includes also door-to-door sales.[126]

B. Definitions and Scope

Article 8(1) CPL contains a wide definition of door-to-door sales, comprising all contracts, which are concluded away from business premises, like exhibitions or trade fairs. Article 4 Door-to-doorR adds the conclusion of contracts at the place of work. In the Door-to-doorR, there is a legal definition too. Thus, the rule reaches far further than the Directive 85/577/EC. It does credit to the name of the directive, which extends to all contracts, which are negotiated "away from business premises." In fact, the directive contains a catalogue and gives the member states the option, to reduce the scope of application to circumstances, in which the consumer has not previously agreed to a visit at the house door.[127]

According to Article 14 Door-to-doorR particular products and services are not within its scope: (1) foodstuffs or beverages or other goods intended for daily consumption (nutrition supplements fall within the scope), (2) insurance contracts, (3) products or services, whose marketing outside business premises is recognized as a general trade practice. Only the first two exceptions are consonant with Article 3(2) Directive.[128] The last reaches far beyond and allows, given its very weak

124. Therefore, it is doubted whether the E.C. has the power to legislate in this area at all. *See* Roth, *Bürgschaftsverträge und EG-Directive über Haustürverträge,* ZIP, 1996, at 1285.

125. *See* Micklitz, *in* REICH & MICKLITZ, *supra* note 108, § 14. The *Heiniger*-Saga has led to further decisions. *See* Micklitz, *Rechtsprechung zum Europäischen Vebraucherrecht in den Jahren 2006-2008, Vertrags- und Deliktsrecht*, EWS 2008, at 353, 354 et seq.

126. *See Proposal for a Directive of the European Parliament and of the Council on Consumer Rights*, COM (2008) 614 final (Oct. 8, 2008), Chapter III Art. 8 et seq.

127. *See* Micklitz *in* REICH & MICKLITZ, *supra* note 108), § 14.11 et seq.

128. *See id.* § 14.17 et seq.

formulation, for a large proportion of relevant products to be taken out of the scope. A narrow interpretation is however possible when one takes into consideration the background of the norm: in regional areas of Turkey some goods and services are still offered only by travelling salesmen. The norm is actually reduced to these cases, which is clear from the practice of the courts.

The personal scope is wider than in the Directive.[129] Consumers are named in Article 3(h) next to natural persons, also legal persons, in so far as they do business outside of their professional activities. Such a wide formulation has been rejected by the ECJ in the *Di Pinto*[130] case. In so far, the rule of Turkish law is not consistent with the Directive.

The term, trader, corresponds with that of the Directive, but goes further to the extent that Article 3(f) also includes public undertakings. Conversely, neither the law nor Door-to-doorR contemplate the role of vicarious agents. However, Article 2 Directive equates everybody who is acting in the name or on behalf of the trader with the trader itself. This rule has, in the German version, played a central role with respect to the so-called Schrottimmobilien (*scrap immovables*). The ECJ has decided, contrary to the German Court, that the acts of the agent are imputed to the principal irrelevant of the fact whether the principal knew or could have known about marketing strategy the agent was applying.[131]

C. *Prerequisites of Business Practice*

According to Article 5 Door-to-doorR, the seller or supplier—the rule does not speak of the sales agent—requires proof that their capital amounts to a minimum of 25.000 new TL (which corresponds to about €13, 865). To get permission to do door-to-door sales, the applicant must present the following documents: an example contract, which adheres to the minimum criteria of Article 6 Door-to-doorR, an excerpt from the commercial register, a notary authentication of the proxy, as well as a report from the auditor. Pursuant to Article 7 Door-to-doorR, the certificate is valid only for a year and must be renewed thereafter. Certificates which are not renewed lose their validity three months after the expiry of their term. Article 8 Door-to-doorR gives the ministry the power to withdraw the trading permit of a trader, if the trader violates the rules of door-to-door trade. The Industry and Trade Ministry has issued about 15.000 of these permits. The not inconsiderable income from

129. *See supra* part II.B.1.

130. Case No. C-361/89, di Pinto, 1993 E.C.R. I-1206.

131. Case No. C-350/03, Schulte, 2005 E.C.R. I-9215; Case No. 229/04, Crailsheimer Volksbank, 2005 E.C.R. I-9273 Rdnr. 41-45.

these permits helps the intensification of the oversight activities of the Ministry.

This rule is not unproblematic in EC-law terms. Although the Directive 85/577/EC does not regulate the permit pre-requisites and seems to leave this area to the Member States, the Turkish provision could contradict the fundamental freedoms laid down in the EC Treaty. On the other hand, the freedoms are not unlimited. It could be argued that the numerous shortcomings necessitate a stricter stance on the part of the Turkish legislator. The ECJ has twice rejected similar attempts to overthrow by reference to the fundamental freedoms stricter national prerequisites for the practice of certain professions.[132] In both cases, a central role is played, by the fact that the potential effects are too marginal on the cross-border trade, and, as a result, could not be evidenced. This way the ECJ has increased the autonomy of the member states in the sensitive area of door-to-door contracts. However, the Draft Proposal on Consumer Rights would no longer leave any leeway for the Member States to adopt such type of rules.[133]

D. Information Duties, Form Requirements, Confirmation of Contract

Article 9 CPL and Article 6 Door-to-doorR mandate a written contract between consumer and trader. The consumer must be given a copy. Article 9(3) CPL and Article 6(3) Door-to-doorR demand that the consumer signs the contract and inserts the date in the contract by hand. This way, the aim is to prevent the trader from altering the date of the conclusion of the contract retrospectively. This rule is consistent with the Directive currently in force. However, it should be taken into account that the EC wants to reduce the formal requirements of contracts. That is true, at least for the electronic transfer of relevant contractual information.[134]

The Turkish rule is geared towards written form. As Article 9(1) does not lay it down expressly it can be argued in theory that the minimum requirements of the contract, as they are regulated in Article 6 Door-to-doorR can also be electronically sent. But the last half sentence of Article 9(1) seems to stand in the way of this interpretation, as it

132. Case No. C-20/03, Strafverfahren Burmanjer u.a., 2005 E.C.R. I-4133; Case No. C-441/04, A-Punkt Schmuckhandels GmbH v. Schmidt, 2006 E.C.R. I-2093.

133. *See Proposal for a Directive of the European Parliament and of the Council on Consumer Rights*, COM (2008) 614 final (Oct. 8, 2008) Chapter III.

134. The debates on the form of the contract played a decisive role in the work on the Directive on Consumer Credit 2008/48/EU. Finally, the Commission, together with the financial service providers managed to prevail with its more liberal standing. Contrary to the existing law in individual member states, consumer credit contracts are, in the future, also capable of electronic conclusion. *See also infra* part XI.C.

mandates, that, on the first side of the contract, in minimum 16-point font, there must be a legally pre-formulated notice about the consumer's right of withdrawal. Every other understanding would also run counter to the fact that the consumer must personally sign the contract.

E. Right of Withdrawal

The main statement is in Article 8(2) CPL. The ruling philosophy is also laid down there. The consumer is free to accept the wares or to reject them without giving reasons within seven days—without specification whether calendar or working days are intended. The withdrawal period commences according to Article 11 Door-to-doorR as follows: a) if delivery and contract conclusion fall together, from the date of the contract, b) if delivery occurs after conclusion of the contract, the withdrawal period begins with delivery, c) for service contract, the date of the contract is determinative. The Directive, in Article 5(1)1 on the other hand, takes account of the handing over of the written notice about the consumer's right of withdrawal.[135] In view of the shortcomings, such a regulation would be counterproductive. Since the Directive still formulates minimum standards, the stricter Turkish law is compatible with EC law.

The Turkish rule is lagging behind the provision of the Directive in that it does not expressly state that, the consumer will satisfy the withdrawal period (to give an example) by bringing the packet to the post, on the seventh day (Article 5(1)2). The Turkish rule can be read so that the returned wares must be with the vendor within seven days. In Article 8(2) CPL, the term used is "within seven days." Article 11 Door-to-doorR establishes that, the right of withdrawal is not bound to any form. If the consumer has made use of his right of withdrawal, he does not owe the vendor, pursuant to Article 8(3) CPL and Article 11 Door-to-doorR anything for the diminished value of the goods resulting from normal usage.[136]

Until the end of the seven-day term, the trader is forbidden to demand from the consumer payment or any written guarantee. It is noteworthy that such a detailed regulation has been codified in Article 8(2) CPL. The status of the established shortcomings could not find clearer expression. This is repeated once more in Article 11 Door-to-doorR.

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135. *See* Micklitz, *in* REICH & MICKLITZ, *supra* note 108, § 14.34.

136. The meaning of Article 8(2)3 CPL is not clear, according to which the trader is obliged to retrieve the goods within 20 days of the exercise of the right of withdrawal. It can be assumed that the return costs are to be borne by the trader.

It is the trader's responsibility to prove that a legally conforming contract was made and that this was sent together with the wares to the consumer. If this cannot be shown, the consumer is not bound to the seven-day term (Art. 9(4) CPL and Art. 11 Door-to-doorR)—the Turkish variant of the *Heininger*[137] jurisprudence of the ECJ. Such a rule would weigh all the heavier as the vendor must not only repay the purchase price but has no claim for loss of value on the goods.

F. Linked Transactions

Article 8(5) CPL explains the rules on installment contracts also for door-to door contracts applicable. These provisions are further enlarged upon in Article 9 Door-to-doorR. But accurately speaking, they are not concerned with joined transactions. Although the legislature had clear situations in mind, in which door-to-door sales are financed,—overwhelmingly by vendors of wares—Article 9 is aimed solely at the content of this credit relationship. Whether and how the right of withdrawal works on the linked credit transaction is not expressed in the law or the Directive.

Article 9 governs, in a detailed way, the minimum requirements of a credit contract, defines the upper limits for consumer payments, protects the consumer's early repayment right, and provides for when and under what conditions the vendor/creditor can claim early repayment and to what level.

G. Guarantee Certificates

To the extent that the consumer purchases goods in the frame of door-to-door sales, for which a guarantee is given, the relevant rules of the law of sale of goods are applicable.[138]

X. DISTANCE CONTRACTS

A. Overview

Article 9A CPL governs what a distance contract is, defines the information that must be provided by the trader, contains provisions about the execution of the contract and declares the rules of door-to-door sales applicable with few exceptions.

The details are found in DistanceCR, which supplements the CPL. Little is know about the practical meaning of the rule. This might have

137. Case No. C-481/99, Heininger, 2001 E.C.R. I-9945.
138. *See supra* part IV.F.

something to do with the fact that, unlike door-to-door sales, no special permit requirements are set up. It is precisely this that gives the Industry and Trade Ministry an overview of the actual problems of the consumer in door-to-door sales.

The backdrop to the rules are formed by Directive 97/7/EC on Distance Contracts,[139] which like the door-to-door sales Directive is subject to revision and redrafting on European level. In the horizontal directive proposal made public by the Commission on 8.10.2008, a formulation was suggested, which approximates the provisions regarding door-to-door and distance contracts.[140] Thus, the final step was taken to accomplish what was already inherent in the wording of the Directives. They are supplementary. The door-to-door Directive governs contracts, which are concluded outside of business premises in the simultaneous presence of both parties, the distance contract Directive concerns contracts, which are concluded outside of business premises in the simultaneous absence of both parties. According to that there are two connecting factors: the conclusion of the contract outside of business premises and the moment of contemporaneous absence/presence.

Directive 2002/65 on the distance marketing of consumer financial services to consumers has not yet been implemented into Turkish law.

B. Definitions and Scope

The terminology of consumer und trader are similar to those of the door-to-door sale. Here, like there, there are difficulties, as the Turkish law includes legal persons in the term consumer, to the extent that they are forming contracts outside of their field of trade.[141]

Article 9(1) provides a legal definition of the distance contract, which Article 4(i) DistanceCR repeats. In comparison to Art 2(1) or (4) of the Distance Contracts Directive there are some major variations. Although contracts are included, which are concluded by means of distance communication methods, without a physical contact between the parties, both provisions feature only few forms of distance communication. There is no exhaustive list in the sense of Article 2(4) Directive, nor is there an exemplary reference to the appendix. The Directive seems stricter than the Turkish rule, in the sense that it

139. *See also* Yeşim Atamer, *TKHK m.9/A ve Mesafeli Sözleşmelere İlişkin Uygulama Usul ve Esasları Hakkında Yönetmelik'in AB Mevzuatı İle Uyumuna İlişkin Görüş ve Değişiklik Önerileri [How to change Art.9/A of the Consumer Protection Act and the Statute Regarding Distance Contracts to Achieve Harmonisation with EU-Legislation]*, Batider 2005, Vol. XXIII/1, at 177-99.

140. *Proposal for a Directive of the European Parliament and of the Council on Consumer Rights*, COM (2008) 614 final (Oct. 8, 2008), Chapter III.

141. *See supra* part II.B.1.

demands that the contract is "exclusively" concluded with means of distance communication. Conversely, in the relevant provision of Turkish law, it is only stated that the parties must conclude the contact without coming into physical contact. Therefore the Turkish rule permits, mixed forms of communication in its scope, so long as the distance communication is dominant.[142] In the Directive, but missing from the Turkish rule is the necessary characteristic of the "organized distance sales or service provision scheme." This requirement leads in practice to difficulties, because for the consumer, it is not always apparent whether he is working with a professional or with a consumer who frequently uses the medium. Not least, since the consumer bears the burden of proof, the European Commission, in its draft horizontal regulation of consumer contract law, distances itself from this requirement.[143]

Article 11 DistanceCR takes a range of contracts out of the scope of the Directive, including: (1) financial services, which are the subject of Directive 2002/65/EU, (2) contracts which are concluded using vending machines or automated commercial premises, (3) contracts which come about with telecommunications operators through the use of public payphones (4) contracts which are concluded at an auction, (5) contracts for the supply of foodstuffs, beverages or other goods intended for everyday consumption, as well as contracts for the provision of services in the areas of accommodation, transport, catering and leisure services. It is not difficult to recognize Article 3 Directive in this provision. However, the rule is on one hand narrower, because the Turkish legislator does not use the full catalogue of exceptions in the Directive, and, on the other hand, entirely excludes the contracts under (4) and (5), whilst the Directive only declares inapplicable the provisions regarding pre-contractual information duties, written confirmation and the right of withdrawal.[144] The ECJ had only once to deal with this provision and to decide whether car lease contracts are contracts of transport. The Court answered this in the affirmative, contrary to the opinion of the Advocate General.[145] In the Draft Proposal on Consumer Rights leasing contracts are left out of the scope.

142. *See* Micklitz, *in* REICH & MICKLITZ, *supra* note 108, § 14.15 (addressing the important mixed forms in practice and the resulting difficulties for the interpretation of the characteristic "exclusive"); PÜTZHOVEN, EUROPÄISCHER VERBRAUCHERSCHUTZ IM FERNABSATZ 44 (2001).

143. Art. 2 (6), *Proposal for a Directive of the European Parliament and of the Council on Consumer Rights*, at 20, COM (2008) 614 final (Oct. 8, 2008).

144. For details regarding the very complex exceptions in the Directive, *see* Micklitz, *in* REICH & MICKLITZ, *supra* note 108, § 15.10 ff.; PÜTZHOVEN, *supra* note 142, at 84 ff.

145. Case No. C-336/03, easyCar v. Office for Fair Trading, 2005 E.C.R. I-1947.

C. *Pre- and Post-Contractual Information Duties and Formal Requirements*

Art 9/A (2) CPL marks the boundary. Consistently with the Directive, Article 9/A differentiates between information, which must be made available to the consumer before the conclusion of the contract, and the information, which must be received and confirmed at or after that time. Both types of information are interconnected so that the information that should be communicated at or after the conclusion of the contract is a pre-requisite for the conclusion of the contract. The differentiation and the connection are reiterated and further clarified in Articles 5 and 6 DistanceCR.

Article 5 DistanceCR governs the pre-contractual information. That is clear from the title, but not from the text of the provision itself. In the following lines details of the required information is listed. The rule does not correspond completely with the Directive's Article 4. That is valid for lit (h)-(j). It might have been serviceable, in the framework of the rule on pre-contractual information also to implement Article 4(2) and (3) which set out a general rule on transparency and special conditions for telephone communication.

Article 6 DistanceCR concerns the written confirmation of the pre-contractual information. According to the rule, all relevant information, set out in Article 5, must be communicated to the consumer in written form before the conclusion of the contract. Transfer through any durable medium also fulfils the requirement of writing. The rule goes beyond the Directive, because it generalizes the exception stated in Article 5 Directive that written confirmation is needed "unless the information has already been given to the consumer prior to conclusion of the contract in writing or another durable medium" in such way that written confirmation has become the rule. The provision is also problematic, because the consumer must in turn affirm the receipt of the information in writing. Only where the sale is electronic or by order, can the confirmation be in the form of electronic mail. The fulfillment of such a written requirement contradicts the nature of distance contracts and can work to the disadvantage of the consumer, because, pursuant to Article 6 DistanceCR, the contract cannot validly be concluded in the absence of such an affirmation.

Article 7 DistanceCR sets out the minimum contractual requirements that are necessary for every distance contract. The information must be communicated to the consumer in written or electronic form. It follows from Article 9(3) DistanceCR, that the trader carries the burden of proof, that he made all the information available to the consumer and received confirmation of that.

D. Right of Withdrawal

Astonishingly, Article 9/A CPL does not govern the right of withdrawal. This is only contained in the DistanceCR. Article 8(1) DistanceCR guarantees the consumer a seven-day right of withdrawal. The right of withdrawal is valid according to Article 8(2) of the DistanceCR, which has two exceptions obviously inspired by Article 6(3) Directive: no right of withdrawal is given in case of services if performance has started with the consumers consent before the end of the seven-day withdrawal period as well as in contracts about the delivery of audio- and video recordings or computer software, which were unsealed by the consumer. Excluded from the right of withdrawal are also, according to Article 8(4) DistanceCR contracts for the delivery of goods, which are made to consumer specification or which decompose rapidly and therefore would pass their date of expiry. These provisions were also modeled on Article 6(3) Directive. Included, unlike the Directive, Article 6(3), are contracts for the delivery of newspapers, periodicals and magazines as well as contracts for the provision of betting and lottery services.

The Turkish law equates door-to-door and distance contracts when it comes to the duration of the withdrawal period, which EC law does not. The distance contract Directive prescribes, in Article 6 a term of seven working days, the door-to-door contract Directive speaks, contrarily, of seven days. To this extent, Turkish law is not consonant with EC law. Already, Directive 97/7/EC obliges the Commission to point out the need to align the different periods in both types of contracts. Finally, in the draft of 8.10.2008 for a horizontal Directive on consumer contracts, this mandate is redeemed. In the draft, a term of fourteen days is prescribed.[146]

Pursuant to Article 8(1) DistanceCR the withdrawal right for sales contracts begins with the delivery of goods and for service contracts, with the conclusion of the contract. However, in case that the contract provides that the service may be performed before the end of the withdrawal period, the consumer has the right to withdraw up until the performance starts. Indeed, the service provider should not be able to undermine the consumer's withdrawal right by early performance. The background considerations originally stem from abusive practices of door-to-door sales.[147]

146. Art. 12 (1) of the draft, *Proposal for a Directive of the European Parliament and of the Council on Consumer Rights*, at 25, COM (2008) 614 final (Oct. 8, 2008).

147. *See supra* part IX.A.

Neither the law nor the Regulation contain provisions on the form of the withdrawal statement or its timeliness. Here, the express reference of Article 9/A to the laws on door-to-door sales are of no assistance. Admittedly, the Directive 97/7/EC is also silent on this point.[148]

The consumer needs not to give any grounds for his withdrawal. It has not legal consequences for the consumer. According to Article 8(1) DistanceCR, he is subject to no obligations or sanctions. This formulation is modeled on the wording of Article 5(1) Directive. It is contentious in the member states, whether the consumer must pay compensation for the usage of the item. A case for a preliminary hearing is pending in which exactly this question is to be determined. Thus far the Opinion of the Advocate General has not been made public.[149] Contrariwise, the trader is obliged to recompense the consumer for paid fees within ten days in case of withdrawal and to retrieve the goods within 20 days (Art. 9(2) DistanceCR).

If the consumer has not received the pre-contractual information pursuant to Articles 6 and 7 DistanceCR, the trader has the possibility to make up for this and send the information within a maximum of thirty days. Under such circumstances, the withdrawal period begins after the point at which the information is made available. This rule plays into the hands of a trader, who has not completely informed the consumer. After the expiration of thirty days, the consumer loses his right of withdrawal. The Turkish regulation is in conformity with the Directive on this point, but the absence of any form of sanction is, from the point of view of the consumer, problematic.

E. Linked Transactions

The Turkish law contains a single rule about joined transactions in distance contracts. It finds itself in Article 8(6) DistanceCR. Nonetheless, the rule is of remarkable clarity. If the distance contract transaction is fully financed the credit contract is also extinguished with the withdrawal. The withdrawal must be communicated to the creditor in written form. Just as in door-to-door sales, the rule does not make clear who must announce the withdrawal, the consumer, vendor or service provider.[150] EC law chooses a different construction. The consumer

148. Micklitz, *in* REICH & MICKLITZ, *supra* note 108, § 15.33; PÜTZHOVEN, *supra* note 142, at 76 et seq.

149. Case No. C-489/07, Messner v. Krüger.

150. *See supra* part IX.E.

must not withdraw the contract twice. Withdrawal from the distance contract against the trader is imputed also to the creditor. [151]

Much more precise and stricter than the Directive are the legal consequences of the withdrawal from the credit contract. Turkish law treats the distance contract and the credit contract in the same way. The consumer can release himself from both without obligation or repayment. This rule, at first blush, seems plausible, but is, so far unexampled. As is known, the unwinding of linked transactions has caused a whole series of preliminary rulings without any end to the discussion being foreseeable.[152]

F. Contract Performance and Payment Modalities

Rules on contractual performance and payment modalities are found exclusively in Article 9 and 10 DistanceCR. Article 9(1), (4), (5) set out a list of obligations on the trader. Pursuant to 9(1), the order must be fulfilled within thirty days after the day after which the consumer communicated the order to the deliverer. Thus far, the rule is basically consonant with Article 7(1) Directive. Pursuant to 7(1)2 DistanceCR, this period can be extended by ten days, provided that the trader informs the consumer in writing beforehand. This is a strange interpretation of the provisions of the Directive, according to which the parties can agree otherwise on the performance day and unnecessarily limits the contractual freedom of the parties.[153]

In so far as the trader cannot provide the wares, the consumer must be told and any payment must be repaid within ten days. This rule in Article 9 (5) DistanceCR corresponds broadly with Article 7(2) Directive. Article 9 (4) DistanceCR, in conformity with the Directive, grants the trader the right to offer the consumer a replacement article at the same price, where the replacement article must be similar yet not identical to the original object. This right to alter must be provided for in the contract. That alone is not enough to do justice to Community law. One would also have to demand that the trader points out to this right in a prominent place in the contract.[154]

Article 10 DistanceCR guarantees the consumer the right to cancel a payment and ask for compensation against the card provider, in case the price is charged to his debit or credit account without his permission or

151. *See* Reich, *Die neue Directive 97/7/EG über den Verbraucherschutz bei Vertragsabschlüssen im Fernabsatz*, EUZW 1997, at 581, 586; Micklitz, *in* REICH & MICKLITZ, *supra* note 108, § 15.39.

152. *See Heininger*, *supra* note 137; *Schulte* and *Crailshaimer*, *supra* note 131.

153. *See* Micklitz, *in* REICH & MICKLITZ, *supra* note 108, § 15.41; PÜTZHOVEN, *supra* note 142, at 58 et seq.

154. *See* Reich, *supra* note 151, at 586.

fraudulently.[155] Therewith, Article 8 Directive 97/7/EC was implemented, which only governs fraudulent usage. The Turkish rule goes further, because it covers usage without permission. It is noteworthy that the consumer has a direct claim against the card provider.[156] Article10 DistanceCR contains no rule on the burden of proof, which, in practice, is determinative of the claim.

G. *Limitations with Respect to the Use of Particular Means of Communication*

Neither the law nor DistanceCR take precautions for the implementation of Article 10 Directive, which restricts the use of certain long distance communication. In particular, feelings have run high in the debate, before and after the approval of the Directive, about the permission for so-called *cold calling*, where the consumer receives unsolicited phone calls.[157] The legal position in Europe is divided. Germany and Austria have stuck to the opt-in rule, according to which a consumer can be called, if he gives his agreement. Germany has enshrined this rule in section 7 (2)2 of its new Unfair Competition Act.

XI. CONSUMER CREDIT CONTRACT

A. *Overview*

Consumer credit contracts were first dealt with in the law of 1995 in Article 10 CPL and were subject to a revision in 2003. In the same year, the Administrative Regulation on Consumer Credit ("CreditR") was issued[158]. The rules are orientated towards the EU provisions, but they are only partly in conformity. With the coming into power of Directive 2008/48/EC in June 2008, the discrepancy was increased. In what follows, the Turkish rules are compared to the new version of the consumer credit Directive.

B. *Terminology and Scope*

The Turkish and EU law provisions are different from the offset—the definition. Pursuant to Article 10(1) CPL, a consumer credit is a loan that is paid to the consumer with the purpose of facilitating the purchase

155. *See* Atamer, *supra* note 139, at 194-95.

156. For the most complex German rules on reimbursement in the triangular relationship, *see* VOGT, DIE RÜCKABWICKLUNG VON KARTENZAHLUNGEN (2007).

157. *See, e.g.*, Leible, *in* MÜNCHENER KOMMENTAR ZUM LAUTERKEITSRECHT, Band 2: §§ 5-22 UWG, 2006, § 7 UWG ¶ 102 et seq.

158. Published in: RG 13.06.2003, sayı 25137.

of goods or services. Consequently, the law excludes from its scope all contracts in which the creditor offers a loan in the form of a deferred payment or other similar financial accommodation. Like the definition of credit, the definition of creditor is also limiting. In the sense of the CPL, these are only banks, special financing institutions, or companies, which are legally permitted to provide consumer credits (Art. 3(k) CPL).[159]

Although the scope in connection with the term, credit, is narrower than in the Directive, there is no catalogue of exceptions comparable to that given in Article 2(2) Directive 2008/48. Therefore also credits, which are designed to serve the procurement of immovable property, and credits, which are secured through immovable property, are covered by the CPL.[160] The amount of the credit, its repayment periods and the like are also of no importance in the determination of the applicability of the law as it is in the Directive.

C. Advertising, Information Duties and the Conclusion of the Contract

The Turkish consumer credit provisions include no duties similar to those of Article 4 Directive 2008/48 with respect to the content of advertisements. In fact, the AdvertR,[161] in Article 7(e) and (f),[162] prohibits misleading advertisements, but up to this date, no advertisement in which e.g., only the contractual interest rate was used without indicating the annual percentage rate of charge and the total cost of the credit to the consumer, has been found misleading by the Advertising Council. In practice, this is heavily exploited, with the result that the credit consumption is artificially driven to heights and a raising indebtedness in society is to be feared.[163]

Also a pre-contractual information duty is not established in Turkish consumer credit law.[164] Only with respect to the mandatory content of the contract there are provisions in Article 10(2) CPL. If this is compared to Article 10 of Directive 2008/48, one can see that especially the following information is not obligatory in Turkish law, making it inconsistent with EU law:

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159. *But see* Art. 3(b) Directive 2008/48.

160. In the revision of the CPL in 2003, real estate, which serve as temporary or holiday accommodation were included in the term "goods." *See supra* part II.B.2. In 2007, a special regulation was introduced for mortgage loans (in Art. 10/B).

161. *See supra* note 22.

162. *See supra* part III.E.

163. For the statistics of the Turkish Banking Association, visit www.tbb.org.tr.

164. For mortgage credits, *see supra* note 160, such duty was introduced in the 2007 regulation.

- A statement about the annual percentage rate of charge, that is the total cost of the credit to the consumer, expressed as an annual percentage of the total amount of credit. This term is absent from the law, and is only mentioned in the CreditR. In spite of this omission, the CreditR mandates that the interest must be stated in the contract. Thus, there is another case in which the hierarchy of norms is not respected. In practice, there is no known case, where the credit contact was declared null, because it omitted this information.

- The right of withdrawal (no such right is prescribed in Turkish law for consumer credit agreements);

- Rights in a linked credit agreement;

- Termination;

According to Article 10(1) a credit contract must be in written form. Failure in this respect, nullifies the contract.[165] This will cause a problem under the Directive 2008/48 as it has given up the written form requirement and introduced in Article 10 the rule, that credit agreements may be drawn up on paper or on another durable medium (Art. 4 of the old Directive 87/102).

Unlike in the Directive, the Turkish legislature also provides that the contractual terms cannot, after conclusion of the contract, be changed to the detriment of the consumer. That means that in consumer credit contracts, only a fixed interest rate can be agreed upon which can only be reduced in favor of the consumer). The default interest rate is also fixed: it can be set at a maximum of 30% more than the contractual interest rate.

D. Applicability of Acceleration Clauses in Case of Default

An immediate collection of the entire loan and termination of contract, for the case that a consumer falls behind with payments is, pursuant to Article 10(3) CPL, only allowed under strict conditions: Such an acceleration clause must be contracted for, the creditor must have completely fulfilled his contractual duties; the consumer must be two successive payments in arrears and the creditor must give the consumer a one week period with the explanation that he will terminate

165. ZEVKLILER & AYDOĞDU, *supra* note 19, at 284.

the contract, after the expiration of the period. Although there is a similar regulation in many member states, this is not dealt with in the Directive.

E. Early Repayment

Article 10(4) CPL gives the consumer the right to discharge fully or partially his obligations under the credit agreement at any time. In both cases, the consumer, depending on the amount paid, is entitled to a reduction in the total cost of the credit. How the amount of reduction is to be calculated was set out by the Ministry in the CreditR. Appendix II Directive 87/102 served as a model for the drafting of the Regulation. A suitable compensation of the creditor for the case of early repayment is, unlike Article 16 (2) Directive 2008748 not provided under Turkish law.

F. Linked Credit Contracts

Pursuant to Article 10(5) CPL, a linked credit contract means a contract, where the consumer is given a credit on the condition that he purchases a particular product or service, or purchases from a particular vendor or service provider. Although this definition covers those types of linked credit agreements, which in practice most frequently occur, it will not meet the demands of the *Max Rampion* decision of the ECJ,[166] which gives a broader definition of linked agreements. This can be circumvented by interpreting Article 10(5) CPL as an exemplary list of linked agreements and not an exhaustive one as it is done in practice.[167]

In case of a breach of contract in a linked contract, the creditor is jointly liable to the consumer together with the vendor or the service provider. The consumer is at liberty to choose whom to sue. Since Article 15(3) Directive 2008/48, unlike Article 11(2)e Directive 87/102, leaves it up to the member states to introduce a direct claim against the creditor, this provision of Turkish law should be unproblematic.

G. Ban on the Issuing of Securities

Article 10(6) CPL contains the prohibition of securitization of the loan debt. If this prohibition is transgressed, the consumer can demand the return of the security papers at any time. Should the creditor meanwhile have endorsed them he will be liable for any damage, which the consumer suffers due to this endorsement. A rule on assignment of rights, which is comparable to Article 17 Directive 2008/48 is not to be

166. Case No. C-429/05, Max Rampion und Marie-Jeanne Godard gegen Franfinance SA und K par K SApp 2007 E.C.R. I-8017 ff.

167. ASLAN, *supra* note 63, at 356.

found in the CPL. However pursuant to Article 167 Turkish Law of Obligations every debtor can in the event of assignment to a third party plead against the assignee any defense which was available to him against the original creditor, including set-off.

H. Topics not Dealt with Under Turkish Law

In a final comparison of the Turkish provisions regarding consumer credit contracts with the Directive 2008/48, one can ascertain that following issues need to be tackled in a possible reform: advertisement and pre-contractual information duties (Chapter II Directive), access to databases used for assessing consumer creditworthiness (Chapter III Directive), the right of withdrawal (Art. 14 Directive) and supervision of creditors and credit intermediaries (Chapter VI). The provisions with respect to the declaration of the annual percentage rate and about the mandatory content of credit contacts need to be of harmonized and supplemented. Another important lacuna in Turkish law is that no duty is imposed on credit institutes to control the creditworthiness of consumers.

XII. ACTIONS FOR AN INJUNCTION

A. Overview and Background

The discussion about the standing of actions for an injunction in the consumer law system can only be had against the background of the European discussion. The EC first imposed rules on the member states in Directive 84/450/EC on misleading adverts, mandating that either a state body, trade- or consumer organization have oversight and to stand in the way of infractions with an action for injunction. Since then, this instrument recurs in a flood of Directives, Directive 93/13/EC on unfair terms, Directive 97/7/EC on distance contracts, Directive 2002/65/EC on distance marketing of consumer financial services and Directive 2005/29/EC on unfair commercial practices. These directives have one thing in common, they are specific to particular areas and encompass, at their core, marketing and sales methods as well as unfair contract terms. According to common understanding, the member states have the choice of entrusting public authorities or consumer organizations, or in the area of advertisement also business organizations, with the enforcement. In

fact, this approach led mostly to the entitlement of consumer organizations beside or together with state authorities to file a lawsuit.[168]

This issue should be distinguished from Directive 98/27/EC on actions for an injunction. It concerns, as the name suggests, only injunctions and is purely procedural. It establishes actions for injunction as the central element of law enforcement in national and transnational domain. The considerable novelty lies in the structure of the reciprocal acknowledgement of a right to sue in the EC-transnational context. The EC Commission draws up a list of the qualified entities, to which member states can add their authorized institutions, be they public authorities or consumer organizations.[169] The Directive formulates only very modest minimum requirements for consumer organizations[170] and the competent authorities. The member state is left a wide discretion, so that the criteria differ considerably, in each member state, according to which the status consumer organization is conferred.

Thus far, this action has been used once, in a legal dispute of the Office of Fair Trading against a Belgian company, which distributed from Belgium, so-called *Sweepstakes* in England.[171] This might have been also the reason, why the Commission introduced the Regulation of 2006/2004[172] on cooperation between national authorities responsible for the enforcement of consumer protection laws. It demands of member states that they elect a single authority, which is entrusted with enforcement and can also proceed, where necessary by way of injunctions. But Germany and Austria have reserved the right to delegate the right of action to consumer organizations. Nevertheless, with the Regulation, the emphasis has been shifted away from private law enforcement to public enforcement.

For Turkey, given this background, there is a two-fold question: (1) who should be entrusted with the control of unfair contract terms and/or unfair and misleading advertisement—trade or consumer organizations and/or state authorities, and (2) how can the participation of Turkey in the transnational litigation of infringements of consumer law Directives via "qualified entities" be conceived? To this extent,

168. MICKLITZ, ROTT, DOCEKAL & KOLBA, VERBRAUCHERSCHUTZ DURCH UNTERLASSUNGSKLAGEN, RECHTLICHE UND PRAKTISCHE UMSETZUNG DER RICHTLINIE UNTERLASSUNGSKLAGEN 98/27/EG IN DEN MITGLIEDSTAATEN (2007).

169. Last published in 2008 O.J. (C 63/5).

170. GRABITZ, HILF & WOLF, DAS RECHT DER EUROPÄISCHEN UNION, Band IV, A 5 Art. 7 ¶ 16 et seq. zur Rechtslage nach der Richtlinie 93/13/EG über missbräuchliche Klauseln in Verbraucherverträgen.

171. *See* Micklitz, *Transborder Law Enforcement—Does it exist?*, *in* THE REGULATION OF UNFAIR COMMERCIAL PRACTICES UNDER EC DIRECTIVE, NEW RULES AND NEW TECHNIQUES 235-54 (Bernitz & Weatherill eds., 2006).

172. 2004 O.J. (L 364), 1.

Turkey is not autonomous. The Directive 98/27/EC does not prescribe, that non-member states are included in the reciprocal acknowledgement process regarding qualified entities. The legal position is more flexible when it comes to administrative cooperation. The Regulation of 2006/2004 on cross-border cooperation between national authorities responsible for the enforcement of consumer protection laws allows, in Article 14, for the possibility of the inclusion of non-member states in this process.

B. The Legal Position in Turkey

Turkey has found different solutions for the two main areas of general contract terms and the laws relating to fair advertisement. Against the use of unfair terms in general contract conditions, consumer organizations have been permitted to make claims (Art. 8 of the UnfairTR in connection with Art. 23(4) CPL. Conversely, the control of unfair and misleading marketing lies in the hands of an Advertising Council, a body, which is associated with the Ministry of Industry and Trade (Art. 17 CPL in connection with Art. 8 of the Advertising Council Regulation). Consumer organizations are not given standing in the law or in the Regulation. Nevertheless, they can call upon the Advertising Council to investigate a particular advertisement.

The significance of Article 23(4) CPL is an open question. The rule states as follows: "The ministry or consumer organizations have the permission to bring a claim to the consumer court, which is not an individual consumer problem but can be seen as having general implications for consumers, with the aim of avoiding possible infractions of the law."

On a first glance, the rule is in three ways very broad. It gives standing to the consumer organizations and the ministry, it encompasses not only the use of unfair terms and unfair trading but also infringements of the "collective interest of the consumers"—tending to reach far past the areas of the Unfair terms Directive and the Unfair trading Directive and extends itself, thirdly, beyond mere injunctions. Seen this way, Article 23(4) CPL would also include claims that the law has been infringed,[173] which, pursuant to Directive 98/27/EC, extends to all the Directives, so long as the collective interest of the consumer is injured.

173. Regarding the implementation of Directive 98/27/EC in Germany, consider the newly introduced § 2 Law on actions for Injunction.

XIII. REVISION ATTEMPTS SINCE 2003, THE TWINNING-PROJECT AND THE FUTURE

The above analysis reflects the state of the valid law, but does not say anything of the intra-Turkish, or more precisely, intra-ministerial discussion. Shortly after the issuance of the revised version of the Consumer Protection Code in 2003, the European Commission began new negotiations with Turkey on the conformity of the consumer law to the consumer *acquis*. In order to offer Turkish authorities legal assistance a usual call for tenders process was started and a consortium with the name of ECODES—Economic Development Services accepted the bid. The instructions had two components, (1) one legal, the critical appraisal of new Turkish consumer law in the version of 2003, as well as support in the updating; and (2) one political, the support for the professionalization of Turkish consumer organizations. In this phase, which lasted from Autumn 2003 until the end of 2004, the first critical examination of the new law from 2003 emerged, with concrete alternative suggestions, which also were the subject of internal counsel with the Turkish Industry and Trade Ministry and their collaborators. As usual, this report was not publicized. Nevertheless, it is available in the relevant expert circles.[174]

More or less directly thereafter the Twinning Project (financed by the European Commission) of the German Ministry for Food, Farming and Consumer Protection (MFFCP) with the Turkish Ministry of Industry and Trade began. The basic inspiration of the Twinning Project is, that a member state of the European Union can help a country with candidate status harmonize and implement an entire legal complex, here consumer law and consumer policy. This project encompassed a multitude of tasks, of which only the part relevant to Turkish consumer law will be introduced. The work was coordinated by a team of the MFFCP, which was integrated into the Turkish Trade and Industry Ministry. Since it was known, at the end of 2003, that Turkish consumer law did not yet correspond to the European *acquis*, the challenge lay therein, to find a way to work surgically on Turkish law, including the comprehensive administrative regulations. Starting from the EC-Directives, working groups were built around the individual themes. Nearly three years were taken to balance the various fields of door-to-door sales, distance contracts, consumer sales and product liability, credit and marketing, product safety and injunctions, with provisions of EC law. A large part of the work was done by one of the authors of this

174. The report was drafted by one of the authors of this article. *See* HANS MICKLITZ, FINAL REPORT ASSISTANCE FOR THE DIRECTORATE GENERAL FOR CONSUMER PROTECTION AND COMPETITION AND MINISTRY OF TRADE AND INDUSTRY (Nov. 30, 2003).

contribution, Hans-W. Micklitz. The concrete results, the necessary alterations of the law and the regulations should be executed by the Turkish authorities, or, more precisely, by the Turkish Ministry. The project accelerated only in October 2005, as the second author of this article, Yeşim Atamer, joined the MFFCP-led project. Yeşim Atamer, partly with the Ministry, partly in agreement with the Ministry, but actually single-handedly, made suggestions as to the renovation of the law and all the relevant regulations, which were then discussed intensively between the authors and the Ministry.

With the ending of the Twinning Project in 2007, the Turkish Ministry was presented with a fully reformulated law, with 99 articles (cf. the current 43) with an extensive explanatory memorandum, and 12 new administrative regulations. But contrary to the hopes of the authors, this law no longer made it into Parliament because of the unexpected early elections in Summer 2007, which hamstrung the EU-harmonization process. The newly appointed Minister for Industry and Trade did not stand with similar conviction behind the project, so that, instead of the issuing of a new law, new options for the revision of the existing CPL were sought. In May 2009, a shorter version of the proposals prepared by the authors was put up for public discussion.[175] It is not, at the present time, foreseeable how the discussion will develop.

A final personal remark from the authors:

Another article could be written about the political guidelines of the EC-led harmonization process of Turkish law and its practical implementation through tenders, the engagement of consultancy firms, later then the German Ministry as well as the army of (largely identical) experts, who were employed by the different contractors. Here only this much be said: Over the years a quite friendly relationship developed between authors and coworkers of the Ministry, which helped the project over difficult phases. In this respect, the authors remain personally attached to the Ministry and its collaborators independent of the awaited results of the project. For both authors, it was a fruitful period of their academic careers, which produced, not least of all, this article.

175. Available on the Ministry's website: www.sanayi.gov.tr.