T.C.
İSTANBUL MEDENİYET UNIVERSITY
INSTITUTE OF GRADUATE STUDIES
PRIVATE LAW PROGRAMME

INFRINGEMENT OF TRADE MARK RIGHTS BY COMPARATIVE ADVERTISING

Master's Degree

NECMİ AKSOY

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ONAY

İstanbul Medeniyet Üniversitesi, Lisansüstü Eğitim Enstitüsünde Özel Hukuk Ana Bilim Dalı Yüksek Lisans öğrencisi olan Necmi AKSOY'un hazırladığı ve jüri önünde savunduğu "Infringement of Trade Mark Rights by Comparative Advertising" başlıklı tez başarılı kabul edilmiştir.

JÜRİ ÜYELERİ **İMZA**

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ÖN SÖZ

Karşılaştırmalı reklamlar, reklam verenin, kendi ürün veya hizmetlerinin rakip ürün veya hizmetleri ile karşılaştırması suretiyle yapılan reklam türüdür. Hukukumuzda diğer reklam türlerine göre daha az uygulama alanı bulmasına karşın, tüketicileri daha fazla ikna edebilmektedir.

Karşılaştırmalı reklamlara ilişkin, hukukumuzda doğrudan kanuni bir düzenleme bulunmamakla birlikte Tüketicinin Korunması Hakkında Kanun, Sınai Mülkiyet Kanunu ve Türk Ticaret Kanununda karşılaştırmalı reklamlara değinilmiştir. Karşılaştırmalı reklamların yapılmasına ilişkin temel kriterler Ticari Reklam ve Haksız Ticari Uygulamalar Yönetmeliğinde yer almaktadır.

Karşılaştırmalı reklamların yapılmasına ilişkin temel kriterler her ne kadar Yönetmelik ile belirlenmiş olsa da, karşılaştırmalı reklamların haksız rekabet teşkil etmesi halinde, Türk Ticaret Kanunu, marka hakkına tecavüz teşkil etmesi halinde ise, Sınai Mülkiyet Kanunu hükümleri uygulanmalıdır.

Bu çalışmanın amacı karşılaştırmalı reklamlar yolyula marka hakkına tecavüz eden eylemler hakkında bilgi vermek ve bu bu eylemlere dayalı hukuki taleplerin neler olduğunu açıklamaktır.

Bu tezin konusunun belirlenmesinde ve tezin yazım sürecinde desteklerini esirgemeyen değerli hocam Dr. Öğr. Üyesi Özgür Arıkan'a teşekkürü bir borç bilirim. Bunun yanında bu süreçte benim yanımda olan sevgili ailem ve çalışma arkadaşlarıma teşekkürlerimi sunarım.

PREFACE

Comparative advertising is a type of advertising that is done by comparing the advertiser's own goods or services with the competitor's. Although it has less application than other types of advertising in our law, it can convince consumer more.

Even though there is no direct legal regulation on comparative advertising in our legislation, comparative advertising has been mentioned in Law on Consumer Protection, Industrial Property Law, and Turkish Commercial Law. The basic criteria for making comparative advertisements are in Commercial Advertisement and Unfair Commercial Practices Regulation.

Although the basic criteria for making comparative advertisements are determined by the regulation, if comparative advertisements constitute unfair competition the provisions of Turkish Commercial Code, and if it constitutes an infringement of trademark rights, the provisions of Industrial Property Law shall be applied.

The aim of this study is to give information about the actions that infringe the trade mark right by comparative advertisements and to explain the legal demands based on these actions.

I would like to express my gratitude to my dear thesis advisor Asst. Prof. Özgür Arıkan for his contributions. Thanks should also go to my family and colleagues for their supports.

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İstanbul Medeniyet Üniversitesi Lisansüstü Eğitim Enstitüsü bünyesinde hazırladığım bu yüksek lisans tezinin bizzat tarafımdan ve kendi sözcüklerimle yazılmış orijinal bir çalışma olduğunu ve bu tezde;

1. Çeşitli yazarların çalışmalarından faydalandığımda bu çalışmaların ilgili bölümlerini doğru ve net biçimde göstererek yazarlara açık biçimde atıfta bulunduğumu,
2. Yazdığım metinlerin tamamı ya da sadece bir kısmı, daha önce herhangi bir yerde yayımlanmışsa bunu da açıkça ifade ederek gösterdiğimi,
3. Alıntılanan başkalarına ait tüm verileri (tablo, grafik, şekil vb. de dâhil olmak üzere) atıflarla belirttiğimi,
4. Başka yazarların kendi kelimeleriyle alıntıladığım metinlerini kaynak göstererek atıfta bulunduğum gibi, yine başka yazarlara ait olup fakat kendi sözcüklerimle ifade ettiğim hususları da istisnasız olarak kaynak göstererek belirttiğimi,

beyan ve bu etik ilkeleri ihlal etmiş olmam hâlinde bütün sonuçlarına katlanacağımı kabul ederim.

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Danışmanlığını yaptığım işbu tezin tamamen öğrencinin çalışması olduğunu, akademik ve etik kuralları gözeterek çalıştığını taahhüt ederim.

Danışman

Dr. Öğr. Üyesi Özgür ARIKAN

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LIST OF ABBREVIATIONS

ABA	**:** American Bar Association
ABD	**:** Ankara Bar Association Journal
AİTİAD	**:** Adana Economic and Commercial Sciences Journal
AÜHFD	**:** Ankara University Law Faculty Journal,
AÜSBFD	**:** Ankara University Political Sciences Faculty Journal,
BATİDER	**:** Bank and Commercial Law Research Institute
CJEU	**:** Court of Justice of the European Union
Decree Law No. 556	**:** Cancelled Decree Law No: 556 on the Protection of Trademarks (Yürürlükten kaldırılan 556 sayılı Markaların Korunması Hakkında Kanun Hükmünde Kararname)
Directive 2006/114/EC	**:** 12/12/2006 dated Directive 2006/114/EC of the European Parliament and of The Council of 12 December 2006
E.	**:** Main number
EC	**:** European Commission
ESBAİD	**:** Economics and Political Sciences Monthly Internet Journal
etc.	**:** Et cetera
EU	**:** European Union
FMR	**:** Ankara Bar Association Intellectual Property and Competition Law Journal
FSEK	**:** Law on Intellectual and Artistic Works No: 5846 (5846 sayılı Fikir ve Sanat Eserleri Kanunu)
GÜHFD	**:** Gazi University Law Faculty Journal
HD.	**:** Civil Chamber
HGK.	**:** Assembly of Civil Chambers
HMK	**:** Code of Civil Procedure No:6100 (6100 sayılı Hukuk Muhakemeleri Kanunu)
İÜİFD	**:** İstanbul University Communication Faculty Journal
İTİCÜSBD	**:** İstanbul Commerce University Social Science Journal
JM	**:** Journal of Marketing
K.	**:** Decision number
MAÜSBD	**:** Muş Alparslan University Social Science Journal

MİD	**:** Marmara Communication Journal
N.	**:** Number
NJILB	**:** Northwestern Journal of International Law & Business
RG	**:** Official Journal
p.	**:** Page
q.v.	**:** Quod vide
Regulation	**:** Regulation on Commercial Advertisement and Unfair Trade Practices (Ticari Reklam ve Haksız Ticari Uygulamalar Yönetmeliği)
RK	**:** Board of Advertisement (Reklam Kurulu)
RKHK	**:** Law On The Protection Of Competition No:4054 (4054 sayılı Rekabetin Korunması Hakkında Kanun)
SBE	**:** Institute of Social Sciences
SDÜİİBFD	**:** Süleyman Demirel University Economics and Administrative Sciences Faculty Journal
SMK	**:** Industrial Property Code No: 6769 (6769 sayılı Sınai Mülkiyet Kanunu)
T.	**:** Date
TBK	**:** Turkish Code of Obligations No: 6098 (6098 sayılı Türk Borçlar Kanunu)
TCK	**:** Turkish Criminal Code No:5237 (5237 sayılı Türk Ceza Kanunu)
TD.	**:** Trade Chamber
TDK	**:** Turkish Linguistic Society
TKHK	**:** Law on Consumer Protection No: 6502 (6502 sayılı Tüketicinin Korunması Hakkında Kanun)
TPMK	**:** Turkish Patent and Trademark Office (Türk Patent ve Marka Kurumu)
TRIPS	**:** Trade-Related Aspects of Intellectual Property Rigths
TTK	**:** Turkish Commercial Code No: 6102 (6102 sayılı Türk Ticaret Kanunu)
UNESCO	**:** United Nations Educational, Scientific and Cultural Organization
YD	**:** Yargıtay Journal
Vol.	**:** Volume

ÖZET

Markayı kullanma hakkı marka sahibine aittir. Tescili markanın, marka sahibinin izni olmaksızın kullanılması Sınai Mülkiyet Kanunu uyarınca marka hakkına tecavüz teşkil etmektedir. Marka hakkına tecavüz sayılan eylemler Sınai Mülkiyet Kanunu madde 29'da belirtilmiş olup, bunlardan biri İşaretin hukuka aykırı şekilde karşılaştırmalı reklamlarda kullanılmasıdır.

Karşılaştırmalı reklamlar, reklam verenin kendi ürün veya hizmetlerini rakip ürün veya hizmetleri ile karşılaştırmasdır. Karşılaştırmalı reklamlarda, reklam veren ile rakip markalarının ve işaretlerinin belirtilmesi hukuka aykırıdır. Karşılaştırmalı reklamlar yapılırken, reklam verenin, rakibin markasından haksız yarar sağlaması, markasının itibarına zarar vermesi veya ayırt edici karakterini zedelemesi veya rakibin markasının aynısı veya benzerini kullanması suretiyle rakibin markasına tecavüz etmesi ve karşılaştırmalı reklamda rakip markasını açıkça beilrtmesi hukuka aykırı olup marka hakkına tecavüz teşkil eder.

Aynı zamanda karşılaştırmalı reklamlar yapısı gereği reklam verene ait ürün veya hizmetin rakip ürün veya hizmetinden daha üstün niteliklerini ortaya koymaktadır. Bu durum da teşebbüsler arasında rekabet oluşturmaktadır. Teşebbüsler arasındaki dürüst rekabetin bozulmasıyla birlikte, haksız rekabet meydana gelmektedir.

Bu çalışma "Infringement of Trade Mark Rights by Comparative Advertising / Karşılaştırmalı Reklamlar Yoluyla Marka Hakkına Tecavüz" konusunda yapılmıştır. Çalışmada, karşılaştırmalı reklamlar Türk Ticaret Kanunu, Sınai Mülkiyet Kanunu ile Tirari Reklam ve Haksız Ticari Uygulamalar Yötnetmeliği bağlamında incelenmiştir.

Anahtar Kelimeler: Reklam, Karşılaştırmalı Reklam, Sınai Mülkiyet, Haksız Rekabet, Marka, Marka Hakkına Tecavüz.

ABSTRACT

The right to use the trade mark belongs to the trade mark owner. Use of the registered trademark without the permission of the trademark owner constitutes an infringement of the trademark right under the Industrial Property Law. The acts deemed to infringe the trademark right are stated in Article 29 of the Industrial Property Law, one of which is the unlawful use of the mark in comparative advertising.

Comparative advertising is the comparison of the advertiser's own goods or services with the competitor's. It is against the law to state the advertising and competing trade marks and signs. When making comparative advertising, it is unlawful and constituting infringement of trade mark right for the advertiser to take unfair advantage of the or be detrimental to the distinctive character or reputation of the registered trade mark, or infringe the trade mark by using the identical or similar competitor's trade marks, and explicitly declare the competitor trade mark in comparative advertising.

In the same time, by nature of comparative advertising, it reveals the qualities of the advertiser's goods or services that are superior to the competitor's goods or services. This creates competition among the enterprises. With the breakdown of honest competition between enterprises unfair competition occurs.

This study is is made about “Infringement of Trade Mark Rights by Comparative Advertising / Karşılaştırmalı Reklamlar Yoluyla Marka Hakkına Tecavüz”. In this study comparative advertisings were examined in the context of Turkish Commercial Code, Industrial Property Code, and Regulation on Commercial Advertisement and Unfair Trade Practices.

Key Words: Advertisement, Comparative Advertisement, Industrial Property, Unfair Competition, Trade Mark, Infringement of Trade Mark

INTRODUCTION

In today's world, with technological developments, communication tools, including radio, television and internet have been developed and access to them has been facilitated. With the industrial revolution, industrial production and service sectors came to the forefront instead of agriculture-based economy. Thus, mass production was started and studies were carried out for sales and marketing of products. In addition, manufacturers and service providers aim to offer their goods or services to consumers in the best way. Thus, the advertising sector emerged. Through advertisements, enterprises can promote their goods or services, and consumers can get information about the goods or services they will purchase. Thanks to today's technology, production of products that make life easier has been accelerated and it has become easier to reach. Especially with the widespread use of the internet and the use of mobile devices, the service sector has also developed and it has become easier to obtain the services via the internet without going to a branch or dealer. Therefore, the importance of the advertising sector has increased.

Enterprises aim to persuade consumers by using various types of advertising to better sell their goods or services. One of these advertisement types is comparative advertisement. Comparative advertisings are advertisement that show that their goods or services are better than competing goods or services as a result of comparing the advertiser with the competing goods or services. Therefore, thanks to comparative advertising, both consumers are informed and convinced by comparison. When making comparative advertisements, there is a link between their goods or services and competing goods or services, explicitly or implicitly. Thus, the consumer is informed and the hesitations about which goods or services the consumer will choose are eliminated.

Comparative advertising is one of the important tools of the free market economy. Thanks to comparative advertising, the competitive market is developing and competition between enterprises is increasing. However, with comparative advertising, there may be also violations of competition rules. In addition, because comparative advertising is often made in the form of a comparison of the trade mark of enterprises, there is also infringement of the trademark right.

As will be explained detailed in our study, comparative advertising can be made directly or indirectly. In direct comparative advertisements, the goods or services are compared by clearly specifying the advertiser and competitor names, brands, logos or trade names. In indirect comparative advertising, goods or services comparisons are made by specifying only the advertiser's name, brand, logo or trade name. Furthermore, comparative advertising has both positive and negative aspects. While comparative advertisements increase transparency and create competition in the market, consumers can be misled, create unfair competition against competing goods or services and violate the trademark right without considering the objective criteria.

Although there is no direct regulation on comparative advertisements, they are included in the RG 28/11/2013 N. 28835, Law on Consumer Protection No:6502, RG 10/1/2017 N. 29944, Industrial Property Code No:6769 and RG 14/2/2011, N. 27846, Turkish Commercial Code No:6102. The conditions for comparative advertising are explained in detail in RG 10/1/2015 N.29232 Regulation on Commercial Advertisement and Unfair Trade Practices Article 8. While direct and indirect comparative advertisements can be used in Comparative Law, only indirect comparative advertisements are allowed in our Law.
As a matter of fact, with the amendment made in the Regulation on 04.01.2017, direct comparative advertisements were allowed however, on 28.12.2018, paragraph a was added to Article 8 of the regulation and direct comparative advertising was prevented again. The fact that despite the amendment of the Regulation, there is an unfair competition through comparative advertisements in the TTK, and the existence of regulations regarding the violation of trademark rights through comparative advertisements in the SMK shows that comparative advertisements may be unlawful and may constitute an unfair competition or violation of trademark rights.

In the first part of our study, the concept of advertising, its elements and its place in our legislation have been examined. In the second part of our study, the concept of comparative advertising will be explained and the basic criteria and elements of comparative advertising will be mentioned. In addition, information what the opinions are about comparative advertising and the types of comparative advertising types will be given.

In the third part of our study, the concept of competition and unfair competition will be explained and the actions that constitute unfair competition will be explained specifically. In addition, actions that constitute unfair competition through comparative advertisements will be mentioned, and legal claims based on unfair competition in case of such actions will be mentioned.

In the fourth section, which constitutes the main subject of our study, the actions that constitute infringement of the trademark rights will be explained in detail by giving information about the trade mark. The subject of our thesis, the issue of infringement of trademark rights by comparative advertisements will be examined in detail in this section and the legal remedies in case of infringement will be described in detail.

The scope of our work is covered within the framework of Industrial Property Code, Turkish Commercial Code, Turkish Code of Obligations, EU Directive, Regulation on Commercial Advertisement and Unfair Commercial Practices and other regulations.

CHAPTER 1: ADVERTISING

1.1. Concept of Advertising

Throughout the history of the mankind, economic systems have changed and developed, and come up to today. While primitive societies were carrying on with their lives by hunting and foraging, together with the passage to the permanent settlement, they had started making a living by agriculture and animal husbandry[1]. With the industrial revolution, transition has been seen from the style of production with human power to the style of production where machines are now used[2]. Together with the coming into existence of the industrial revolution, production and population have increased rapidly, in which case important changes have taken place in the living standards and consumption habits.

Especially at the end of the 20th century, important developments have taken place in the field of technology, as a result of which radical changes have occurred in the advertising sector. In this context, while advertisements were made in newspapers and periodicals, on the radio and later on television in the 20th century, together with the rapid development of technology in the 21st century advertisements have been shifted to the internet pages. During the recent years, with the majority of societies starting to spend time on social media, advertisement have been broadcasted and published on this channel. For this reason, we can fairly and equally utter that the development of the advertising sector is directly related to the living habits and patterns of societies.

In today's world, advertisements play an important role almost everywhere in our daily lives. Today, various advertisements are seen in different categories. For instance, in the advertisement of a trade mark name in the children's shoes sector, children are usually seen; and in the detergent advertisements, housewives are usually given roles to play.

[1] Alâeddin Şenel**,** *İlkel Topluluktan Uygar Topluma Geçiş Aşamasında Ekonomik Toplumsal Düşünsel Yapıların Etkileşimi*, Ankara, 1982, p.125 q.v.
[2] Mesut Küçükkalay**,** "Endüstri Devrimi ve Ekonomik Sonuçlarının Analizi", *SDÜİİBFD*, Issue.2, 1997, p.52.

Most of today's global economies are based on liberal economy[3]. The fundamentals of the liberal economy are the market economies[4]. Together with the development of the market economy, competition has emerged between producers, and therefore promotional means have emerged for the purposes of promoting their own goods or services. In line with this fact, in market economies where there are more than one company in each sector and which form the fundamentals of the competition freedom, the existence of advertisements are important for the presentation of a product to the consumer in the best manner and for directing the perception of the consumer to the promoted product. Indeed, in the contemporary economic order which has adopted the market economy, the same goods or services are manufactured under different trade mark names, and there are tough competitions between these goods or services with different trade mark names.

The concept of advertising which forms the basis of freedom of competition has many definitions in many various resources and studies. The concept of advertising originates from the French word *"réclame"* which means advertisement. It is defined by the Turkish Linguistic Society as *"Every way that is tried in order to promote something to the society and to cause the society to like it and to launch it to the market, and the writings, pictures, films, etc. used for this purpose"*[5].

1.2. Advertising in the Doctrine

Because of the vast area of application of advertising, there are conceptually more than one definition. The concept of advertising has been defined in many ways in the doctrine. In **BABACAN**'s opinion, advertising is a means of infusing something into someone which is carried out with convincing mass communication means by paying for the price of every object which is the subject of the marketing[6].

In addition to that, **BOZBEL** defines advertising as statements and declarations in order to create demand for a certain goods and enterprise, and furthermore he states

[3] Özgül Özkan**, "**Tüketici Hukuku Bakımından Ticari Reklamlar ve Tabi Olduğu Hükümler", *ABD*, Vol.4, N.1, p.4.
[4] Hayrunnisa Özdemir**, "**Aldatıcı Reklamlara Karşı Tüketicinin Korunması", *AÜHFD*, 2004, p.65.
[5] http://www.tdk.gov.tr/index.php?option=com_gts&arama=gts&guid=TDK.GTS.5a8f45235e0f84.86564558, (11.04.2018).
[6] Muazzez Babacan**,** *Nedir Bu Reklam,* İstanbul, 2015, p.43.

that advertising creates the thought of a need in the consumer and is a means of directing the consumer towards the satisfaction of this need[7].

On the other hand, **ÇAMDERELİ** defines advertising as an effort spent for increasing the sale of goods or services groups and carried out for the purposes of promoting[8].

Likewise, **DOĞAN** defines advertising as an announcement which is made by making use of various means for the purposes of selling or increasing the sales of a goods or a service[9].

According to **GÖLE,** advertising is an explanation or addressing made to consumers by giving the names of the goods or services or the names of the persons presenting the goods or services[10].

GÜLSOY defines advertising as an announcement which is made in return for a certain sum of money in order to convince people to perform certain actions voluntarily and to try to direct the attention of people to certain goods or services and to certain ideas and organizations, and which aims at changing the ideas of people in line with certain objectives[11].

İNAL/BAYSAL define advertising as a promotion made for the purposes of increasing the amount of a group of certain goods or services to be sold[12].

KURTULUŞ has defined advertising as preparation of visual or audio messages for the purposes of providing information for consumers about the existence of a certain goods or services or trade mark and for the purposes of creating a positive image with respect to such goods or services or trade mark in the eye of the consumer in return for a certain sum of money[13].

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[7] Savas Bozbel**,** *Mukayeseli Hukukta ve Türk Hukukunda Karşılaştırmalı Reklam Hukuku,* Ankara, 2006, p.28-31.
[8] Mete Çamdereli**, "**Bir Terimce Arayışında 'Reklam'", *İÜİFD*, Issue.9, İstanbul, 1999, p.328.
[9] D. Mehmet Doğan, *Büyük Türkçe Sözlük,* İstanbul, 1996, p.13.
[10] Celal Göle**, "**Ticaret Hukuku Açısından Aldatıcı Reklamlara Karşı Tüketicinin Korunması (Aldatıcı Reklamlar)", *BATİDER,* Ankara, 1983, p.33.
[11] Tanses Gülsoy, *Reklam Terimleri ve Kavramları Sözlüğü*, İstanbul, 1999, p.9.
[12] Emrehan İnal and Başak Baysal, *Reklâm Hukuku ve Uygulaması*, İstanbul, 2008, p.35.
[13] Kemal Kurtuluş, *Reklam Harcamaları*, İstanbul, 1989, p.25.

ÖZSUNAY has defined advertising as a message given by a certain producer in return for a price for the purposes of promoting goods or services and increasing their amounts being sold[14].

According to **PÜSKÜLLÜOĞLU,** advertising is all sorts of efforts and endeavors made orally or in written form by way of promoting a certain thing to people for the purposes of causing people to like and therefore to want more and more of that certain thing and for selling that thing more and more[15].

ZEVKLİLER/ÖZEL define advertising as means which aim at causing people to have a certain behavioral pattern by affecting people one by one or in certain groups by way of making a certain plan[16].

When the opinions in the doctrine are examined, it is noted that each discipline has defined the concept of advertising in different ways and in line with their own perspectives. In our own opinion, advertising is a means of the promotion of a certain goods or services group to people by the advertising party by way of audio and visual means for the purposes of increasing the sales amounts of such group of goods or services by paying a certain sum of money.

1.3.Advertising in Legislation

Various definitions have been made in the doctrine in relation to the concept of advertising, and the cases which are considered to be advertising in the legislation in effect are radio and television advertisements, and commercial advertisements, and in actuality there is various definitions in relation to advertising.

Advertising has directly been defined in the RG 9/1/1961 N.10702, Law On The Establishment Of The Press Announcement Institution No:195, and in Article 40/2[17] of the said law it is indicated that the cases where visual announcements which are made in newspapers or periodicals for the purposes of attracting interest to something

[14] Ergun Özsunay, "Karşılaştırmalı Reklamlar, AB Yönergesi Işığında Türk Hukukuna İlişkin Gözlemler", *Uluslararası Reklam Hukuku Sempozyumu*, İstanbul 2008, p.137**.**
[15] Ali Püsküllüoğlu, *Arkadaş Türkçe Sözlük*, Ankara, 1977, p.13.
[16] Aydın Zevkliler and Çağlar Özel; *Tüketicinin Korunması Hukuku*, Ankara, 2016, p.24.
[17] Law On The Establishment Of The Press Announcement Institution No:195 Article 40/2 *"Announcements made in newspapers and magazines with articles, pictures or lines for commercial purposes such as increasing sales or for the purpose of obtaining a material or spiritual interest such as providing a demand for something or an idea shall be considered advertising".*

or to an idea and for obtaining material proceeds or immaterial interests will be considered to be advertisements.

Advertisements may be made in many channels such as periodicals, radios, televisions, social media, and the like. A definition of radio and television advertisement is made although a general definition of advertisement is not made in Article 3/ş of RG 3/3/2011 N. 27863, Law with enactment number 6112 about the Establishment and Broadcasting Services of Radio Stations and Television Channels. Pursuant to the terms and conditions of the said Article, including the rights and obligations, announcements or promotional broadcasts are considered to be radio and television advertisements which are made in return for a certain amount of money by persons who have relations to commerce, business, or a profession for the purposes of emission of an objective or an idea and for supplying goods or services.

The definition of advertisement is not only made in our primary legislations, but also in our secondary legislations we find direct definitions. Pursuant to Article 4 of the Sponsorship Regulations of the General Directorate of Sports and Youth[18], promotion of a product, trade mark name or a service commercially by using various communication means such as writings, pictures, symbols, banners, and so on is considered to be an advertisement. Similarly, pursuant to Article 4/1-c of the Regulation about the Maintaining of Advertisement on Commercial Vehicles[19], an advertisement is the promotion and presentation of a product, service, or organization by way of using writings, figures, symbols, banners and sound and light equipment, and similar things, on the condition that such equipment is allowed to be maintained in vehicles. In actuality in the said regulation, a definition is made in relation to the advertisements maintained in commercial vehicles instead of a general definition of advertisement due to the fact that the subjects are regulated in the regulation in relation to the maintaining of advertisements in commercial vehicles.

In addition to those definitions, some other definitions are made in international legislations. In line with this, the concept of advertising is defined under 12/12/2006 dated Directive 2006/114/EC of the European Parliament and of The Council of 12

[18] RG, 16/6/2004, N. 25494.
[19] RG, 06.08.2004, N. 28017.

December 2006[20] Article 2; *"'(a) Advertising' means the making of a representation in any form in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immovable property, rights and obligations"*.

The basic elements of advertising can be seen in various definitions related to the concept of advertising are examined in both national and international legislation and doctrine. Each element will be examined below.

1.4. Elements of Advertising

In order that one can talk about an advertisement, it should be aimed by the advertisement giver at promoting the goods and the service whichever is the subject of the advertisement by acting with the inducement of advertising and at obtaining a commercial earning to this effect firstly in line with the fundamental criteria[21] in relation to advertising. Therefore, in this section of our thesis, we will talk about the will of giving an advertisement, and elements of aiming at promotion and acting for commercial purposes which are all included in the advertisement.

1.4.1. Will (Intention) of Advertising

In order to qualify a statement or statement as "advertisement", such statements must be made with the intention of advertising. For example, information, test results and reports which are obtained as a result of scientific research for providing info be considered as an "advertisement", and these statements or declarations should be made for the purposes of advertising[22]. Just as an advertisement can be given by an organization, person, or establishment in his/her or its own favor, at the same time an advertisement can be made in favor of a third party with no consideration of a personal interest[23].

In order that a will or a statement or an announcement can qualify as an advertisement, first of all such a will, statement or announcement should be made to the public with the inducement of advertising. In other words, subjects that only aims

[20] https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:376:0021:0027:EN:PDF (10.02.2019).
[21] RG, 10.01.2015, N.29232.
[22] Aslan, p.14.
[23] Özdemir, p.66.

at providing information for consumers and not aiming at an advertisement should not be considered as advertising. For example, announcements made on many TV channels today about the harms of cigarette smoking having the qualities of public service announcements should not be evaluated as advertising [24] . Likewise, information, test results and reports which are obtained as a result of scientific research for providing information for the consumers shouldn't be considered as advertisements. On the other hand, scientific research results and reports presented by a third party can be used with the inducement of giving an advertisement[25].

The scientific research reports and test results in question shouldn't be diverted, the statistical results should not be presented differently from the real results, and the scientific terms and expressions should not be used in a misleading way, and the assertions should not contain misleading information and should not be presented in a misleading way as if they were based on scientific research[26].

1.4.2. Promotion

In order to mention the existence of an advertisement, the existence of the will of advertising is not sufficient alone, and a goods or services being the subject of the advertisement should be presented and promoted. Promotion may be defined as transmittal of the packaging and label of a product to consumers[27]

1.4.3. Having the Purposes of Trading

Advertising is making the promotion for a certain purpose. The fundamental purpose of making an advertisement is to increase the sales of the relevant goods or services groups on order to increase the sales turnover of the company, person the consumers[28]. Therefore, promotions made without commercial purpose or material earnings and the statements and expressions made in this respect should not be assessed as advertisements.

In addition, this is possible by the purchase of their goods or services by consumers. Therefore, merchants who are competitors to each other and who manufacture,

[24] See RG, 08.02.2012, N. 2012/45 Public Spots Directive Article 4/4.
[25] BGH GRUR 02, p.633 q.v. Hormonersatztherapie cited by Aslan, p.18.
[26] See Regulation Article 8/7.
[27] Özdemir, p.67.
[28] Emrehan İnal**,** *Reklam Hukuku ve Aldatıcı Reklamlar*, p.14-15.

market, and sell the same goods or services groups have the objective of gaining superiority over their competitors in the eye of the consumers by giving advertisements promoting their products. In such case, in addition to the objective of being known and making the products known by the consumers, we see the objective of increasing the sales of the goods or services. In other words, we can fairly say that the party giving the advertisement acts for commercial objectives.

Besides, in various definitions made in the doctrines and legislations about advertisements, these advertisements appear to be for commercial purposes. Thus, indeed, one of the elements of advertisements is that it should be related to a commercial objective. Within this scope, a commercial advertisement, being one of the sorts of advertisement is defined as follows in Article 61/1 of the TKHK announcements made visually, aurally, in written form or in some other ways in any media or channels for the purposes of informing or convincing the people in the targeted market and for selling or leasing or renting a certain goods or services in relation to commerce, artisanship, business, occupation or profession.

1.5. Legal Nature of Advertisements

Advertisements must not be deceptive and against the concept of honesty, and at the same time, the product which is the subject of the advertisement must be exactly the same as the product presented to the customer in terms of color and shape and have the same technical characteristics which encourage the consumer to purchase the product.

In general, advertisements are made for promoting a certain goods or services group belonging to a trade mark name. Therefore, the trade mark names which are subjects of advertisements are protected within the scope of SMK.

Today, together with increasing competition, the advertisements need to be more unique and creative in order to be distinctive and catchy from other advertisements. Therefore, the ideas which form the subject of an advertisement are also protected within the scope of FSEK in the event that the relative conditions exist[29].

[29] Arzu Erol, *Türk Hukukunda Örtülü Reklam,* İstanbul, 2018, p.11.

Advertisements also cause the formation of a purchasing& selling agreement between the advertisement giver and the purchasing consumers by way of encouraging and convincing the consumers to purchase the subject product of service and by indicating that the goods or services has the qualities indicated in the advertisement. Therefore, advertisements are characterized and described in the doctrine and related legislation as deal and invitation to deal.

1.5.1. With Respect to the Law of Contracts

An advertising organization, person, or establishment aim at selling their goods or services to consumers through advertising. The aim is to conclude a purchasing-selling agreement between the advertisement giver and the consumer by way of promotion of a certain goods or services which is the subject of the advertisement. It is important to determine the action made for the purposes of advertising as a proposal or as an invitation to proposal.

A proposal is a declaration of intention which is includes the proposal for the establishment of a contract through a unilateral legal process, and shall be made prior to the establishment of the agreement and the declaration of acceptance by the other party, ensures the establishment of the contract with the acceptance of the interlocutor, binding and has a definite quality, necessary to reach the addressee (adverse party)[30]. In order to refer to a proposal, it is necessary to declaration of intention reach third party. On the other hand, one of the most important effects of a proposal is that the contract is establish with the transmittal of declaration of acceptance by the addressee to the proposing party and without the need for the proposing part to propose and put forth further declaration of intention[31].

Invitation to proposal or to deal is the encouragement of the consumer by the advertisement giver to accept the proposal. In invitation to proposal, although the person who made the declaration of intention do not clearly indicate the intention of establishing the contract, he/she implies that he/she has the intention of establish the contract. In a proposal, even though the declaration of acceptance of the addressee is

[30] Fikret Eren, *Borçlar Hukuku Genel Hükümler,* İstanbul, 2009, p.219; M. Kemal Oğuzman and M. Turgut Öz, *Borçlar Hukuku Genel Hükümler,* İstanbul, 2009, p.45; Selahattin Sulhi Tekinay, Sermet Akman, Haluk Burcuoğlu and Atilla Altop, *Borçlar Hukuku Genel Hükümler,* İstanbul, 1993, p.82.
[31] Bozbel, p. 33.

necessary and sufficient for establishing the contract, in invitation to proposal, only a statement is made to prompt the adverse party to make a proposal [32].

Also, the following is said in TBK Article 8;

"(1) If the proposer makes it clear that he has the right not to be bound by his proposal, or if it is understood that he does not intend to be bound by the nature of the work or the circumstances, the proposal does not bind him.

(2) Displaying the goods by showing the price or sending the tariff, price list, is considered as a suggestion unless it is not clearly and easily understood""

When the above provision is examined and clearly understood that the proposer explicitly states that he is not affiliated with the proposal or if the motive of not being connected to the proposition is understood from the nature of the work or the necessity of the situation, it is understood that the exposition products whose price is indicated on the proposal will be accepted as a suggestion.

In case that any essential element required for the establishment of the contract between the advertiser and the consumer is missing in the content of the advertisement, or if the offer submitted by the advertiser is not binding on the advertiser, such advertisement shall be an invitation to the request. In other words, advertisements given by the advertiser for the purpose of directing the other party to the proposal without the intention of establishing a contract are considered invitational.

Brochures distributed by the food restaurant, and advertisements given with audio video tools like television are of proposal qualification. Likewise, features that distinguish food types, prices, grammage and similar in the content of the advertisement concerned are usually expressed clearly in the advertisements. In this case, the only thing that the relevant contact will do is to go to the firm's sales restaurant to purchase the goods or to place an order through the online sales system if the online order is valid. The institution that advertises in a way that will not mislead the consumer has to offer the goods or services appropriate to the content of the advertisement to the consumer. In such cases, chain trade marks generally limit the

[32] Eren, p. 222.

goods or services offered to certain stocks in order to avoid economic damage in case the demand is more than supply.

Advertising leads to a contract between the advertiser and the purchaser of the goods or services concerned[33].

According to **ADAK**; advertising does not constitute offer or invitation to requisition, because it is made before the offer or invitation to requisition[34].

According to **GÖLE**; the advertiser is usually the manufacturer. The seller is not a direct party to the contract as the manufacturer or general distributor advertises instead of the seller. Therefore, advertising should be an invitation to requisition rather than an offer[35].

According to **İNAL**; producers do not intend to enter into negotiations with consumers to establish contracts. Therefore, the advertisements given by the producers are not an invitation to the consumer, and the advertisements are an invitation to the retailers because the consumer aims to buy the product and the retailer to sell the product[36].

According to **OĞUZMAN/ÖZ**; there is no provision in the RG 4/2/2011 N.27836 Turkish Code of Obligations No:6098 stating that an announcement made to society is considered proposal except for public reward, and even if the price is specified through newspapers, television or internet site, the advertisements that the sale or announcement to be made are invited to the proposal. In case of reply to these advertisements, the advertisements in which answer is required and the consumer can make payment by pressing the purchase or accept button via internet should be accepted as a proposal[37].

According to **ÖZKAN**; If the advertisement has all the essential elements necessary for the establishment of the contract and if it is possible to establish the agreement

[33] Yılmaz Aslan, *En Son Değisikliklerle ve Yargıtay Kararları Isığında Tüketici Hukuku,* p.237.
[34] Agah Adak, "Türk Hukuku Açısından Haksız Rekabet Müessesi ve Reklam Yolu ile Haksız Rekabet", *AİTİAD,* 1975, p.362.
[35] Göle, p.45.
[36] Emrehan İnal, p.17.
[37] Oğuzman and Öz, p.54.

upon acceptance of the other party, the advertisement shall be considered as proposal[38].

1.5.2. In Terms of The Law on Consumer Protection

TKHK contains regulations that protect consumers. Thus, TKHK Article 9[39] is examined, it is stated that the seller's liability will be removed if the seller is not aware of the advertised explanations due to reasons not caused by him or if the content of the related products is corrected during the establishment of the contract.

TKHK Article 61[40], also is a general arrangement which has been made regarding commercial advertisements and it is the principle that commercial advertisements should be given in accordance with the honesty rules. Likewise, the issues mentioned in this Article are both general rules in terms of both TBK and Turkish Civil Code No:4721[41]. In the third paragraph of the said Article, advertisements that deceive the consumer, abuse the ignorance of the consumer, endanger the life and property safety of the consumer, encourage crime, disturb the public health, abuse the patients, the

[38] Özkan, p.415.

[39] TKHK Article 9 is *"(1) The seller shall be liable to deliver the goods to the consumer in conformity with the sale contract.*
(2) The seller shall not be bound by the contents of an announcement if he/she proves that he/she was not and could not have been expected to be aware of the announcements made by means of advertisements or that the content of the relevant announcement had been corrected at the time of the conclusion of the sale contract or that the decision to conclude the sale contract does not demonstrate causality with the announcement in question.".

[40] TKHK Article 61 is *"(2) It shall be essential that commercial advertisements conform to the principles adopted by the Board of Advertisement, public morality, public order and personal rights and are accurate and honest.*
(2) It shall be essential that commercial advertisements conform to the principles adopted by the Board of Advertisement, public morality, public order and personal rights and are accurate and honest.
(3) Commercial advertisements that deceive the consumer, or abuse the consumer's lack of experience or knowledge, endanger the safety of life and property of the consumer, encourage the acts of violence or the commission of a crime, derange public health, abuse the sick, elderly, children or disabled people shall not be produced.
(4) Placing trade name or business names, through name, brand, logo or other distinctive symbols or expressions for the goods or services in Articles, news, broadcasts or programs without clearly stating that it is an advertisement and presenting such in a promotional manner shall be deemed as covert advertising. Audible, written, or visual covert advertising shall be prohibited in all kinds of communication tools.
(5) Advertisements comparing the goods or services offered by a competitor, meeting the same needs or intended for the same purpose, may be carried out.
(6) Advertisers shall be liable to prove the claims made in their commercial advertisements.
(7) Advertisers, advertising agencies and media companies shall be liable to comply with the provisions of this Article.
8 The limitations to commercial advertisements and the procedures and principles that should be complied with in these advertisements shall be determined by regulations.".

[41] RG, 8/12/2001, N. 24607.

elderly and children are prohibited. It is stated in the relevant Article that the claims in the advertising content offered to the consumer by the advertiser should not be misleading and that they are obliged to prove their accuracy.

1.5.3. In Terms of Law on Intellectual and Artistic Work

Advertising has become a major sector, especially due to today's technology and ever-increasing competition. The Association of Advertisers usually publishes reports. One of the reports of The Association of Advertisers includes media investments in the world by years. It was observed that the media investments were about USD 507 billion in 2015, USD 533 billion in 2016, USD 556 billion in 2017, and USD 581 billion in 2018[42].

In 2017 by the same association "Turkey Forecast Study of Media and Advertising Investment" research was conducted and the results; total media and advertising investments grew by 6.3% and reached TL 10.7 billion [43].

As mentioned in the above report, significant investments are being made in the media and advertising sector in our country and in the world. Therefore, with the increase in competition with each passing day, advertisers aim to make their goods or services more permanent and attractive.

Advertisements are the result of an intellectual effort today. This effort is sometimes presented to the consumer as an audio, a visual or a film[44]. This presentation is important for generating new ideas and protecting the rights of the owners.

There is no regulation related to the concept of advertising within the scope of the RG 13/12/1951 N.7981 Law on Intellectual and Artistic Works. Therefore, the protection of advertisement concepts within the FSEK, like TV formats, are also a matter of

[42] *Türkiyede Tahmini Medya ve Reklam Yatırımları; Reklamcılar Derneği Raporu*, 2018, p.6 (04.01.2019).
[43] *Türkiye'de Tahmini Medya ve Reklam Yatırımları; Reklamcılar Derneği Raporu,* 2017/2018, p.9 (04.01.2019).
[44] Yelda Ürey, "Türk Hukukunda Karşılaştırmalı Reklamlar", Galatasaray Üniversitesi SBE, *Unpublished Master Thesis,* İstanbul, 2010, p.19.

debate. The general view in the doctrine is that the ideas are not within the scope of the FSEK[45].

In order for an advertisement to be accepted as a work three basic conditions must be met. These requirements are as follows[46].

"Form requirement: To be included in one of the works of science, literature, music, fine arts and cinema,

Subjective requirement: Possessing the owner's characteristics

Objective requirement: Being affordable and perceivable by third parties "

If the above mentioned conditions are met, the advertisement will be accepted as a work. If the advertisement in a video format complies with the formal requirement given above, bears the characteristics of the owner and can be perceived by third parties, it will have the quality of work and will be protected within the scope of the FSEK.

1.6. Types of Advertisements

Advertisements can be made in various media. The ads were first given in newspapers and magazines and reached more users with the introduction of radio and television into our lives. The internet has developed at the end of the 20th century, and especially in the 21st century, access to the internet became quite easy. This has also improved internet advertising. Therefore, in this section of our study, advertisements in newspapers and periodicals, radio and television advertisements, and internet advertisements will be examined.

1.6.1. Advertisements in Newspapers and Periodicals

Since ancient times, the mankind has been trying to send messages around within the possibilities of their times depending upon the conditions of their times[47]. In this context, messages were sent through hieroglyphics in primitive societies, and at later

[45]Arslan Kaya, *Reklamın Fikri Mülkiyet Hukuku İçindeki Yeri,* Prof. Dr.Ömer Teoman'a 55 Yaş Günü Armağanı, Vol.1, İstanbul, 2002; Ünal Tekinalp, *Fikri Mülkiyet Hukuku,* İstanbul, 2012, p.61.
[46] Cahit Suluk, Rauf Karasu and Temel Nal, *Fikri Mülkiyet Hukuku*, Ankara, 2018, p. 38.
[47] Mehmet Özçağlayan, Gazetelerin Gelişimi ve Gazeteciliğin Geleceği (Yeni Teknolojiler ve Medya Ekonomisi Açısından Genel Bir Değerlendirme)*, MİD*, 2008, p.133.

times people started using news letters in order to send their messages. Together with the invention of the print works, printed publications in which weekly or daily news are included were used in order to emit news on economic, political, and cultural matters to the societies. Newspapers, being one of the printed publications that are used in order to emit news to people were first issued in the 17th century**.** Because newspapers emit news in relation to subjects and events that attract the interests of societies they were read by all sorts of people in societies with interest, and for this reason, the number of newspapers printed have increased day by day[48].

Due to the fact that newspapers are read by all sorts of people in societies, newspaper advertising has emerged. Since, newspapers emit printed matters, newspaper advertisements can give longer and more detailed messages than the radio and television advertisements [49] . Also, due to the fact that radio and television advertisements are given for shorter periods, they prevent the giving of advertisements which require detailed examination. Therefore, announcing such advertisements in newspapers is more suitable[50].

While newspapers emit current subjects to the society, periodicals are publications which emit unique subjects. For example, for people who are interested in cars there are periodicals about cars, and for people who are interested in fashion, there are fashion periodicals. Even though periodicals address less people in comparison to newspapers, we can fairly say that their targeted market is more specific than those who are readers of newspapers. The fact that issuing periods (intervals) of periodicals are less frequent than newspapers cause the advertisements published in periodicals to be more current[51].

Due to the fact that that periodicals are published for certain specific subjects and their targeted market is made up of people with such certain specific interests, advertisements which can be understood by conscious consumers are preferably published in periodicals. For instance, if a car trade mark publish in periodicals that

[48] Şuayip Özdemir and Fikret Yaman, *Türkiye'de Reklam Ahlâkı: Sorunlar ve Çözüm Önerileri,* İstanbul, İlke İlim Kültür Eğitim Derneği, 2015, p.316.
[49] Tom Brannan, *A Practical Guide to Integrated Marketing Communication,* London, 1998, p.48.
[50] İbrahim Aydın, "Karşılaştırmalı ve Karşılaştırmalı Olmayan Reklamların Tüketiciler Üzerindeki Etkisinin Araştırılması", İnönü Üniversitesi SBE, *Unpunblihed PHD,* 2018, p.29; Mehmet Özkundakçı, *Reklamcılığa Giriş,* İstanbul, 2008, p.70-71.
[51] Özdemir and Yaman, p.316.

its own cars have increased engine power despite a decrease in engine volume, it can easily reach to direct target consumer audience.

1.6.2. Radio and Television Advertisements

Radio stations and television channels have started to play important roles in the lives of people especially towards the end of the 20th century. Radios and televisions have been in our lives for about 100 years. Radio and television advertisements take part actively everywhere in the lives of people.

At the beginning of the 20th century, the radio sector has started developing together with the broadcasting of the first radio station which was one of the most important inventions of that time. In this context, while the radio broadcasting reached 1.5 million people in 1921, more than 550 radio broadcasts were emitted in 1923, and due to understanding the importance of radio broadcasting, radio advertising became important and gained currency. In 1935, NBC earned 3.7 million dollars, and in the following five years they earned 5.8 million dollars[52]. In addition, the number of radio receivers increased more and more each passing day, and the radio sector reached 150 million in 1949, 436 million in 1962, 728 million in 1970, and 1.4 billion radio receivers in 1977[53]. Today, radios can be attained and listened to by almost everyone. Therefore, advertisements broadcasted on the radio can reach people more quickly than the other sorts of advertising. At the same time, due to the fact that radio advertisement is only audial, their costs are lower in comparison to the other sorts of advertising.

Television was invented by John Logie Baird in the year 1923. The first television image was obtained by this person in 1926. Actual television broadcasting started developing in the 1940s. And in 1959, it was watched by 87 people and by 251 million people in 1969. In 1977 the number of TV watchers increased up to 400.3 million people[54]. Today, we find TV sets almost in each and every house. Because

[52] Radyo Yayıncılığında Ticari Model – Amerika, p.5 https://acikders.ankara.edu.tr/pluginfile.php/68766/mod_resource/content/0/acik%20ders%202_radyo%20amerika.pdf (22.04.2019).
[53] Aysel Aziz, *Radyo ve Televizyona Giriş,* Ankara: 1981, p.26; UNESCO, "Information A Travers Le monde", Paris, 196; UNESCO Statistical Yearbook, 1970, 1972-1974 and 1978-1979.
[54] Aziz, p.30; UNESCO, "Information A Travers Le monde", Paris, 1966, 1976-1977, UNESCO Statistical Yearbook.

television involves visual contents, both audial and visual advertisements can be broadcasted on television. Therefore, this remains in the mind of the consumer.

Due to the fact that radio stations and television channels address to consumers everywhere in the world, and that the cost of advertising is low, they are both economical and address to more people.

1.6.3. Internet Advertisements

With the internet coming into our lives towards the end of the 20th century, digital media have taken the place of printed materials. Especially with the high increase in the number of the users of the Internet during the last 10 years and due to the fact that the Internet can be also reached and actively used on mobile devices such as mobile phones, tablet and notebook computers, the Internet has become an important part of our lives. The fact that the number of the users of the internet is increasing every day at a high pace has caused the internet advertisements to emerge.

In today's world, 7.697 billion people are living, and 4.437 billion people can use the internet. In addition to that, 3.499 billion people can actively use the social media, and 3.429 can use mobile social media[55]. According to the same report, 82% of the internet users have made searches in the internet in order to purchase goods or services, 91% have wandered about in the online retail stores, and 75% have purchased goods or services online. In line with these facts, and with people using news sites, social media, and similar internet channels, the advertisement givers (advertisers) have the opportunities to send their advertisement messages to their targeted consumers[56].

The fact that there are so many internet users and the possibility of reaching the consumers more quickly and faster increase the importance of internet advertising more and more. On the other hand, the costs of Internet advertisements are lower than the other sorts of advertisements, and they can reach the consumer faster. Therefore, they are preferred more by advertisement givers (advertisers).

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[55] *We Are Social; Digital Around the World in April 2019 report* https://wearesocial.com/blog/2019/04/the-state-of-digital-in-april-2019-all-the-numbers-you-need-to-know (05.05.2019).

[56] Nevzat Bilge İspir, *Farklı Reklam Mecralarının Karşılaştırılması,* Eskişehir, 2012, p.110.

1.7. Formations about Advertising

Advertisers may give their advertisings various ways to increase the demand for advertising goods or services. These are award promise through announcement, promise, announcement. In this part of our work, these formations will be examined.

1.7.1. Award Promise through Announcement

Award promise through announcement has been arranged in TBK Article;
"*A person announcing that he/she will grant an award against occurrence of a result is liable for keeping his/her words.*

If the one granting an award breaks his/her promise before the occurrence of any result or blocks the occurrence of the result, he/she is liable for making payment of expenses made in accordance with rules of correctness. However, total amount of expenses to be paid to one or more people could not exceed the award value.

If the one granting award proves that people willing to be paid for their expenses would not be able to execute the expected result, he/she will relieve from paying expenses."

The one granting award against any action or a price is liable to fulfill his/her promise. In award promise through announcement, a person could not provide any result by himself/herself and organizes a competition for having some to provide the result or achieving the best result[57]. Provision of the said promise through television, journal, newspaper or such kind of written visual instruments does not have any importance. There are two kinds of award promise through announcement[58].

a) Explicit Award Promise: The one assuring award explicitly assures an award for the execution of a specific action or result and takes the responsibility of giving a prize to the executing person. Some specific conditions should be met for the explicit award promise to be formed.

i) First of all, there should be an announcement for the award promise through announcement. There is no importance of how the announcement would be made.

[57] Ürey, p.14; Tekinay and Others, p.468-469.
[58] Ahmet M. Kılıçoğlu, *Borçlar Hukuku Genel Hükümler,* Ankara, 2016, p.287-289.

Besides, it could even be given to a specific community and all kind of people. The person making the announcement will incur a debt after the occurrence of the announcement result. Accordingly, he/she should be provided with legal transaction license.

ii) In award promise through announcement, the subject execution of the announcement should be shown. The execution should not be contradictory with law and ethics according to TBK. Besides, award to be provided to the person performing the execution should be included in the content of the announcement.

b) Award Competition Promise: In award competition promise, there is no need for any action to be taken, as it is the case for the explicit award promise. Here, there is a competition and award are given to the one succeeding at the end of the competition. Award competition promise has the characteristics of an offer made for the public[59]. The purpose of award competition promise is to determine the one to which would achieve the best result.

For example, there will be no registration fee for the ones taking the exam of an institution and listed as one the first 10 at the end, 100 thousand TRL will be paid to the one who will return an old work of art which was already lost[60], payments made at the end of knowledge contest, awards given at the end of beauty competitions have the characteristics of award promise through announcement. The purpose, when an award is assured by the advertiser through announcement, is to increase the demand of intended consumers for goods or services groups.

1.7.2. Promise

Promise is defined as *"A promise given to take any action"*[61]. Accordingly, while sale and marketing of goods or services groups are made by the advertiser or seller, a promise is provided to the consumer. Promise provided for the consumer should neither be fallacious nor misleading. In this case, although the promise contains

[59] Haluk N. Nomer, *Borçlar Hukuku Genel Hükümler,* İstanbul, 2012, p.35.
[60] Kılıçoğlu, p.288.
[61] http://tdk.gov.tr/index.php?option=com_gts&arama=gts&guid=TDK.GTS.5baa19dded5335.58210865 (08/09/2018).

advertising elements, that would be assumed as fallacious advertisement and the liability of advertiser to the consumer will come to the fore[62].

Generally, promise is provided in accordance with the qualifications of the advertisement[63]. In the advertisements made for the qualifications of a product, unless the relevant product has the specified characteristics, that would mean that there is defect and the consumer will have the right to make an application to guarantee against the seller, the defect.

In case the promise of seller related to the advertisement subject good and service is not executed, articles of TBK and TKHK related to the defective product shall apply.

Articles 219-231[64] of TBK have regulated *Liability for Defects*. Defective good is defined in Article 8[65] of TKHK 6502 and liability for the defective product is arranged in Article 9[66] of the same code.

Provisions of TBK and TKHK, related to the liability for defect, have similar quality. The greatest difference in between the two law is the provision found in second

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[62] Göle, p.43.
[63] Erol, p.16.
[64] TBK Article 219 is *"Seller is responsible both for non-presence of qualifications, notified to the purchaser in any way, in the sold product; and presence of material, legal or economic defects which would affect qualification and quantity, which would be against its quantity, which would remove or decrease the benefits the purchaser awaits considerably.*
Seller will be liable for the aforesaid even if he/she doesn't know the presence of the defects.".
[65] TKHK Article 8 is *"(1) A defective good is a good that is contrary to the contract since it does not comply with the sample or model agreed on by the parties or lacks the characteristics it should objectively have, during its delivery to the consumer.*
(2) Goods that do not have one or several of the characteristics included on the package, on the label, the introductory guide and the instructions of use, on the portal or in advertisements and announcements; that are not in conformity with the characteristics notified by the seller or determined in its technical regulation; that do not correspond to the usage purpose of goods that are equal; that have material, legal or economic deficiencies which reduce or remove the benefits the consumer reasonably expects shall also be deemed as defective goods.
(3) If the good that is the subject matter of the contract is not delivered within the due course set forth in the contract, or the good is not assembled as required in cases where assemblage is made by the seller or under the responsibility of the seller, this shall be evaluated as non-compliant performance. In cases where it is envisaged that the consumer will assemble the good, if the good is assembled incorrectly due to an error or a shortcoming in the assemblage instructions, such shall be identified as non-compliant performance of the contract.".
[66] TKHK Article 9 is "*"The seller shall be liable to deliver the goods to the consumer in conformity with the sale contract.*
The seller shall not be bound by the contents of an announcement if he/she proves that he/she was not and could not have been expected to be aware of the announcements made by means of advertisements or that the content of the relevant announcement had been corrected at the time of the conclusion of the sale contract or that the decision to conclude the sale contract does not demonstrate causality with the announcement in question.".

paragraph of Article 9 of TKHK which is related to the elimination of liability of the seller for the defect. According to TKHK, seller should prove that he/she was not informed on the promise and that this should not be expected from him/her, that the explanation was corrected at the preparation stage of the contract, or the decision to make the contract does not have any causation relation with the explanation; in order for his/her liability related to the defect to be eliminated. Likewise, when justification of the aforesaid article is analyzed, it is clear that the seller is bound with the promise found in the content of the advertisement.

1.7.3. Announcement

One of the formations related to the advertising is announcement. The issue of *"reporting unreal news or making such kind of announcements"* is found in Article 57 of TBK[67]. Besides, in Article 40/2 of Law On The Establishment Of The Press Announcement Institution No:195 there is the following provision *"Announcements made in newspapers and journals with writings, pictures or lines for commercial purposes such as increasing the sales or for material or moral benefits such as providing demand for anything or for any idea, shall be assumed as advertisement."*

In doctrine, there are various opinions related to the relation in between the advertisement and the announcement. According to one opinion, it is mentioned that announcement is more wide-ranging than advertisement, that each advertisement could be assumed as announcement, however that each announcement could not be assumed as advertisement [68] . According to another opinion in the doctrine, announcement shall be assumed as advertisement as soon as it has the same elements with the advertisement and announcement which is not qualified as advertisement shall not be commercial[69].

When both codes and doctrine are analyzed, it is understood that announcement and advertisement would not mean the same. However, certain conditions occur, announcement and advertisement could be in the same meaning. According to our opinion, the meaning of announcement should be considered wider than

[67] See TBK Article 57.
[68] Celal Göle, "Türk Hukukunda Reklâmların Ön Denetimi Sorunu" *AÜSBFD*, Vol.1, Issue.3, 1985, p.255.
[69] Emrehan İnal, p.13.

advertisement. Each announcement could not be qualified as advertisement. An announcement could be made without having any commercial purposes.

CHAPTER 2: COMPARATIVE ADVERTISING

2.1. The Concept of Comparative Advertisings

The main functions of advertisement are increasing sales by giving information to consumers related to the goods or services. Business corporations generally do not compliment their own goods or services in commercial advertisements where their own goods or services are introduced, but they, at the same time, make comment on the goods or services of competitor companies[70].

In this direction, it is expressed in the content of the advertisement the publisher gives, that goods or services of the publisher are at the same level with or at a higher level than the goods or services of competitor companies by establishing a relation with goods or services of the competitor company[71].

In order for the goal of the advertisement to be reached, the information in the content of the advertisement should convince and leave a positive effect in the mind of the customer; and the customer should not run to other goods or services, rather he/she should run to the goods or services which are subjects of the advertisement. One of the commercial advertisement methods used for the advertisements to be effective and in order for the advertisement subject goods or services to be preferable, is comparative advertisings.

In this section of our thesis, we will make mention of the definitions made in the doctrine and legislation related to the comparative advertising and components, types of comparative advertising and positive and negative opinions related to the comparative advertising will be explained.

2.2. Comparative Advertising in the Doctrine

There are various definitions in the doctrine related to the comparative advertisings.

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[70] Sibylle M.Wirth, *Vergleichende Werbung in der Schweiz, den USA und der EG, in Zivilrecht, Werbe- und Medienkodizes*, Zürich: 1993, p.6 and Hans Rainer Künzle**,** *Die vergleichende Werbung im schweizerischen Wettbewerbsrecht – de lege lata und de lege ferenda, WuR (Wirtschaft und Recht)*, 1982, p. 140 cited by Savaş Bozbel, "Adwords Reklamlar Karşılaştırmalı Reklam Teşkil Eder Mi? Avrupa Adalet Divanı'nın Verdiği Kararlar Işığında Bir Değerlendirme", *İTİCÜSBD*, Vol. 9, N. 18, 2010, p. 99.

[71] Bozbel (Adwords), p.99.

According to foreign doctrine, **WILKIE/FARRIS** defined to comparative advertising with two elements as follows: *"Comparison advertising is defined as advertising that:*

i)Compares two or more specifically named or recognizably presented brands of the same generic goods or services class, and

ii)Makes such a comparison in terms of one or more specific goods or services attributes"[72].

In this direction, it is important to declare the names of the trade marks explicitly, for the comparison made clearly in the first component of the definition related to the comparative advertising, to be more effective than other advertisements, which are not comparative, before the customers. It is mentioned in the second component that the comparison should be made from the point of specific characteristic of one or more goods or services, in other words, that the size and amount of the measurement given related to goods or services which will be compared, as being the subject of the advertisement, should be the same.

ASH/WEE[73] made a definition which is as follows: *"It therefore, seems appropriate to define comparative advertising as any advertisement that compares the sponsored brand against any other explicitly named competitive brand(s) along any attribute relating to product, service, price, market standing, or even company factors such as image and status"*. According to this definition; price, market share and such kind of qualifications of advertisement subject goods or services are compared by declaring the name of the trade marks, which are the subjects of the advertising, explicitly by the publisher.

In the same direction, **BELLER**[74] made the following definition: *"Comparative advertising is defined as advertising that 'identifies the competition for the purpose of claiming superiority or enhancing perceptions of the sponsor's brand,' as opposed to advertising that promotes one's product solely on its own merits"* and, therefore, she

[72]Wilkie, William L. and Paul W. Farris. "Comparison Advertising: Problems and Potential", *JM*, Vol. 39, No. 4, 1975, p.7.
[73] Stephen B. Ash and Chow-Hou Wee, "Comparative Advertising: a Review with Implications for Further Research. Advances in Consumer Research", Vol. 10, 1983, p.370-376.
[74] Jenna D. Beller, "The Law of Comparative Advertising in the United States and Around the World: A Practical Guide for U.S. Lawyers and Their Clients", *ABA,* Vol:29, No:4, p.919.

made mention of the fact that there is a comparison, on the contrary of non-comparative advertisements.

ROMANO[75] defined comparative advertising as follows: *"comparative advertising" refers to any form of advertising in which a trademar1k owner draws a comparison between his product, service, or brand and that of a competitor."*

Comparative advertising is defined in Turkish doctrine in a similar way to the comparative doctrine.

According to Turkish doctrine, **GÖLE** made the following definition: *"In comparative advertising, manufacturer or seller compares its own goods or services with another goods or services having the same qualifications"* [76].

MOROĞLU, defined comparative advertising as advertisements of its own goods or services which are at the same level with or at a higher level than the same of its competitor by establishing a direct or indirect connection with the competitor[77].

BOZBEL mentioned that in order for him to make mention of any comparative advertising, there should be a relation between the competitor itself, its goods or services or prices or such kind of characteristics related to them[78]. At the same time, according to **BOZBEL**, that relation can be established both by making mention of the goods or services of the competitor explicitly or by implicitly figuring the goods or services of the competitor verbally, in writing, visually or in such kind of ways; or in a way by making the consumer to think of the goods or services of specific competitors indirectly[79].

While **YUSUFOĞLU** remarked that comparative advertising subject goods or services should have the same qualifications and that those should be substitutable, that the comparison made should be related to the main and important characteristics

[75] Charlotte J. Romano, "Comparative Advertising in the United States and in France", *NJILB*, Vol:25, 2005, p. 372.
[76] Göle, p.79.
[77] Erdoğan Moroğlu, "Karşılaştırmalı Reklam ve Yargıtay Kararları", *BATİDER,* May 1994, p.4.
[78] Bozbel, p.34.
[79] Tekin Memiş and Savaş Bozbel, "Marka ve Haksız Rekabet Hukuku Bakımından Adwords Reklamlar", *ESBAİD*, 2008, p.81 http://www.eakademi.org/incele.asp?konu=MARKA%20VE%20HAKSIZ%20REKABET%20HUKUKU%20BAKIMINDAN%20ADWORDS%20REKLAMLAR&kimlik=1227080164&url=makaleler/tmemis-sbozbel-1.htm (21/10/2018).

of the advertised goods and that the comparison should be made in the direction of objective, fair and verifiable data, he also mentioned on the contrary that the comparison should not be fallacious or it should not benefit from the famousness of a third party unrightly and that it should not be abusive unnecessarily[80].

In the direction of the definitions made in the doctrine, generally, to refer to comparative advertising, first, characteristics of advertisement subject goods or services, which would influence the decision of the consumer to buy the product, should be compared[81].

In our opinion, comparative advertising is a type of advertising explaining the perception that the said trade mark is better than the other trade mark in the direction of objective criteria, where the goods or services of a trade mark are presented to the consumers with goods or services of another trade mark having the same qualifications and criteria, their characteristics which would make the consumer to buy the advertising subject trade mark such as size, technical specifications, product material quality together with important qualifications of the other trade mark.

2.3. Comparative Advertising in Legislation

There are various definitions have been made related to the comparative advertising in not only the doctrine, but also the legislation. Firstly, according to Directive 2006/114/EC Article 2/c;*" 'comparative advertising' means any advertising which explicitly or by implication identifies a competitor or goods or services offered by a competitor"* [82]. Here, the competitor and definition of marketing subject goods or services by the competitor are mentioned.

In Turkey, a direct legal definition has not been made for the comparative advertising in law. Although comparative advertising is not defined in TKHK directly, it is stated

[80]Aslan, p.33; Fülürya Yusufoğlu, *Türk ve İsviçre Hukuklarından Karşılaştırmalı Reklamlar, İsviçre Borçlar Kanunu'nun İktibasının 80. Yılında İsviçre Borçlar Hukuku'nun Türk Ticaret Hukuku'na Etkileri*, İstanbul, 2009, s.116-119.
[81]Baumbach and Hefermehl, *Wettbewerbsrecht, 21. Aufl. München 1999*, § 1 UWG Rdnr. 338 cited by Bozbel (Adwords), p.99.
[82]Directive 2006/114/EC
https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:376:0021:0027:EN:PDF (29/09/2018).

in Article 61/5[83] that comparative advertising can be made related to the goods or services which are for the same needs or purposes.

Having said that, comparative advertising is defined in Regulation Article 4/1-ğ[84] as follows: "*Advertisements where points related to advertised goods or services and goods or services of the competitors which stand for the same purpose or need, are compared"*. It is mentioned in the content of the definitions made in both Directive 2006/114/EC and our legislation that competitor's goods or services are compared directly or indirectly.

2.4. Elements of Comparative Advertising

Comparative advertising can be made to the extent that these are compatible with the provisions of the law[85] and regulations[86]. In order to report to comparative advertising, first, two or more products, belonging to goods or services of the same qualifications and meeting the same request or need, should be compared and those products should be linked together.

2.4.1. Comparison

In order to make comparative advertising, first of all, there should be a concrete *comparison*. Comparative advertising aim to show that the goods or service offered by the advertiser is better or equal to that of the competitor[87]. Consumer finds the chance to compare the goods or services of the publisher with the same of the competitor, in comparative advertising. Thus, the consumer can be informed sufficiently on the advertising subject goods or services and can select in between the products[88].

[83] TKHK Article 61/5 is *"Advertisements comparing the goods or services offered by a competitor, meeting the same needs or intended for the same purpose, may be carried out."*.
[84] Article 4/1-ğ provision of Regulation has changed 28/12/2018. The abolished provision *"Advertisements where elements of competing goods or services are used directly or indirectly during the promotion of a goods or service"*.
[85] See TKHK.
[86] RG, 10.01.2015, N. 29232.
[87] İnal and Baysal, p.54.
[88] Bozbel, p. 47.

2.4.2. Linking with the Competitor

In comparative advertising, *goods or services compared* by the publisher should have a relation directly or indirectly to the competitor[89]. In comparative advertising made directly, publisher makes a direct reference to the competitor[90]. For example, in the advertisement of Vestel refrigerator, if Grundig refrigerator is compared as a competitor company's product, and if there is a slogan used like "*As Vestel, we have manufactured a budget friendly refrigerator with motor options whose internal volume is larger and which are more durable than the same of Grundig brand*", then this can be called a direct advertising comparison and linking, in an indirect comparison, there is no direct reference made to the competitor. In other words, in indirect comparison, distinguishing characteristics of the competitor (specifiable characteristics such as name and like) are not stated explicitly. As an example, to this point, in case the publisher A company asserts that they are an operating company with fastest gravity force in their sector, that will mean that they are better than the other operator companies, indirectly.

2.4.3. Goods or Services Must Meet the Same Need or Have the Same Purpose

The goods or services that are compared in comparative advertisements meet the same needs or are intended for the same purpose[91]. In other words, products having a relation with each other should be compared. For example, in an automotive advertisement of a trade mark in the automotive sector, a trade mark found in the automotive industry should not be compared to a trade mark found in the computer industry.

2.5. Main Criteria Related to Comparative Advertising

Publisher's effectiveness towards the intended consumer population is more as comparative advertising is made with the comparison of competitor's goods or services in an objective way, directly or indirectly. In other words, the publisher aims to increase the sales of its goods or services by proving to customers in the light of

89 See Regulation Article 4/1-ğ.
90 Rolf Sack, Vergleichende Werbung mit Bezugnahme auf Mitbewerber und ihre Leistungen, in: Amann Joachim / Graf Lambsdorf, HansGeorg, Rechtsfragen in Wettbewerb und Werbung Kommentar zum Wettbewerbs und Werberecht, Stuttgart – München – Hannover, 2001 cited by Aslan, p.100.
91 See Regulation Article 8/1-ç.

objective data that its own goods or services are more qualified than the same of the competitor, through the agency of comparative advertising.

In order to make any reference of comparative advertising, components of competitor's goods or services should be used directly or indirectly during the advertising of any goods or services. On the contrary, comparative advertising should be made within the limits of legislation, those should not contain any criticism about competitor's goods or services which are unreal, those should not result in dishonest trading and those should not be fallacious and misleading.

The criteria which should be taken into consideration while making comparative advertising is mentioned in Article 8 of Regulation[92]. Those criteria will be analyzed as follows.

2.5.1. There should not be any Product Name, Brand, Logo, Commercial Name and Suchlike Distinctive Components of Competitors

The publisher can advertise its own products without making any reference to the competitor product, its brand and logo, commercial name and suchlike distinctive components while making comparative advertising. Canceled, Article 11 of Regulation included the provision of *"Not making any remark related to the compared good, service or brand name"*. The aforesaid regulations were canceled together Regulation becoming valid and the way of making mention of the product name, brand, logo, trade name etc. was opened while the publisher makes comparative advertising. However, the provision of "*not making any mention of the competitor's product name, brand, logo, trade name, business name or any other distinctive component*" was added and remarking any distinctive information related to the competitor was again interrupted. Accordingly, making comparative advertising is not permitted in our legislation.

In our opinion, there isn't any inconvenience for making direct comparative advertising in the light of specific criteria. In economies where there is freedom of competition, making mention of distinctive components such as brand, logo, trade name etc. explicitly in the direction of objective criteria, while making comparative

[92] See Regulation Article 8.

advertising of products with the same qualification or with better qualifications, brings benefits to the consumers and those have an important role in the preferences of consumers.

2.5.2. Those should neither be Fallacious nor Misleading

One of the goals to be reached with advertisements is advertising the goods or services to the consumers for generating commercial income. Advertisement is, by its nature, convenient to deceive and misdirect[93]. Accordingly, the publisher can have some unreal behaviors for presenting its goods or services and increasing its sales.

If it can be proven with objective assessment criteria that the components of advertisements are misleading, this advertisement is fallacious [94] . For the determination of the fact that an advertisement is fallacious, information given in the advertisement should be unreal or of the false qualification upon analysis made in the direction of objective criteria[95]. In other words, the most basic criteria for determining whether an advertising is deceptive or not, the information given in the advertisement contains wrong information. Besides, we can say that there is a fallacious advertising if nonapparent expressions are used, important facts are not explained, expressions mentioned in the advertisement can't prove the promissory given in the advertisement, expressions more than one meaning are used, visual used in the advertisement does not have any relation with the advertisement subject product while making advertising, despite the fact that information given in the advertisements are true[96].

Although a direct definition of fallacious and misleading advertising has not been made in our legislation, according to Article 2 [97] of Directive 2006/114/EC, fallacious advertisements are defined as advertisements which misdirects people that those are

[93] Özdemir, p.70.
[94] Özdemir, p.72.
[95] Özdemir, p.72; Göle, p.63; Yılmaz Aslan**,** *Tüketici Hukuku ve İlgili Mevzuat*, Bursa, 1996, p.29.
[96] Göle, p.67.
[97] Directive 2006/114/EC of the European Parliament and of The Council of 12 December 2006 concerning misleading and comparative advertising Article 2 *"(a)'misleading advertising' means any advertising which in any way, including its presentation, deceives or is likely to deceive the persons to whom it is addressed or whom it reaches and which, by reason of its deceptive nature, is likely to affect their economic behaviour or which, for those reasons, injures or is likely to injure a competitor."* https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:376:0021:0027:EN:PDF (2/10/2018).

directed to and, for that reason, which may result in a change of their economic behaviors.

Advertisement subject goods or services being the same in comparative advertising increases the probability of them being fallacious and misleading. Accordingly, comparative advertising is mentioned not to be fallacious and misleading in the regulations.

2.5.3. It should not Result in Unfair Competition

According to TTK Article 55/1-a*, "Advertisements and selling methods against the principle of honesty and other behaviors against law"* are referred to as positions of dishonest trading. According to the reference Article, advertisements made against the principle of honest constitute unfair competition. According to Turkish Civil Code Article 2*"Everybody should obey the rules of honesty while using their rights and fulfilling their liabilities"*. A general law principle has drawn the boundaries of using right and fulfilling liabilities. In this context, in accordance with the provision of TTK Article 55/1-a; advertisements made against honesty principles constitute dishonest trading. This will be analyzed with details in third section of our thesis.

2.5.4. Compared Goods or Services should Meet the Same Needs or They should Stand for the Same Purpose

In comparative advertising, goods or services of the publisher and the competitor having the same qualifications should be compared. In this direction, "*Compared goods or services should meet the same needs or they should stand for the same purpose*" in order for the comparative advertising to be made, in accordance with Article 8/1-ç of Regulation.

Likewise, incase advertisement subject goods or services have different qualifications, they don't meet the same needs or if they don't stand for the same purpose, then, one can't say that there is a comparative advertising. For example, comparison of a refrigerator with a mobile phone constitutes contradiction with the purpose of comparative advertising. The main purpose of comparative advertising is to advertise the most beneficial one to the consumer by comparing same goods or services.

Provision of *"Compared goods or services being in the same qualification and meeting the same request or need"* in Article 8/1-ç of Regulation was changed as; *"Compared goods or services meeting the same needs or standing for the same purpose"*. According to the aforesaid paragraph, expressions of "*meeting the same needs*" and "*standing for the same purpose*" are added instead of the expressions of *"same qualification"* and *"meeting the same request or need"*. In our opinion, similar expressions were used and there wasn't any essential change.

2.5.5. It Should be Beneficial for the Consumer

According to provision 8/1-d of Regulation; *"Any particular which will have a benefit to the consumer should be compared"*. One of the purposes of the advertisement is advertising anything which will bring benefit to the consumer. Anything which will have no benefit for the consumer will not draw the attention of the consumer, and besides, it will not make the consumer to run to the advertisement subject product. For that reason, making the advertisement of anything not having any benefit for the consumer will not have any advantage for the publisher. Likewise, in case there is any comparison which has no benefit for the consumer, the interest of the consumer will not be directed to the advertisement subject product. For that reason, advertisement subject product being preferable should be placed into the perceptions of the consumer because of the comparison while making comparative advertising.

2.5.6. Goods or Services should be Compared in an Objective Way

According to Article 8/1-e of the Regulation; "*One or more concrete, essential, verifiable and typical characteristics of compared goods or services, including their prices, should be compared objectively*" in comparative advertising. When the said Article is analyzed, for compared goods or services;

i) One or more of their characteristics should be compared, including the price

ii) Those characteristics should be concrete, essential, verifiable and typical

iii) The comparison should be made objectively

In our opinion, aforesaid provision of the Regulation is compatible with the purpose of advertising. Because, one purpose of comparative advertising is affecting the

consumer by means of making comparison of goods or services of the publisher and the competitor. Besides, essential, verifiable and typical characteristics of goods or services are not compared, then, one cannot say that there is a comparative advertising in a legal way. The comparison is made in an objective way.

2.5.7. It Should be Based upon Scientific Data

While comparative advertising is made, "*allegations based upon objective, measurable, numerical data*" could be used for the promotion of the advertisement subject goods or services. In that case, according to provision 8/1-f of Regulation, these kinds of data "*should be proven with scientific test, report or documents*". When the provision of the relevant Article is analyzed, while making comparative advertising related to the subjects which do not have any subjective qualification, and which can be proven with scientific data, it should be proven that those subjects are not only allegation but also those could be documented. For example, while making comparison of engine power of advertisement subject cars, those values should be proven with scientific tests. In other words, for example, if a comparative advertising is made as follows: "*our car is 20 hp more powerful than the other car in spite of the same engine volume*", as both engine cylinder volumes and engine powers of cars are based upon objective, measurable and numerical data, that should also be proven with scientific tests and reports. In the same way, the lightening company asserting that it gives more light by using the same WATT should prove that issue with scientific data.

2.5.8. It Should not Discredit Goods or Services of Competitors And It Should Not Disgrace Them

Comparative advertisements "*should not discredit or disgrace goods, services, activities or other characteristics of the competitors*"[98]. While making comparison, goods or services, activities or other characteristics of the competitor should not be discredited, or its reputation should not be damaged. Regulation has brought some limitation related to the comparative advertising. For example, if A trade mark mobile phone is compared with another mobile phone, while A trade mark is telling about the success or characteristics of its own product, it should not tell that the products of its

[98] Regulation Article 8/1-g.

competitors are unqualified, their camera is very insufficient. What one should be careful about here is, when publisher praises himself/herself, he/she should not discredit the competitor and he/she should not damage the reputation of his/her competitor.

The relevant regulation is in parallel with the provision of TTK Article 55/1-a-1[99]. In aforesaid Article of TTK, while the provision of *"discrediting unnecessarily with offending declarations"* constitutes unfair trading, in the same direction, there is the particular of "*neither discredit nor disgrace*" in the Regulation. According to TTK, for the act to constitute unfair trading, there should be "*unnecessarily*" discrediting. In our opinion, the action of discrediting being unnecessary is a rule and no fault is searched for the action of discrediting. Besides, if it is thought that the action of discrediting also contains disgracing, actions found in the aforesaid Article of the Regulation constitute unfair trading. Accordingly, provision 8/1-c of Regulation covers provision 8/1-g of Regulation

While the provision 8/1-g of Regulation is as follows: *"It should neither discredit nor disgrace intellectual and industrial property rights, trade name, business name, other distinctive signs, goods, services, activities or other characteristics of competitors"*, together with the amendment made on 28/12/2018, as paragraph 8/1-a[100] was added to the Regulation, the following section was removed: "*intellectual and industrial property rights, trade name, business name, other distinctive signs"*.

2.5.9. If the Origin of Goods or Services is Mentioned in Comparison, Those Should be From the Same Geography

In comparative advertising, the origin of advertisement subject goods or services could be explained explicitly only if those are from the same geography[101]. In our opinion, the purpose of the publisher making mention of the origin of advertisement subject goods or services is to increase its sales by benefiting from the origin of advertisement subject product. Besides; as aspects like color, visuality, quality etc. are different, a proper comparison could not be made in the comparison of products from

[99] See TTK Article 55/1-a.
[100] See Regulation Article 8/1-a.
[101] Regulation Article 8/1-ğ is *"If the origin of any good or service is mentioned in a comparison, then, those goods or services should be from the same geography"*.

different origins and that position may result in the misguidance of the customer. For example, if the apricot is mentioned to have its origin from Malatya in the advertisement of X trade mark Malatya Apricot, the other compared apricot should also be Malatya Apricot. Because, an apricot from another geography can have different color, visuality and quality. Here, the publisher benefits from the geographical area rather than the product itself.

2.5.10. It should not Cause Any Confusion

While making comparative advertising, the publisher and advertisement subject goods or services of the competitor, trade name, business name, trade marks and other distinctive signs of parties should not cause any confusion before the average customer[102]. In the same direction, while making comparative advertising, there should not be any "*product name, brand, logo, trade name, business name or other distinctive aspects*". In section 4 of our thesis, this issue will be analyzed with details.

2.5.11. It should not be Against the Principles Determined by Board of Advertisement

The provision 8/1-ı of Regulation is as follows: *"It can be made provided that it is not against the principles determined by the Board of Advertisement* ". Accordingly, comparative advertising should be made by taking principles determined by the RK into consideration.

2.6. Positions Where Comparative Advertsing Could not be Made

In this direction, according to the provision 8/3 of Regulation *"In food advertising, issues included in the scope of health declaration according to the relevant legislation could not be the subject of comparison. Use of subjects within the scope of nutritional declaration as a comparing element in advertisements is made in accordance with the relevant legislation provisions. Advertising of food supplements should never be made."* According to the aforesaid provision, while comparison of subjects included in the scope of health declaration[103] is prohibited while making food advertising,

[102] See Regulation Article 8/1-h.
[103] See RG, 07.06.2013 N. 28670 Regulation on Health Declarations of Products Offered For Sale With Health Declaration Article 4/1-c and RG, 26.01.2017 N. 29960 Turkish Food Codex Regulation On Nutrition And Health Claims Article 4/2-ğ.

comparative advertising to be made related to the nutritional declaration, is made in line with the relevant legislation provisions[104]. Advertising of food supplements is mentioned as "*should never be made*". Besides that, it is remarked in the provision 8/4 of Regulation that: *"Related to price arrangements and effective market power liabilities, price comparison could not be made in advertisements related to sectors determined by administrative authorities"*.

2.7. Opinions Related to Comparative Advertising

Publisher makes mention of the fact that his/her own goods or services have a better qualification than the goods or services of the competitor, in comparative advertising. Although there are positive opinions defending positive aspects of comparative advertising for the promotion of goods or services, there are also opinions asserting the negative aspects of comparative advertising.

2.7.1. Positive Opinions

Information related to the trade marks and goods or services are given through the agency of comparative advertising. Besides, there arises the possibility of competition of trade marks, which are not known adequately in the market, and other known trade marks[105]. Besides, consumer's awareness is raised for the advertisement subject goods or services, with the comparative advertising. In other words, consumer has the chance to analyze and compare features of the advertisement subject goods or services which are superior than other goods or services of the same group[106]. Accordingly, with comparative advertising, the consumer will have the chance to buy goods or services of the same or similar or of a higher quality with more feasible prices. As it is more beneficial for consumers to compare goods or services in the market and to make healthy decisions, it also affects the competition in the market positively[107].

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[104] See RG, 26.01.2017, N.29960 Turkish Food Codex Regulation on Nutrition and Health Claims Article 12.
[105] Gamze Yılmaz, "Karşılaştırmalı Reklamların Tutum Üzerindeki Etkisi ve İkna Ediciliğinin Değerlendirilmesi", Eskişehir Anadolu Üniversitesi SBE, *Unpublished Master Thesis,* 2010, p.19.
[106] Soner Kenaroğlu, "Haksız Rekabet Hukukunda Karşılaştırmalı Reklâm", İstanbul Üniversitesi SBE, *Unpublished Master Thesis,* İstanbul, 2008, p.38; Erdoğan Moroğlu; *Karşılaştırmalı Reklâmlar ve Yargıtay Kararları, Makaleler I*, İstanbul, 2001, p. 194.
[107] Bozbel, p.36.

Comparative advertising is not only beneficial for the consumers, but also for the publishers (tradesmen). The publisher can promote the positive aspects of its own products to the consumers, through the agency of comparative advertising[108]. Thus, the publisher's trustability increase with a guarantee of his/her product's quality in the eyes of the consumer.

Comparative advertising both supports transparency in trade life and contributes to the free market economy[109]. A competition is formed in between competitor companies and options like campaign, discount, bonus is offered with affordable prices and conditions to the benefit of consumer. Thereby, national economy is affected positively from the perspective of countries adopting free market economy.

As is known, quality and guarantee functions of the trade mark before the consumer are one of the important reasons to prefer a trade mark. Formation of such kind of functions of any trade mark takes a long time. With comparative advertising, publisher's products are preferred and those can stay in the market with the comparison made in between the products of a trade mark which is in the market for years and another trade mark which has just entered into the market. In other saying, the trade mark entering the market newly is supported to have a place in the market with the comparison made in between the products offered by the publisher entering into the market newly and the trade mark which has been staying in the market for long years. In this case, while publisher is affected positively from the comparative advertising, other advertisement subject trade mark may be affected negatively.

Comparative advertising should be made by taking provisions of unfair trading into consideration. Comparative advertising should be made by the publishing tradesmen without making any criticism of competitor companies' goods or services illegally and without any abuse. Otherwise, unfair trading provisions will become an issue according to TTK.

[108] Göle, p.85.
[109] Burkhart Menke; "Die vergleichende Werbung in Deutschland nach Richtlinie 97/55EG und der Entscheidung "Testpreis-Angebot", WRP 1998, p. 811-817 cited by Aslan, p.54.

2.7.2. Negative Opinions

Although there are opinions stating that comparative advertising has so many positive aspects, there are also views mentioning its negative aspects. While making comparative advertising, it is mentioned that the objectiveness decreases as the publisher tells that its goods or services have more superior characteristics than the goods or services of the competitor[110]. In spite of that, it was decided with Article 8 of the Regulation that comparative advertising can be made in the direction of objective criteria. Accordingly, comparative advertising will be made in the direction of objective criteria found in regulations.

Comparative advertising can be misused. According **ÖRS**, comparative advertising is a type of fallacious advertisement and that comparative advertising results in the abuse of products of the competitor trade mark [111].

Making the products of a known trade mark or tradesman the subject of the comparison with comparative advertising has unfair benefits to the publisher and, moreover, it has the risk to damage the reputation of the known trade mark or tradesman[112].

In our opinion, incase comparative advertising is made, in the direction of criteria set forth in the legislation, objectively and in a way to be proven with scientific data, it will bring benefits to both the consumer and the publisher. In comparative advertising, making mention of the characteristics of the publisher's product which are better than the competitor's goods and not making any mention of its characteristics which are worse than the same of the competitor's product may misdirect the consumer. For example, in a comparison where X trade mark car consumes less fuel than Y trade mark car, if Y trade mark car is never mentioned as being more comfortable, secure than X trade mark car, as having a higher material quality than X trade mark car, than the consumer will prefer X trade mark car by only taking the less fuel consumption into consideration, without considering other characteristics of Y trade mark car and there may be a perception before the consumer

[110] Bozbel, p. 37.
[111] Fahri Halil Örs, *Türk Hususi Hukukunda Haksız Rekabet,* Ankara, 1958, p.38.
[112] Henning Piper and Ansgar Ohly, *Gesetz gegen den unlauteren Wettbewerb*, 4. Auflage, Beck, München, 2006, p.771 cited by Aslan, p.57-58.

like X trade mark car is better. This may misguide the consumer. Accordingly, while making the comparison, provisions 8/1-a and 8/1-b of the Regulation should be taken into consideration.

2.8. Types of Comparative Advertising

Comparative advertising occurs in various forms. In this part of the study, comparative advertising types which are direct comparison, indirect comparison, positive and negative comparison will be examined.

2.8.1. Direct Comparison

If *"an advertisement explicitly mentions the name of a competitor, the comparison is 'direct.'* "[113]. In other saying, names, trade marks and logos of the publisher and competitor are explicitly mentioned in direct comparative advertising[114]. The purpose of direct comparative advertising is to convince the consumer by showing the characteristics of the goods or services of the publisher which are more superior than the goods or services of the competitor.

Discounts and bonuses are made together with the competition in between competitor companies through the agency of direct comparative advertising. This has results which are in support of the consumer. Besides, direct comparative advertising is important for the clarification of the product which would be preferred by the consumer while trying to make a choice in between the products of two competitor companies. On the contrary, there are also disadvantages of direct comparative advertising. One of the greatest disadvantages of direct comparative advertising is explaining competitor's information and that could bring damage to its business reputation.

On the other hand, in English law, at first the direct comparative advertising was defined in a negative way and negative advertisements were thought to be

[113]Sak Onkvisit, Howard W. Combs and John J. Shaw, *Comparative Advertising*: *A Typology And Research Issues, Proceedings, Western Decision Sciences Institute's Annual Conference*, Las Vegas, 2002, p.141.
[114] Elisabetta Corvi and Michelle Bonera, *The Effectiveness of Comparative Advertising: A Literature Review In: Atti del convegno: 2nd International Scientific Conference, Marketing Theory Challengers in Transitional Societies,, Zagabria, Faculty of Economics and Business*, 26-27 September 2008, p. 5.

offending[115]. Comparative advertising was not directly adopted in earlier times in English law and, moreover, it was qualified as a infringement of the trade mark right. However, in time, this understanding was waived and making comparative advertising came to be easier[116].

In Turkish law, while making comparative advertising, according to RG, 14.8.2003, N.25138, Canceled Principles and Codes of Practice related to Commercial Advertisements and Announcements Article 11/a; *"the name of the compared good, service or brand should not be mentioned"*. Thus, it was not possible to make comparative advertising. In any case, with the amendment made in Regulation on 04/01/2017[117], direct comparative advertising could be made. On the contrary, there was another amendment in Regulation dating 28/12/2018[118] and direct comparative advertising was forbidden in our legislation.

2.8.2. Indirect Comparison

Name of the goods or services of the competitor is not mentioned explicitly in indirect comparative advertising which is another type of comparative advertising[119]. The publisher asserts that its own goods or services are mores superior than the goods or services of the competitor with respect to specific characteristics without mentioning trade mark name of the competitor's goods or services in indirect comparative advertising [120] . For example, Oral-B is "the trade mark more dentists use themselves"[121], or "While 10 units of other batteries we trusted, were not enough, only 1 Duracell was enough". Likewise, in so many Duracell advertisements, there is the slogan: *"it has 10 times longer life"*. In Turkish law, indirect comparative advertising is permitted, direct comparative advertising is prohibited.

[115] Beller**,** p.928.
[116] For more information see Beller p.928-929.
[117] See Regulation Article 8/2.
[118] With the RG, 28/12/2018 N.30639, Article 8/1 added to Regulation.
[119] Anabel Idrac; La Publicité Comparative en Europe, Paris, 2000; p.17 cited by Ürey, p. 29.
[120] Patrick De Pelsmacker, Maggie Geuens and Joeri Van Den Bergh, "Marketing Communications a European Perspective, Edinburgh", 2010, p. 231; Sak Onkvisit, Howard W. Combs and John J. Shaw, p.141; Idrac, p.18 cited by İbrahim Aydın, "Pazarlama Perspektifinden Karşılaştırmalı Reklamlar"**,** *MAÜSBD,* Vol:5, No:3, 2017, p.902.
[121] Onkvisit, Combs and Shaw, p.141.

2.8.3. Positive Comparison

In advertisements where there is positive comparison, positive characteristics of advertisement subject products and competitor's products are mentioned. Positive comparison is generally used by the trade marks which has entered into the market newly[122]. In positive comparative advertisements, it is fundamentally mentioned that some characteristics of the goods or services is better than the same of its competitor. Here, one benefits from the famousness of the competitor in the market[123]. For that reason, comparison made in positive comparative advertising may result in unfair competition.

2.8.4. Negative Comparison

In negative comparative advertising, negative or missing aspects of the goods or services of the competitor are mentioned, and the comparison is made in that way[124]. As negative attitudes are adopted related to the competitor in negative comparative advertising, if goods or services of the competitor are discredited and if the reputation of the competitor is damaged, this may constitute unfair competition[125].

[122] Onkvisit, Combs and Shaw, p.141.
[123] Onkvisit, Combs and Shaw, p.141.
[124] Franck Cochoy and Roland Canu, **"**La Publicité Comparative, ou comment se faire justice a soi-même en passant par le droit", p.9 cited by İrfan Dönmez, "Markalar ve Haksız Rekabet Davaları", İstanbul, 1992, p. 211.
[125] Bozbel, p. 236.

CHAPTER 3: COMPARATIVE ADVERTISING WITH REGARD TO UNFAIR COMPETITION LAW

3.1. In General

One of the main purposes of comparative advertising is to show consumers that goods or services offered by the publisher is equivalent to goods or services of the competitor or better than goods or services of the competitor. Thus, the purpose of comparative advertising is to make consumer purchase the goods or services offered to him/her. Comparative advertising should not be in contradiction with the law and should not constitute unfair competition. As comparison with goods or services of the competitor is made in comparative advertising, it can be said that those kinds of advertisements are of the quality to result in unfair competition compared to the other types of advertisement. For that reason, the publisher should take the aforementioned facts into consideration. Otherwise, it is clear that one can't talk about an environment of honest and fair competition.

In this section of our study, we will discuss the concept of unfair competition, types of unfair competition, in which conditions the comparative advertising would constitute unfair competition and which kinds of law cases could be brought against advertisements which constitute unfair competition.

3.2. Concept of Unfair Competition in Turkish Law and Unfair Competition Types in Comparative Advertising

3.2.1. Concept of Competition and Unfair Competition

The concept of competition is, with its word meaning, defined as "*conflict, competition, race in between people pursuing the same goal*"[126]. The concept of competition is define in various forms in the doctrine and according to **KARAYALÇIN**, competition is "*to advance in every step of life, sports, politics, science, professional occupations such as attorney ship, medicine and, finally, in*

[126] http://www.tdk.gov.tr/index.php?option=com_gts&arama=gts&guid=TDK.GTS.5c654d042b5416.07415021 (14/02/2018).

trade; competition made with people working in the same field"[127], and according to **MİMAROĞLU,** competition is *"the effort made for beating competitor in political, scientific and economic areas"*[128]. In the light of the aforesaid definitions, there should be a conflict in between enterprises found in the market of same goods or services in order to make mention of any competition.

The competition is defined in the legislation as follows: "*Competition in between the enterprises in product and service markets enabling to make economic decisions freely"*[129].

The presence of competition in markets has also been adopted by economists. Classical economists defended that free competition environment should be established to prosper people and all commercial boundaries should be removed for the free competition[130].

In markets where competition is dominant, as goods or services to be requested by the consumers are sold by more than one enterprise, it is mentioned that there are so many preferences offered to the consumer. In this case, the consumer has the chance to purchase the same goods or services in exchange for a cheaper price. Besides, decision of consumers is more effective than the decision of manufacturers in all economic systems[131]. In other words, requests and wishes of consumers are more important than the same of manufacturers for the sale of goods or services.

Execution of competition in a way compatible with law, increase in the business volume of companies and benefits of consumers from the market where there is competition, are supported[132]. In addition, although competition brings results in favor of the consumer, unless there are fair, honest and equitable attitudes in between competitor companies, one would go beyond the purpose of the competition in an unfair way and so that means there is *an unfair competition*[133]. In other words, taking

[127] N. Füsun Nomer Ertan, *Haksız Rekabet Hukuku,* İstanbul, 2016, p.79; Yaşar Karayalçın, *Ticaret Hukuku, I Giriş, Ticari İşletme,* Ankara,1968, p.440.
[128] Ertan (2016), p.79; Sait Kemal Mimaroğlu, *Ticaret Hukuku, İşletme Hukuku*, Ankara, 1978, p.375.
[129] See RKHK Article 3.
[130] Ludwig von Mises, *Human Action: A Treatise on Economics*; Alabama: Institute Auburn,1998, p.274.
[131] Mises, p.270.
[132] Ömer Teoman, *Yaşayan Ticaret Hukuku, Cilt I: Hukuki Mütalaalar, Kitap 10: 2000–2002*, İstanbul, 2003, p.12.
[133] Bozbel, p.51.

actions which are against the law, in order to attract the customers of competitor companies in a way which is not in compliance with the principles of behaving with good faith and honesty, would constitute unfair competition[134]. In this case, some sort of regulations should be made by the law in order to have an honest and fair environment for the competition.

3.2.2. Legal Regulations of Our Law in respect of The Unfair Competition

In free market economies, although free competition has been adopted, actions limiting or removing the competition should be legally forbidden in order to form a fair and honest market. In this respect, various kinds of regulations have been made. When regulations of our law are observed, it is found that the original regulations are made in TBK and TTK. Besides, regulations are made for the processing of unfair competition against consumers with Article 62 of the TKHK.

3.2.3. Unfair Competition in Ordinary Business

3.2.3.1. Regulations Found in Turkish Code of Obligations

Provisions of unfair competition is arranged in Article 57 of TBK as follows: *"A person whose customers are decreasing or started to carry a risk to be lost as a result of making unreal news or making such kind of announcements or behaving in a way not in compliance with honesty rules, could ask for putting an end to such kind of behaviors and compensation of his/her damages, if there is any fault.*

Provisions of the Commercial Code shall prevail in case of any unfair competition of commercial affair.".

When the provision of the aforesaid article is analyzed, in case of unfair competition in commercial affair, the provisions of the TTK will be applied. In other words, there is a bilateral arrangement in our law for the unfair competition[135] and unfair competition provisions of TBK cover particulars related to the *affairs which is not commercial*[136]. On the other hand, constituting unfair competition in TBK are propagating unreal news or making such kind of announcements or behaving in a way

[134] *T.C. Başbakanlık Türk Hukuk Lügati,* Ankara: Türk Hukuk Kurumu, 1991, p.101.
[135] Rıza Ayhan, Mehmet Özdamar and Hayrettin Çağlar, *Ticari İşletme Hukuku,* Ankara, 2016, p.390.
[136] Hüseyin Ülgen, Mehmet Helvacı, Abuzer Kendigelen, Arslan Kaya, N. Füsun Nomer Ertan**,** *Ticari İşletme Hukuku,* İstanbul, 2015, p.521.

which is against the rules of honesty. Making unreal news is to make declarations about the financial or personal position of himself/herself or any other third party which do not have any relation with the reality or to propagate those news[137]. Giving unreal information to the public in respect of the quality and content of the goods sold by any business or financial status of the said business may be an example for this situation.

Behaving against the rules of good faith and decreasing customers of any person with behaviors against the honesty would also constitute unfair competition according to TBK [138]. In order for the unfair competition to be formed in ordinary business mentioned in TBK; there should be behaviors against the rules of honesty and accordingly a decrease in the customer mass or risk of a decrease in the customer mass and a casual relation in between those[139].

According to some authors of the doctrine; as there has arisen the problem of the distinction in between and qualification of the unfair competition related to non-commercial affair in TBK and the unfair competition related to commercial affair in Commercial Code, although the provision of Article 57 of TBK prevails, it was still mentioned that provisions of Commercial Code would prevail even for the non-commercial affair[140].

In the following decision of Yargıtay "*provisions of Commercial Code shall prevail for the unfair competition in between tradesmen, Article 48 (Turkish Law of Obligations Article 57) of Code of Obligations shall prevail for the unfair competition in between people who are not tradesmen (like two hair dressers)"*[141], in opposition to the authors of the doctrine, it is mentioned that there should be a distinction in between unfair competition in commercial affair and unfair competition in noncommercial affair.

[137] Ülgen and Others, p.521.
[138] Fatih Bilgili and Ertan Demirkapı, *Ticari İşletme Hukuku*, İstanbul, 2016, p.229-230; Ülgen and Others p.521.
[139] Tamer İnal, *Ticari İşletme Hukuku, Uluslararası Ticari Sözleşmeler*, Ankara: Incoterms, 2015, p.528-529; Ali Naim İnan, *Borçlar Hukuku Genel Hükümler,* Ankara, 1984, p.333-334.
[140] Bilgili and Demirkapı, p.229-230; Ülgen and Others, p.524-525; Ayhan, Özdamar and Çağlar, p.390-391.
[141] Yargıtay 11 HD, T.15/5/1989 E.1989/2889, K.1989/2929. www.lexpera.com.tr (25/03/2018)

3.2.3.2. Regulations found in Law on the Protection of the Consumer

There are also consumers in between stakeholders who should be protected against unfair competition. Likewise, for the practice of provisions related to any behavior or action against consumers, Article 62 of the TKHK should also be taken into consideration in addition to TTK. In Article 62 of the TKHK, it was ensured that *unfair commercial practices* were forbidden. Aforesaid provision of the Article expresses that especially fallacious or offensive practices and practices attached to the regulations were unfair commercial practices and that incase unfair commercial practices are made by means of advertisements, provisions of the Article 61 of TKHK with the heading *"Commercial Advertisements"* shall prevail. Besides, in the last paragraph of the Article, it was ensured that procedures and principles related to the detection and inspection of commercial practices would be determined with regulation[142]. In the aforementioned regulations, exemplary practices assumed as unfair commercial practice were shown in Annex[143] under two basic headings as *fallacious commercial practice and offensive commercial practice*.

Penalties related to unfair commercial practices made for the consumers are ensured in 13th paragraph[144] of Article 77 of TKHK. When the aforesaid provision of the paragraph is analyzed, penalties such as administrative fine, suspension of unfair commercial practice up to 3 months were set forth and it was mentioned that incase of any opposition through the agency of advertisements, provisions of 12th paragraph[145] shall prevail.

According to the doctrine, applying to TKHK for unfair commercial practices is not appropriate[146]. Likewise, consumers may think that arrangement of behaviors and practices constituting unfair competition subject to TKHK instead of TTK.

[142] See Regulation.
[143] 19 deceptive commercial applications and 5 offensive commercial applications is in the appendix of Regulation.
[144] See TKHK Article 77/13.
[145] See TKHK Article 77/12.
[146] Ertan (2016), p.35.

3.2.4. The Relation Between Unfair Competition in Commercial Affair and Comparative Advertising

One of the elements of advertising is that it is intended for commercial purpose, it is also taken into consideration that comparative advertising, which is one of the types of advertising, is intended for commercial purposes. Thus, unfair competition provisions in commercial affair should apply relating to such advertising.

In Turkish law, although there are regulations made for the comparative advertising[147], there may arise unfair competition by means of making a direct attack to the goods or services of the competitor as per the structure of comparative advertisements. This situation should not be interpreted as "all comparative advertisements constitute unfair competition"[148].

3.2.4.1. Regulations found in Turkish Commercial Code and Conditions of Unfair Competition

Unfair competition is the abuse of competition with behaviors against the rules of honesty, by disregarding the rules of good faith. Provisions related to unfair competition are arranged between Article 54 and Article 63 in TTK. In this section of our thesis, purpose of provisions made related to unfair competition found in Article 54/1 of TTK, fundamental principles related to the unfair competition found in Article 54/2 and primary unfair competition conditions found in Article 55 will be explained.

3.2.4.2. Relation of Comparative Advertising with Unfair Competition in terms of Article 54 of Turkish Commercial Code

Article 54/1 of TTK is as follows: "*purpose of the provisions of this Section related to unfair competition is to enable honest and untainted competition for the benefit of all participants"*. When the provision of the aforementioned Article is analyzed, it is aimed to establish an honest and untainted competition environment[149].

Following provision of Article 54/2 of TTK defined, in general, the matters constituting unfair competition: *"Behaviors and commercial practices which are*

[147] See Regulation.
[148] Doğanay, p.394.
[149] Ayhan, Özdamar and Çağlar, p.396; In accordance with that see Yargıtay 11 HD, T.21/2/2010, E.2008/9072, K.2010/591 www.lexpera.com.tr (25/03/2018).

fallacious, and which are against honesty rules, affecting relations in between the competitors or in between the suppliers and the customers, are unfair and illegal." When the aforesaid provision of the Article is analyzed, unfair competition could be discussed in case of the presence of a practice with commercial quality, if this practice made in the form of fallacious behaviors or behaviors against the good faith and if that has effect on the relation in between competitor and in between the suppliers and customers. Besides provision of Article 54/2 of TTK generally discusses the conditions of unfair competition and did not seek for "*the presence of competition in between parties", "the maker to be faulty", "the maker to have a benefit"* or *"the person being exposed to unfair competition to be damaged"*[150].

One of the basic criteria for making comparative advertising is not being fallacious and misleading [151] . Incase particulars found in comparative advertising give misleading information because of objective assessment and if this fact is proven, then one can talk about misleading comparative advertising. Comparative advertising made in this direction constitutes unfair competition within the scope of Article 54 of TTK. For example, if it is understood that a mobile phone trade mark asserting that it has a better camera than other mobile phones and that the camera is 20 megapixels, has a camera with 10 megapixels as a result of the tests made, then one can talk about fallacious comparative advertising and this situation constitutes unfair competition.

Additionally, in our opinion, it is mentioned in Article 8/1-b of Regulation that the advertisement should not be fallacious and misleading and in Article 8/1-c that it should not constitute unfair competition. Thus, as fallacious and misleading comparative advertisements constitute unfair competition in terms of TTK, these facts should regulate under one clause.

3.2.4.3. Relation of Comparative Advertising with Unfair Competition in terms of Article 55 of Turkish Commercial Code

A general explanation is made in Article 54 of TTK in respect of the unfair competition and the main circumstances of unfair competition are mentioned in Article 55 of the same Code, with the heading "*Behaviors against the good faith,*

[150] Ayhan, Özdamar and Çağlar, p.396 q.v.**;** In accordance with that see Ülgen and Others, p.531.
[151] See Regulation Article 8/1-b.

commercial practices". In this respect, circumstances of unfair competition given under Article 55 are not *numerus clausus*, it is thought that actions to be assumed as unfair competition are present within the frame of Article 54.

3.2.4.3.1. Commercial Practices Against the Good Faith

Article 55/1-a of TTK assumes *"Advertisements and sales methods against good faith and other behaviors against the law"* as circumstances of unfair competition and then it is stated twelve constituting examples to these behaviors, conclusively.

3.2.4.3.1.1. Abuse

"Abuse of others or their products, work products, their prices, activities and their commercial affair with offending declarations in a wrong, fallacious or unnecessary way"[152] constitutes unfair competition. It is understood from the provision of the aforementioned Article that abuses made in respect of the private life or in conditions which are not related to their commercial affair would not constitute unfair competition. According to Article 55 of TTK, one should make offending declarations in respect of commodities, work products, prices and activities of any third party in a wrong, fallacious and unnecessary way, in order for any abusing action to be assumed as unfair competition. The important thing in unfair competition made by way of abusing is making abuse in an unnecessary way[153].

In the unfair competition made by means of abusing, the injured party does not suffer any loss directly, third parties are directed to think negatively by giving unreal and fallacious information to third parties related to the injured party and the injured party suffers losses indirectly in this way[154].

On the other hand, if the abuse made with offending behaviors contains any attack against the honor, reputation or respectability of any person, then there will also be infringement of libel in accordance with Article 125 of RG 12/10/2004 N. 25611, Turkish Criminal Code No: 5237. In that case, a legal process would be brought against the person taking the said action in accordance with both Article 55 of TTK, and Article 125 of TCK. For example, asserting that any car company sells used or

[152] TTK Article 55/1-a-1.
[153] Tamer İnal, p.534-535.
[154] Karayalçın, p.457.

repaired parts as if those are unused, would be asserting an unfair claim, and accordingly, abusing. Yargıtay, *"...as in the concrete case, the defendant unnecessarily used declarations abusing the plaintiff and his/her products in places where people related to the subject can reach and as the defendant could not prove the said assertion he/she attributed to the claimant"*[155], it mentioned that the action of defendant constitutes unfair competition and that making abuse in an unnecessary way would be assumed as unfair competition.

Fundamentally, in practice, unfair competition in the quality of abusing is generally made through the agency of media, and it is observed that, with the developments in technology, the unfair competition could also be made with tools such as internet, e-mail[156].

If the advertiser makes with offending declarations in a wrong, fallacious or unnecessary way to the competitor or to the competitor's goods or services through comparative advertisements, there is referred to unfair competition through abuse. For example, if the advertiser declares that the products of the competitor's are his/her own patented invention, and that he/she waived his/her patent right on the said invention as the conditions were ineligible, there are unreal declarations, that means there is fallacious advertising and as there is abuse of competitor's products needlessly, that means there is abuse according to Article 55/1-a-1 of TTK [157].

In our opinion, this is more common in direct comparative advertising. Since, parties trade mark, logo, commercial name etc. is explained in direct comparative advertising. For example, when trade mark X tells that its products are better than the products of trade mark Y, as the target trade mark is Y, there occurs a situation suitable for abuse. On the other hand, if trade mark X tells that its products are better than the products of an ordinary trade mark, unfair competition conditions can not be occured through abusing as information about the opponent is not given. Besides, if trade mark X promotes its trade mark with a slogan like *"forget about all other trade*

[155] Yargıtay 11 HD, T.04.04.2011, E.2009/11362, K.2011/3864 https://www.lexpera.com.tr (01/04/2019) and Yargıtay 11 HD, T. 13/11/2014, E. 2013/16673, K. 2014/17538 https://www.lexpera.com.tr (01/04/2019).
[156] Ülgen and Others, p.539.
[157] Ömer Camcı, *Haksız Rekabet Davaları,* Vol.2, İstanbul, 2002, p.80 cited by Kenaroğlu, p.96.

marks, the best one is my goods or services", this may be an issue of unfair competition as there occurs abuse of the other trademarks.

3.2.4.3.1.2. Making Unreal or Fallacious Declarations or Making any Third Party Leader in the Competition in Same Ways

According to Article 55/1-a-2 of TTK *"Making unreal or fallacious declarations about himself/herself, his/her commercial affair, business signs, products, work products, activities, stocks, form of sales campaigns and business relations or making any third party the leader of the competition in the same way"* are assumed as circumstances of unfair competition. According to the aforementioned Article, there should be a declaration, and the content of the said declaration should be unreal, fallacious and it should be related to *himself/herself, his/her commercial affair, business signs, products, work products, activities, stocks, form of sales campaigns and business relations* and by that means *he/she should make himself/herself or any other third party the leader of the competition*; in order to talk about any unfair competition. Particulars found in the relevant Article were shown as examples and except those examples, advertisement slogans, internet domain names are also included in the scope of Article 55/1-a-2 of TTK [158]. Besides; anybody making comparison in between the history of his/her competitor or his/her products put in the market, and his/her own products and making mention of the fact that those are unsuccessful without depending on any objective data, would also constitute unfair competition [159].

For example, although any person does not have Turkish Standards Institutes certificate, if he/she presents his/her products like they have the said certificate, or any merchant using the expression "*branches*", although he/she does not have any, or he/she presents his/her enterprise older than it is, these would constitute unfair competition[160]. Additionally, if any high school whose 40% share is owned by a bank, shows itself as it is wholly owned by that bank in order to present itself

[158] Ülgen and Others, p.540.
[159] Tamer İnal, p.537; Mimaroğlu, p.396.
[160] Ertan (2016), p.152; Ülgen and Others, p.541.

financially strong[161], or although it is told in the advertisement that glasses are isinglass, it is understood that those are not isinglass[162] would constitute unfair competition.

Making unreal or fallacious declarations related to himself/herself or making any third party leader in the competition in same ways which is the kind of unfair competition can be used by comparative advertising. In practice, generally, making unreal or fallacious declarations generally comes to the fore with the promotion of any goods or services, in other words, in the advertisement sector. These kinds of declarations affect the decision of the consumer to purchase the product[163]. Since, the publisher making unreal or fallacious declarations related to himself/herself, matters such as his/her activities, prices, at the same time, aims to gain benefit for himself/herself by making comparison with his/her average competitors in the market. For example, making oneself advantageous by asserting that they produce apricot juice by using natural Malatya apricots, although they don't use the same, or asserting that the eggs sold are produced by cage-free chicken, however, indeed backyard chicken eggs selling would constitute unfair competition in this regard. Likewise, Yargıtay stated, in one of its decision that the accuracy of the slogan of the fuel oil company which uses additive agents should be proven, otherwise that this could constitute unfair competition[164]. Another decision of Yargıtay is as follows: *"The heading of the newspaper "Sabah" as "Best Selling Newspaper of Turkey" and number "1 with evil eye talisman" at the same place do not reflect the truth and thus the defendant made unfair competition by showing herself more superior in comparison with the plaintiff competitor newspaper by giving wrong and fallacious information, as mentioned in Article 57/3 of* TTK.*."*[165], thus it mentions that, in the concrete case, defendant had shown herself more superior than the plaintiff company, with unreal information and that the said action would constitute unfair competition.

Besides that, for example, if a detergent company asserts that it cleans better than all other detergent trade marks although it uses less detergent and if it can't prove this

[161] Yargıtay TD. T.24/6/1970, E. 1537-K. 5541 citedİsmail Doğanay**,** *Türk Ticaret Kanunu Şerhi,* Ankara, 1992, p. 323 cited by Berkant Şengel, "Reklamlarda Haksız Rekabet", *YD,* Vol.26, Issue.3, 2000. p.463.
[162] Yargıtay TD, T.10/05/1968, E.1966/4040, K.1968/2779 cited by Şengel, p.323.
[163] For further information see the preamble of TTK Article 55/1-a-2.
[164] Yargıtay 11 HD, T.14/03/2002, E.2001/10574, K.2002/2316 www.lexpera.com.tr (03/04/2019).
[165] Yargıtay 11 HD, T.20/2/1998, E.1997/9233, K. 1998/1026 www.kazanci.com (03/04/2019).

and if it abuses the other trade marks needlessly by telling that those are not qualified, this could constitute unfair competition within the scope of both Article 55/1-a-2 of TTK and Article 55/1-a-2 of TTK. In other words, it is possible both to give fallacious information related to himself/herself by making unreal and fallacious declarations and to abuse the competitor needlessly.

3.2.4.3.1.3. Showing Oneself Highly Gifted

"Behaving in a way like he/she has any degree, diploma or award, although he/she has not got any in the real life and trying to make people think like he/she has an exceptional talent or using wrong profession names and symbols which are suitable for that"[166] would constitute unfair competition. According to the aforementioned Article, people behaving in a way like they have any degree, diploma or award, although they do not have any in the real life and people using wrong profession names and symbols try to make third parties think of themselves as they have those properties which, in real life, they don't. This matter forms action of unfair competition by showing himself/herself highly gifted. For example, any lawyer not having any title like (Dr.), (Prof. Dr.), introducing himself to third parties as if he/she has those titles[167], anybody introducing herself as "*Tailor with a diploma from Paris*" although she does not have any[168], anybody who does not have any advocacy certificate introducing himself as a lawyer or any practicing physician introducing himself as a specialist physician would constitute unfair competition according to Article 55/1-a-3 of TTK. Fundamentally; any person trying to show himself like he has a diploma, award etc. in order to show himself to people as highly gifted would constitute unfair competition[169]. Yargıtay made a prejudication in respect of the said matter as follows: "*any person using the sign of Turkish Standards Institute, although he/she does not have any right to do so, would constitute unfair competition"*[170].

In practice, this issue is not frequently faced in comparative advertising, however if conditions are met, it can constitute unfair competition. For example, although hospital X tells that it has more specialist and professor physician staff compared to other hospitals, if the names mentioned in the staff list do not carry the mentioned

[166] TTK Article 55/1-a-3.
[167] Ülgen and Others, p.542.
[168] Ayhan, Özdamar and Çağlar, p.405.
[169] Ahmet Tamer**,** *Yanlış veya Yanıltıcı Beyan ve Hareketlerle Haksız Rekabet*, Ankara, 2011, p.161.
[170] Yargıtay 11 HD, T.27/12/1982, E.1982/5594, K.1982/5674 www.lexpera.com.tr (05/04/2019).

titles, this will constitute unfair competition both in terms of Article 55/1-a-2 of TTK and Article 55/1-a-3 of TTK.

3.2.4.3.1.4. Triggering Confusion

"Taking measures in such a way that would cause confusion with other's products, work products, activities or business"[171] constitutes unfair competition. Anybody using the same trade marks, products, work products or commercial name of any other third party or using any similar thing of third party in his/her own business, releasing goods or services to the market which would cause confusion with goods or services of any third party would constitute unfair competition. In order to determine the presence of unfair competition which would trigger confusion, it is enough if there is any probability of that to be confused in the eyes of average consumer class[172]. Besides, in order to talk about any confusion, there should not be competition in between the parties or parties should not deal with the same kind of commodities. Likewise, there is confusion in between *"Reşadiye Erciyaş Woven Yarn Factory"* and *"Kayseri Erciyaş Stout Leather Factory"* although those address to different goods or services[173].

According to an opinion, intellectual property rights registered officially in their special registry could be protected with provisions of unfair competition cumulatively, apart from special arrangements[174]. Besides, circumstances of unfair competition triggering confusion, also forms a subject for infringement of trade mark rights in accordance with SMK at the same time, in case of presence of conditions.

Resulting in confusion includes also deception, causing misperception and persuasion.[175]. For that reason, matters misleading, persuading the average consumer or making them misunderstood could not be a subject for comparative advertising. Yargıtay decided in one of its decision that advertisements used by the defendant

[171] TTK Article 55/1-a-4.
[172] Yargıtay 11 HD, T.2/11/1999, E.1999/4005, K.1999/8651 www.kazanci.com (06/04/2019); In accordance with that see Ayhan, Özdamar and Çağlar, p.405.
[173] Yargıtay TD, T.16/02/1948, E.48/800, K.47/800-782 cited by Hasan Halis Sungur and Kamil Boran, *Türk Ticaret Kanunu Şerhi*, İstanbul, 1957, p.525.
[174] Ülgen and Others, p.543-544.
[175] For further information see the preamble of TTK Article 55/1-a-4.

could establish relation with the plaintiff company, and that this would constitute unfair competition[176].

In our opinion, there should be the probability of having a confusion in between the publisher and competitor trade marks for their trade names and suchlike subjects, in order for the unfair competition to be formed through the agency of confusion in comparative advertising. Because, one of the main criteria of comparative advertising is comparing goods or services which are directed to same purposes. For that reason, matters causing confusion with others' goods or services in comparative advertising constitute exception.

3.2.4.3.1.5. Making Comparison

Article 55/1-a-5 of TTK regulates the activity of unfair competition through the agency of comparative advertising. When the aforementioned provision is analyzed; unfair competition occurs through the agency of comparative advertising, incase:

i) Any person makes himself/herself, his/her products, work products, activities, their prices the leader,

ii) Any person makes himself/herself leader in a way to benefit from the popularity of his/her competitor in an unreal, fallacious way and in a way to abuse his/her competitor needlessly,

iii) Any person makes comparison with others, their products, work products or prices or makes the third-party leader in similar ways.

Fundamentally, any person, in the direction of objective data and criteria, comparing himself/herself, his/her products, work products, activities, prices with others, their products, work products or prices or making any other third-party leader in similar ways would not be against the law and would not constitute unfair competition alone. When the provision of the Article related to the comparative advertising is analyzed, unreal, wrong, exploitative comparative advertisements constitute unfair competition. In other words, because of the analysis where there are unreal declarations, and which has been made in the light of objective data, wrong comparative advertisements where

[176] Yargıtay HGK, T.20/4/1994,E.1993/11-965, K.1994/252 www.kazanci.com (10/04/2019).

these issues can be proven, fallacious advertisements which divert the perception of the consumer falsely and comparative advertisements benefiting from the popularity of the competitor needlessly constitute unfair competition[177].

Comparative advertisements are made by comparing the products of the publisher and his/her competitor. Comparative advertisements are not against the law in principle and rather comparative advertising which is fallacious and misleading, or which constitute unfair competition, which are distant from being objective are against the law. Comparative advertisements should be made by taking Article 55 of the TTK and Article 8 of the Regulation into consideration. In other words, comparative advertising made by being in incompliance with the relevant Articles of the law and regulations and by making harmful explanations for competitors needlessly, is against the law and at the same time, those constitute unfair competition. In comparative advertising, generally, advertisement subject goods or services, work products, activities or prices of goods or services are compared[178].

For example, if a refrigerator trade mark mentions in its advertisements that it has double-directional door tool and if it does not make any mention of energy class, inner volume, and if it hides important information and thus diverts the perception of consumers to the door handle. If it mentions that although its product has the same motor volume, it consumes less energy than the other trade marks, as all of these do not reflect the truth, if a new mobile phone is compared with other trade mark whose purchasing value is high and thus which tries to benefit from its popularity, all of these will constitute unfair competition.

In comparative advertising which constitutes unfair competition, the damaged party may bring legal action before courts for the detection, prevention of unfair competition, its reinstatement and indemnity. Besides, in case of the presence of unfair competition conditions, at the same time, this could be a subject for the administrative fines by the RK[179]. Once case of RK, inflicted administrative penalty and detain penalty to the company who could not prove that it was making faster deliveries than the other companies, although it had asserted that it would be doing

[177] For further information see the preamble of TTK Article 55/1-a-1-4.
[178] For further information see the preamble of TTK Article 55/1-a-1-4.
[179] See RG, 03/07/2014 N.29049 Advertising Board Regulation.

so[180]. Yargıtay decided that in one case comparative advertising could be made if there is no abusing expression, if the publisher only makes comparative advertising to separate himself/herself and if it is not against Articles 54 and 55 of TTK [181].

Fundamentally, conditions of unfair competition mentioned in Article 55 of TTK are not conclusive. Besides, there is unfair competition if comparative advertising is made by abusing, making unreal explanations, and thus, by making oneself leader of the competition, by showing oneself as highly gifted, by making sales below supplying prices, by causing confusion, by misguiding the customer regarding the price through additional deeds, by using aggressive sales methods and by misguiding customer through hiding, by not mentioning the trade name or price of the product explicitly, by making missing explanations or by using contract formulas including missing or wrong information.

3.2.4.3.1.6. Making Sales with Prices Below Supply Price

As a principle, everybody can sell every kind of product from any price in free market economy. In markets where free market economy is dominant, although there is freedom of pricing, it is observed that some products are sold, in practice, with prices under their supply price[182]. This matter makes consumers think that the products of the said store are cheaper. Accordingly, Article 55/1-a-6 of TTK appears as a new arrangement which is not found in TTK. Together with the provision of the aforesaid law *"putting some selected products, work products or activities on the market with prices below the supply price for more than once, mentioning those presentations in advertisements especially and misguiding its customers related to the talent of himself/herself or his/her competitors in such a way"* are assumed as unfair competition and *"incase the sales price is below the supply price implemented for the purchase of same kinds of products, work products or activities in similar amounts"* the presence of misguiding is accepted as presumption [183]. Some stores make advertisements only by decreasing the price of specific products. At the same time, customers are directed to other expensive products by reason of the fact that store

[180] 11.01.2005 dated 112 numbered Board of advertisement case 2004/150.
[181] Yargıtay 11 HD, T.20.1.2016, E.2015/6501, K.2016/555 www.kexpera.com.tr (12/04/2019).
[182] Ülgen and Others, p.549.
[183] Ayhan, Özdamar and Çağlar, p.407.

stocks are very few or that they have no stock for the said product[184]. Thus, stores sell products to the customers with normal prices with the view that those are cheaper. Accordingly, preventing customers from being deceived by the sellers is aimed with this arrangement brought with TTK.

Making sales with prices below supply price which is a kind of unfair competition action can be done through comparative advertising. For example, if a company states through comparative advertisements that it is selling the goods or services cheaply (below the price it supplies) from other companies, this constitutes unfair competition.

3.2.4.3.1.7. Misguiding Customers in Respect of Real Value of the Offer with Additional Actions

"Misguiding the customer in respect of the real value of the offer, with additional actions"" appears as a new circumstance of unfair competition with Article 55/1-a-7 of TTK. Principally, offer of some specific products as promotion by sellers or giving the same as a gift would not constitute unfair competition[185]. Promising advantages like gifts, premiums to the customer and directing the customer to buy the product without making them think of the quality of the product, constitute unfair competition[186]. For example, customers are directed to purchase specific products with slogans like *"we give coffee cup as a gift to anybody purchasing coffee machine"*[187]. The main purpose of the Article is to prevent the misguidance of the customer related to the real value of the offer[188].

This kind of unfair competition action can also be done through comparative advertising. For example, if a mobile phone company to present a smartwatch in comparative advertisements and that mobile phone is not attractive as the price and feature of the mobile phone from the competitor's mobile phone, unfair competition occurs.

[184] Ülgen and Others, p.550.
[185] Ülgen and Others, p.550.
[186] Ayhan, Özdamar and Çağlar, p.407.
[187] Ülgen and Others, p.550.
[188] See TTK preamble of Article /1-a-7.

3.2.4.3.1.8. Using Aggressive Sales Methods

Affecting decisions of customers by means of using aggressive sales methods is assumed as a circumstance of unfair competition. Customers feel themselves to be obliged to purchase the products in the use of aggressive sales methods. Sellers generally show courtesy to customers and benefit from the appreciativeness of customers and customers feel themselves to be obliged to purchase the sales subject product. Circumstances of aggressive sales methods are also mentioned in Article 8 of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005[189].

There is no arrangement in law in respect of in which methods and conditions any sales would be assumed as an aggressive sale. It is mentioned in the doctrine that every sales method has the purpose of diverting customers to themselves, that it is not enough for a sales method to be "aggressive" alone to constitute an unfair competition, that "aggression" should be serious in the said sales method and that free will of customers should be under "a serious aggression[190].

For example; telling that there could be health problems in case the offered product is not purchased are unfair competition by means of using aggressive sales method. Additionally, if a contract is made by using aggressive sales methods, the said contract could be cancelled in accordance with Article 39 of TBK as conditions of fault, cheat and frightening, found in Article 30 of TBK, have been satisfied.

Aggressive sales method can be subject of comparative advertising. For example, advertiser mentioning that the offer made to the customer would be valid only at evening in the comparative advertising, unfair competition conditions are mentioned.

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[189] 2005/29/EC Directive of the European Parliament and of the Council of 11 May 2005 Article 8 *"This Directive directly protects consumer economic interests from unfair business-to-consumer commercial practices. Thereby, it also indirectly protects legitimate businesses from their competitors who do not play by the rules in this Directive and thus guarantees fair competition in fields coordinated by it. It is understood that there are other commercial practices which, although not harming specific Community law provisions regulating specific aspects of unfair commercial practices, such as information requirements and rules on the way the information is presented to the consumer. It provides protection for consumers where there is no specific sectoral legislation at Community level and prohibits traders from creating a false impression of the nature of products. This is particularly important for complex products with high levels of risk to consumers, such as certain financial services products. This Directive consequently complements the Community acquis, which is applicable to commercial practices harming consumers' economic interests.".*

[190] Ülgen and Others, p.552.

3.2.4.3.1.9. Misguiding Customer by Means of Hiding and not Making Mention of Commercial Name or Product Price Explicitly

Article 55/1-a-9 of TTK regulates misguidance of customers by means of hiding as a circumstance of unfair competition. According to the aforesaid Article, "*hiding properties of products, work products or activities, their amounts, intended purposes, benefits or dangers and accordingly misguiding the customer in such a way*" constitute unfair competition. In this direction, if the seller does not inform the customer on benefits and dangers of his/her products, work products or activities in terms of the quality, quantity and similar properties, this will be against the law. For example, the packaging of any product being larger than the content of the product would make consumers think of the amount of the said product as more than it is or any product to be used as a toy for the kids containing carcinogen and not making mention of this fact although the product is harmful for the kids would constitute unfair competition.

Misguiding customer by means of hiding and not making mention of commercial name can be subject to comparative advertising. For example, putting snacks in a pocket which is two times larger than the amount of the snacks, any cologne bottle seeming like it is full, however having a very limited inner volume in comparative advertising, would constitute unfair competition[191].

According to the Article 55/1-a-10 of TTK, diverting any person who made a contract for installment selling, sale for cash or consumer credit in a way to cancel previous contracts in order to be able to make a new one would constitute unfair competition.

This kind of unfair competition occurs in comparative advertising. For example, if an internet subscription provider to claim that its company's internet is faster than competitor's, and to cancel their subscription from the other company, in comparative advertisements, it occurs unfair competition.

[191] Ayhan, Özdamar and Çağlar, p.409.

3.2.4.3.1.10. Lacking Explanation in Announcements and Using Contract Formulas Containing Missing or Wrong Information

According to Article 55/1-a-11 of TTK [192], not making clear explanation in respect of the net amount, interest and such like facts of the consumer credits in the announcements made for the consumer credits or not mentioning the title explicitly are defined as circumstances of unfair competition. Besides, according to Article 55/1-a-12 of the abovementioned code *Offering or making installment sales or consumer credit contracts within the frame of its activities related to its business, therefore, using contract formulas containing missing or wrong information about the subject, price, payment conditions, period of the contract, the right of the customer to retract or cancel the contract or the right of the customer to complete the payment before the due date"* also constitute unfair competition.

In this regard, people making consumer credit or installment sales contracts, should be informed with all the details. It is aimed, with the customer being informed need fully and efficiently, to make them take healthier decisions. This kind of unfair competition may be subject of comparative advertising. For example, although a bank mentions with its advertisement that it will offer consumer credit equaling 5,000 TL with 150 TL installments each month, and says that *"we gives lowest interest percentage"*, if it does not give any information regarding the costs of the said credit, then this will also constitute unfair competition.

3.2.4.3.2. Directing the Contract to Violation and Cancellation

In Article 55/1-b of TTK *"Directing the contract to violation and cancellation"* is assumed as circumstances of unfair competition and examples of this were mentioned under four sub paragraphs[193]. As is known, contracts bind parties in principle, for that reason those do not bind third parties. Although contracts made in between parties do not bind third patties, third parties may intervene in the commercial affair of any other person in the direction of their own benefits or others' benefits[194]. Accordingly, any person violating or cancelling the contract within the direction of his/her own benefit

[192] See TTK Article 55/1-a-11.
[193] For more information see Ayhan, Özdamar and Çağlar, p.410.
[194] Ülgen and Others, p.556.

or others' benefits in spite of the fact that he/she is not a party to the said contract, causes unfair competition in the presence of some specific conditions.

3.2.4.3.2.1. Directing to Behave against the Contract or to Cancel the Contract

Advices of anybody in the direction of making the customer/consumer use the right of cancellation do not constitute unfair competition, in principle. None the less, directing people to behave against the contract consumers had made with the third party, for the sake of making contracts with customers[195], or directing any person who made installment sales, sales in cash or consumer credit contract to cancel his/her contract[196] constitutes unfair competition.

The purpose of the legislator to put this provision is to protect the customer from offensive sales methods[197]. This kind of unfair competition may be subject of comparative advertising For example, making any person to get credits because of comparative advertising generally said that "we can pay your credits or credit cards off, it will be cheaper than paying" constitutes unfair competition in this regard. However, offering anybody another operator by making more attractive offers does not constitute unfair competition.

3.2.4.3.2.2. Directing Assistants of Third Parties to Wrongful Conduct or Taking Possession of Business Limits Through the Agency of their Assistants

The employees of third parties are mentioned in Article 55/1-b-2[198] of TTK. According to the aforesaid Article, making any party act against their obligations by means of obtaining or promising unfair advantage for his/her representatives, workers and other assistants for gaining advantage for himself/herself or for any other party, would constitute unfair competition. Although, an arrangement of *"gaining advantage for himself/herself or for others"* is made, generally in practice, those types of unfair competition occur in between competitors[199]. For example, asking from the cleaning worker of the competitor company to open the doors of the office after the

[195] See TTK Article 55/1-b-1.
[196] See TTK Article 55/1-b-4.
[197] Ülgen and Others, p.556.
[198] See TTK Article 55/1-b-2.
[199] Ülgen and Others, p.557.

working hours for them to search for some documents[200] would, in this regard, constitute unfair competition.

Diverting workers, representatives or other assisting parties to take possession of or disclose trade secrets of employers or their principals, constitutes unfair competition according to Article 55/1-b-3 of TTK. What is meant by trade secret is that manufacturing, production related information that the companies keep as secret[201]. For example, the component of a drink might be kept by the business owner as secret. In our opinion, this kind of unfair competition may not to be used in comparative advertising.

3.2.4.3.3. Benefiting from Work Products of Third Parties Incompetently

Merchants take some calculations, presentations, drawings and offers to their clients related to their field, in order for their products to be sold or in order to do business. And clients take offer from so many companies for the handling of the business or for purchasing the product. In practice, when clients take offer from more than one company, bargaining by telling the price offered by the previous company and merchants supplying better prices by knowing the offers made by other companies are circumstances generally faced by the people. Accordingly, Article 55/1-c of TTK arranged benefiting from accounts, plan and suchlike work products trusted to himself/herself incompetently, benefiting from offers, accounts and suchlike work products of third parties, although those are offered incompetently and taking the transfer of ready-for-marketing work products of any other party although he/she did not have enough contribution with the method of technical reproduction are accepted as unfair competition in order to prevent these types of practices[202]. For example, contractor company taking offer from three different architecture company for the same work and showing the offers to the fourth company and trying to make a more appropriate deal would constitute unfair competition, in this regard. In our opinion, this kind of unfair competition may not to be used in comparative advertising.

[200] Ülgen and Others**,** p.557.
[201] Ayhan, Özdamar and Çağlar, p.411.
[202] See TTK Article 55/1-c.

3.2.4.3.4. Disclosing Production and Business Secrets in Defiance of the Law

According to Article 55/1-d of TTK, *"Disclosing production and business secrets in defiance of the law"* constitutes unfair competition. According to the aforementioned Article, the person taking the said action does not need to be an employee or he/she does not need to have an advantage. Accordingly, explaining production and business secrets in defiance of the law is enough reason for the unfair competition. The legislator has given an explanatory example in the following Article: "*especially, the one utilizing information he/she took secretly and without any permission or he/she learnt illegally or sharing that information with others would be in a behavior against good faith."*. For example, a new model operator being given to the competitor company by the company's engineers illegally, for some advantages or the company's financial advisor sharing the statistical data of the company on social media illegally although he/she does not have any advantage would constitute unfair competition in this regard. Those types of unfair competition appear in practice so frequently, together with the social media entering into our life, especially, information of new model mobile phones or car designs are shared secretly before those are put in the market, without the permission of the company. In our opinion, this kind of unfair competition may be less used. For example, unauthorized use of a competitor's new mobile phone design while making comparative advertising is constitute unfair competition.

3.2.4.3.5. Incompliance with Business Conditions

According to Article 55/1-e of TTK, incompliance with the business conditions constitutes unfair competition. The legislator gives the following example regarding incompliance with business conditions in the relevant Article: *"especially people being incompliance with the business conditions loaded also to competitors with the law or contract or in a profession or in the environment ordinarily would be in a behavior against good faith"*. Rules to be obeyed by the companies in their commercial life are determined with the legislation or commercial manners and customs. For example, minimum wage, working hours, weekly holidays etc. are determined with the legislation, minimum price of bread and these kinds of particulars

are determined with the chamber the said company belongs to[203]. Businesses taking actions without conforming to these rules do not comply with the work conditions and their actions constitute unfair competition. In our opinion, this kind of unfair competition may not to be used in comparative advertising.

3.2.4.3.6. Using the General Operating Conditions Against Good Faith

Using the operating conditions against good faith would constitute unfair competition according to Article 55/1-f of TTK. Although the conditions of operating are mentioned in TTK, this particular should be understood as general operating conditions mentioned in Article 20 of TBK [204]. In order for the general operating conditions arranged unilaterally to constitute unfair competition, those should be fallacious, those should be arranged against the counter party and those should be mentioned in the contract explicitly[205]. Accordingly, general operating conditions prepared against good faith would constitute unfair competition. In our opinion, this kind of unfair competition may not to be used in comparative advertising.

3.3. Legal Claims Based upon Unfair Competition

3.3.1. Court Actions

Because of any action or behavior constituting unfair competition in accordance with TTK, the party being exposed to unfair competition may bring legal claim against the one applying unfair competition. In that case, the party being exposed to unfair competition has the right to bring declaratory action, disqualification action, reinstatement action and action for compensation before courts and has the right to ask for the temporary protection of his/her legal right against the party applying unfair competition. Those court actions are heard in commercial courts of first instance in accordance with TTK. In this section of our thesis, information will be related to the court actions and protection claims, plaintiff, defendant, prescription of court action, announcement of the court decision and execution to third parties and criminal liability.

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[203] Ülgen and Others**,** p.561.
[204] Mustafa Sencer Kara, "Genel İşlem Şartlarına İlişkin Haksız Rekabet Hükümleri", *GÜHFD,* Vol. XVII, 2013, p.731.
[205] Kara, p.734.

3.3.2. Declaratory Action

Article 56/1-a of TTK regulated *determination of whether the action is unfair or not*. In this direction, the fact that the behavior, which is the subject of unfair competition, constitutes unfair competition may be detected and also, detection of the fact that it does not constitute unfair competition may also be asked[206]. As the detection of whether the taken action constitutes unfair competition or not is a declaratory action in terms of its qualification, prohibition of the unfair competition or enforcement for the party applying the unfair competition would not be an issue because of the court action. Additionally, the party bringing the declaratory action should have a legal benefit from the said court action[207]. With the declaratory action, the plaintiff would be acquiring evidence for the action for compensation which would be brought in the future[208]. In other words, the decision made as a result of the declaratory action, would constitute evidence for the other actions. According to Article 56 of TTK, the faultiness of the defendant is not sought in the declaratory actions to be brought.

3.3.3. Disqualification (Prevention) Action

According to Article 56/1-b of TTK, *action of disqualification of unfair competition* can be brought in order to eliminate the action constituting unfair competition. Action of disqualification of unfair competition is a kind of action for fulfillment. In other words, it is a kind of executive action related to elimination of the action constituting unfair competition. The action of unfair competition should continue or there should be a risk for it to be continued in order for the said action to be brought before courts[209]. If the action constituting unfair competition is finished or the risk is eliminated, then disqualification action could not be brought. Also, in this type of court action, faultiness of the party applying unfair competition is not sought.

3.3.4. Reinstatement Action

According to Article 56/1-c of TTK, elimination of the financial situation as a result of unfair competition, elimination of the results of the action constituting unfair competition, correcting the declarations made in a fallacious or misleading way,

[206] Tamer İnal, p.546; Ayhan, Özdamar and Çağlar, p.41.
[207] Tamer İnal, p.546; Mimaroğlu, p.413.
[208] Bilgili and Demirkapı, p.237; Tamer İnal**,** p.546.
[209] Ülgen and Others**,** p.567; Tamer İnal, p.546; Ayhan, Özdamar and Çağlar, p.416.

destruction of tools and products which are effective for the constitution of unfair competition in situations where prevention of infringement is obligatory, are aimed with this action which is in the qualification of reinstating. Substantially, as it is a very serious penalty, destruction of tools and products which are effective for the constitution of unfair competition should be claimed as the final remedy[210].

The party applying the unfair competition should not be faulty as it is the case for the declaratory and disqualification actions[211]. Within the scope of the said court action, labels resulting in confusion are decided to be removed from the products, plans including production secrets are decided to be returned, a correction letter is decided to be published for the party who was damaged with unreal information and explanations constituting unfair competition.

Reinstatement action does not have any quality of compensation. If the damages are asked to be compensated, action for compensation should be brought before courts. It is possible to bring action for compensation together with action for prohibition of infringement[212].

3.3.5. Action for Compensation

Action for compensation to be brought because of unfair competition could be brought in two ways: action for material compensation and action for moral compensation.

3.3.5.1. Action for Material Compensation

The party being harmed by the unfair competition may also ask for the compensation of his/her damages through the agency of material compensation actions in addition to actions which would be brought by reason of unfair competition, in accordance with Article 56/1-d of TTK. This court action depends on the faultiness of the actor[213] and the plaintiff to be harmed. In other words, in order for the compensation payment to be decided for the action which is the subject of the unfair competition, the action should be taken wrongfully, and the presence of unfair competition alone should not

[210] Ertan (2016), p.415; Ülgen and Others**,** p.568; Erdoğan Moroğlu and Abuzer Kendigelen**,** *İçtihatlı Notlu Türk Ticaret Kanunu ve İlgili Mevzuat,* İstanbul, 2014, p.109.
[211] Ertan (2016), *Haksız Rekabet Hukuku*, p.413.
[212] Ayhan, Özdamar and Çağlar, p.418.
[213] Yargıtay 11 HD, T.29/3/1979, E.1979/911, K.1979/1649 cited by Doğanay, p.353.

be evaluated within the scope of the wrongfulness. Besides, there should be causal relation in between the wrongful action constituting unfair competition and the damages of the plaintiff. According to this, damages arising as a result of unfair competition, amount of damages, causation relation in between the damages and the action should be proven by the plaintiff. However, in practice, the presence of damages arising before the plaintiff and its amount could not be determined easily every time[214].

In case the damages could not be proven completely, the judge determines the amount of the damages fairly by taking, flow of events and measures that will or could be taken by the plaintiff being exposed to unfair competition, related to the concrete case, into consideration in accordance with Article 50 of TBK. According to Article 51 of TBK, the extent of the compensation and payment method are determined by the judge by taking the severity of the wrongfulness and the need of the situation. In addition to that, it is mentioned in Article 56/1-e [215] of TTK, related to the determination of damages in material compensation action, that the provisions for benefits which could be acquired by the defendant applying the unfair competition could be decided as a result of the unfair competition. In other words, the judge can make decision for compensation in the ratio of the probable profit of the defendant, upon the request of the plaintiff[216].

3.3.5.2. Action for Moral Compensation

Article 56/1-e of Turkish Commercial enables action for moral compensation provided that written conditions of Article 58 of TBK are met for the party being exposed to unfair competition. An amount of money could be asked to be paid in the action for moral compensation within the frame of Article 58 of TBK. Again, condemnation of the unfair action and announcement of this decision through media could be decided in accordance with Article 58 of TBK. The plaintiff asking for the compensation of moral damages could be a natural person or legal entity[217]. The

[214] Tamer İnal**,** p.547; Ülgen and Others, p.568.
[215] Ayhan, Özdamar and Çağlar, p.419.
[216] Ülgen and Others, p.568.
[217] Ayhan, Özdamar and Çağlar, p.419; Ertan, p.431.

defendant should be wrongful in order to make any decision for moral compensation[218].

3.3.6. Parties

3.3.6.1. Plaintiff

People who has the right to bring unfair competition action before courts, are mentioned[219] in detail and specially in Article 56/1 of TTK. In this regard, people who are damaged by reason of unfair competition and who has the risk to be damaged by the unfair competition could bring all the aforementioned unfair competition actions before courts.[220] The presence of the risk of being exposed to damages is sufficient in order to bring any action before courts, according to TTK. In such type of an action, plaintiff could be both natural person and legal entity[221]. Besides, customers, professional and economic associations, non-governmental organizations, public institutions may also bring unfair competition action together with the conditions being satisfied.

3.3.6.2. Defendant

Actions related to unfair competition are generally brought against people applying the unfair competition. If unfair competition is applied by employees or workers, declaratory action, disqualification action and reinstatement action could also be brought against those people[222]. Accordingly, these kinds of actions can be brought against both employees and employers.

The wrongfulness of the defendant is not considered in these kinds of actions and any damage should not be born. Besides, one could not also benefit from the evidence of release in order to get rid of the liability of employer and employer's liability is determined within the scope of TBK Article 66 in material and moral compensation actions[223].

[218] Bilgili and Demirkapı, p.238.
[219] See TTK Article 56.
[220] Bilgili and Demirkapı, p.239.
[221] Ertan (2016), p.432.
[222] See TTK Articler 57/1.
[223] Ülgen and Others, p.570.

If action of unfair competition is applied through the agency of media, communication or informatic tools, unfair competition declaratory action, disqualification action and reinstatement action could be brought before courts against *"only owners of the thing, program published in the media; the one viewed on the screen, informatic tool or similar media; the one published as voice or any other thing communicated in any way and the people making announcements"*[224]. In spite of this *" if the one, program, content, image, voice or message published in printed media are published without the knowledge of its owners or the ones making the announcement or without their consent or the identity of the owner of the one, program, image, voice or message or the one making the announcement are kept hidden or if it is not possible to reveal or to bring an action before any Turkish court for the owner of the one, program, image, voice, message or the one making the announcement by reason of other facts"*[225] these actions could be brought against *"editorial office manager, executive editor, program maker, the person who puts images, voice, message into the broadcast, communication and informatics device or have them put in those and announcement service chief; if those people could not be shown, the owner of the business or foundation"*[226].

3.3.7. Announcement of the Court Decision

Principles of unfair competition not only protect the party being exposed to unfair competition, but also customers and the society[227]. For that reason, according to Article 59 of TTK, the prevailing party can ask for the announcement of the decision after the decision is finalized by means of expenses being paid by the party who has been proven to be wrong. The method of announcement and the fact that the scope would be determined by the court, are mentioned in the last sentence of the same Article.

3.3.8. Execution of Court Decision Related to Third Parties

As a result of the decision in the cases of disqualification of unfair competition and reinstatement, "*it is also executed for the people who gained the subject goods*

[224] See TTK Article 58.
[225] See TTK Article 58.
[226] See TTK Article 58.
[227] Ülgen and Others**,** p.572.

directly or indirectly for commercial purposes"[228]. When the provision of the aforementioned paragraph is analyzed, although there is no court decision for people having the products at their hands for commercial purposes, it was mentioned that this would be applied. That matter constitutes an exception that the decision finalized in between parties may only have executional capability in between parties, which is one of the basic principles of the remedial law[229].

3.3.9. Prescription

The period to bring any court action related to unfair competition will drop due to prescription in (1) year starting from the date the party having the right to bring court action learns that he/she has the right to do so and, in any event, (3) years starting from the start of the said right. In case the act of unfair competition is continuous, the prescription type starts from the day the said continuity act finishes[230].

In some cases, unfair competition act constitutes a crime in accordance with TCK. In this case, if a longer prescription is predicted within the scope of TCK regarding the act constituting crime, that period will also be valid for the legal action.

3.3.10. Temporary Legal Protection Claims

3.3.10.1. Provisional Injunction

The court may decide on the reservation of the present legal status, elimination of the financial status constituting unfair competition as per Article 56/1-b and c of TTK, prevention of unfair competition, correction of wrong and fallacious declarations and other precautions, upon the request of parties having the right to bring court actions according to Article 61 of TTK and it may decide provisional injunction according to RG 4/2/2011 N. 27836 Code of Civil Procedure No: 6100.

3.3.10.2. Recording of Evidence

In positions of unfair competition, recording of evidence may also be asked. In this regard, parties may ask for a court expert analysis or eye witness reports to be issued

[228] See TTK Article 56/4.
[229] Ülgen and Others**,** p.572.
[230] Ülgen and Others**,** p.573.

for the recording of the facts which has still not come to analysis phase in the current action or which could be submitted as evidence in any future court action. There should be a legal benefit for the recording of evidence.

3.3.11. Criminal Liability

According to Article 62 of TTK; upon the complaint of people having the right to bring legal action, prison sentence up to two years or fine punishment could be decided for the following parties if the act does not need any heavier punishment within the scope of TCK:

a) Parties applying unfair competition found in Article 55 intentionally,
b) Parties giving wrong or fallacious information related to the products,
c) Commercial activities in order for their proposals or offers to be preferred instead of their competitors,
d) Ones deceiving employees, attorneys or assisting parties for the purpose of acquiring production and commercial secrets of employers or principals,
e) Ones learning from the employers or principals that workers, employees or attorneys applied unfair competition while they were working, however who could not prevent those actions.

CHAPTER 4: COMPARATIVE ADVERTISING WITH REGARD TO TRADE MARK INFRINGEMENT

4.1. General Concept of Trade Mark

In trade life, businesses manufacturing same or similar products or offering same or similar services aim to create the product quality perception in the sight of the consumers that their own goods or services are more qualified than the same of others. In this direction, business corporations use various kinds of marks such as trade name, business name, company name, internet domain in order to distinguish their own goods or services from the same of other corporations. Thus, if consumers were satisfied with the goods or services of the same business before, they prefer the same business among more than one choice.

Although distinctive marks of businesses are limited with the function of promotion, together with the industrial revolution, the concept of "trademark" has emerged as a result of the sale of goods or services in different channels, especially after the serial production has been started [231] Trademark is one of the intangible elements of enterprises [232]. Trademarks owned by enterprises are known more than the enterprises and the reason of consumers preferring goods or services of enterprises is the sense of trust in the trademarks [233]. For that reason, trademarks are one of the most important elements of enterprises.

The concept of trademark is defined in the dictionary as follows: *"Marks which are put to distinguish all kinds of products; made, prepared, manufactured in industry, crafts, agriculture or put on the market in trade, from the others and which are found favorable for that purpose"*[234].

[231] Arslan Kaya, *Marka Hukuku,* İstanbul, 2006, p.1.
[232] Sabih Arkan, *Marka Hukuku*, Vol. 1, Ankara, 1997, p.1.
[233] Akar Öçal, **"**Türk Hukukunda Markaların Himayesi (İsviçre ve Fransız hukuklarıyla mukayeseli olarak)", Ankara, 1967, p.2.
[234] Ejder Yılmaz**,** Hukuk Sözlüğü, Ankara, 2002, p.519.

The concept of trademark is defined literally as follows: *"any mark or combination of mark distinguishing goods or services of a business from goods or services of other businesses"*[235].

Although there has been no direct definition of trademark in our legislation, the following definition was made in SMK Article 4 *"Trademark can be composed of any kind of marks, such as words, including human names, shapes, colors, letters, numbers, voices and shape of the goods or packages, provided that it provides the goods or services of an enterprise to be distinguished from goods or services of other enterprises and it can be represented in the registry as providing a clear and accurate understanding the subject of the protection provided to the trademark owner."*[236] and marks which could be a trademark were mentioned. According to the definition made, any mark which has a distinctive character could be registered as a trademark.

Various definitions of trademark were made in the doctrine. According to **KARASU**; trademarks save several goods or services from being anonymous and bring the character of being distinctive from goods or services of other businesses in the eye of consumers [237]. **ARSEVEN** defined trademark as a mark used to distinguish commodities resulting from the businesses of economic enterprise owners, from the same of others [238]. **ARIKAN**, also defined trademark "*traditional form of expression and valuable conveyors of information that enable people to convey a message to the customers about the origin of product that they own or want to trade in or other kind of messages*"[239].

4.2. Elements Of Trade Mark

4.2.1. The Mark

Words of trademark and mark found in SMK do not have the same meaning and the word of mark covers trademark. In other words, every trademark is a mark at the same time, but every mark is not a trademark every time[240]. From the point of view of

[235] See TRIPS 15/1.
[236] See SMK Article 4.
[237] Suluk, Karasu and Nal, p.159.
[238] Haydar Arseven, *Nazari ve Tatbiki Alameti Farika Hukuku,* İstanbul, 1951, p.1.
[239] Özgür Arıkan, *Trade Mark Rights and Parallel Importation in the European Union,* İstanbul, 2016, p.24.
[240] Uğur Çolak, *Türk Marka Hukuku,* İstanbul, 2016, p.22; Tekinalp, p.360.

trademark law, the mark is a symbol connecting the intended population with the enterprise and evoking the enterprise [241]. There has been no definition made for trademark in SMK and it is mentioned that all kinds of marks *"including human names, shapes, colors, letters, numbers, voices and shape of the goods or packages"* could be a trademark[242]. As can be understood from the provisions of law, all kinds of marks enabling the explicit understanding of the protection provided to the owner of the trademark which has a distinctive character could be registered as a trademark. Marks not having aforementioned type of effects could not be registered as a trademark. The marks which could be a trademark, may also be composed of only one or more than one element (mixed mark)[243]. Likewise, for the trademark registration application made by CJEU, DYSON related to the transparent case look of vacuum cleaners, it is decided that bagless and transparent dust collection case was a "concept", that it does not appeal to the five senses and, for that reason, that it does not meet the condition of mark and that, in such a way, trademark registration application could not be made[244].

4.2.2. Distinctiveness

A mark should have the character of being distinctive, in order to become a trademark. In other words, marks distinguishing goods or services of an enterprise from goods or services of another enterprise could be registered as a trademark. Together with this element, marks related to specific goods or services groups could be distinguished from each other and could be perceived as different from each other in the eye of the consumer[245]. For example, 'M' mark found in the trademark of Migros gained distinctiveness after it has been used and then it was registered as a trademark [246].

Distinctiveness has two aspects. In case any mark has distinctiveness in any goods or services group, that means "*intangible* distinctiveness" and in case it has the function of distinctiveness within the scope registration subject goods or services, that means

[241] Suluk, Karasu and Nal, p.159.
[242] See SMK Article 4.
[243] Hayrettin Çağlar, *Marka Hukuku Temel Esaslar,* Ankara, 2013, p.12.
[244] Çolak, p.22; CJEU, C-321/03 *Dyson Ltd v Registrar of Trade Marks*
[245] Kaya, p.80.
[246] Arkan, p.83.

"*tangible distinctiveness"*[247]. Fundamentally, intangible distinctiveness is a condition for being a trademark, tangible distinctiveness is a condition for being registered [248]. For example; although the word of steel has an intangible distinctiveness, it has no tangible distinctiveness in iron and steel industry. In other words, while word of Steel has distinctive character in the hotel industry, the same word does not have any distinctive character in the saucepan industry.

Generally, marks which do not have any distinctive character, do have descriptive character [249]. Besides, marks defining goods or services [250], marks composed of words having more than one meaning [251], words having grammatical equivalent [252] and phonetic equivalent words [253] do not have a distinctive character [254].

4.2.3. Clarity and Certainty

It was mentioned in Cancelled Decree Law No: 556 on the Protection of Trademarks that marks which could be shown with drawing or expressed in a similar way, published and reproduced through print could be registered as a trademark. According to the revision made in SMK, subject of the protection provided to the owner of the trademark should be understood clearly and certainly and that should be evincible in the registry in order for any mark to become a trademark[255]. In other words, the condition of representation with graphics found in the Decree Law No. 556 was removed, and instead, the condition of providing clear and certain understanding of the trademark subject and being able to be evincible in the registry were brought in

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[247] Rauf Karasu, "Ses Markaları", *FMR,* Vol.7, 2007. p.34-35; Çağlar, p.12.
[248] Paul Ströbele and Franz Hacker, *Markengesetz Kommentar*, Köln, 2012, p.62 cited Beşir Fatih Doğan, "Türk, Alman ve Avrupa Birliği Hukukuna Göre Marka Olamayacak İşaretlerin Kullanım Sonucu Ayırt Edici Nitelik Kazanarak Tescil Edilebilirliği Sorunu", *FMR*, Vol.3, Ankara 2006, p. 18; Çağlar, p.12-13.
[249] Çolak, p.23.
[250] For instance, the 'fresh' mark in bakery products is not distinctive and indicates that the product is not intact or stale.
[251] For instance, tea, which is one of the co-voiced words, means both drink and small river. In the doctrine, it is stated that evaluation should be made by considering how the consumer perceives the trade mark. In this case, we believe that if the word tea is used in the beverage sector, therefore it has no distinctive character; Çolak, p.28.
252 For instance; The word Ç3LIK is not distinctive because it can be perceived in the form of steel in the pot industry.
253 For instance, although their spelling of ONE and WON words are different, they have no distinctive character as their pronunciation is the same.
[254] Çolak, p.26-32.
[255] Suluk, Karasu and Nal, p.161.

order to enable registration of new types of trademarks[256]. Likewise, in provision 7/2 of Regulations Related to the Implementation of SMK, the fact that the application is a sound trademark should be mentioned clearly in sound trademark applications and the record of the mark which is suitable to be listened in the electronic environment should be submitted to the corporation. As continuous development of technology enables the registration of marks, except the effects which could be shown only with a graphic, as trademark, the arrangement was to the point[257].

4.3. Functions of Trade Mark

4.3.1. Distinctiveness Function of Trade Mark

Goods or services of a business could be distinguished from goods or services of another business with the distinctiveness function of trademark[258]. Function of distinctiveness is the most basic function of trademark, according to many authors of the doctrine [259]. Consumers could make distinction in between same goods or services of trademarks together with the distinctiveness function of trademark [260]. Same good or service groups are put on the market together with the development of industry. Accordingly, it is important to distinguish any good or service from others.

4.3.2. Origin Function of Trade Mark

Origin function of trademark shows the reference of the used goods or services, from which business they come and connection of the trademark with the business [261]. In other words, it shows by which manufacturer the good or service was produced or put on the market. Thus, consumers could decide on whether the purchase the goods or services or not [262]. Accordingly, it makes distinction in between good or service

[256] For further information see the preamble of SMK Article 4.
[257] Suluk, Karasu and Nal, p.162.
[258] Tekinalp, p.378.
[259] Hamdi Yasaman, Sıtkı Anlam Altay, Tolga Ayoğlu, Fulürya Yusufoğlu, Sinan Yüksel, *Marka Hukuku, 556 sayılı KHK Şerhi,* Vol.1-2, İstanbul, 2004, p.18; Kaya, Marka p.60; Çolak, p.14; Tekinalp, p.378; Çağlar, p.33; Suluk, Karasu and Nal, p.162.
[260] Arseven, p.7.
[261] Yasaman and Others, p.18; Çolak, p.13.
[262] Çağlar, p.33.

possible for the consumer [263]. CJEU mentioned that the most important function of trademark is the origin function [264].

Substantially, as known trademarks indicate the enterprise directly, origin function is more important for the known trademarks. According to some of the authors in the doctrine, origin function also includes the distinctiveness function.

4.3.3. Quality and Guarantee Function of Trade Mark

Quality and guarantee function of trademark is providing confidence for the protection of the quality of purchased good or service also in the future [265]. In other words, good or service purchased by consumers protect their quality also in future time.

Any goods or services having a trademark does not mean that the said goods or services would be qualified all the time [266]. With the quality and guarantee function, consumers think that they would face the same quality and would feel the same appreciation when they purchase good or service of a specific trademark. Because, any consumer who has used goods or services of the same trademark before foresees that he/she would face the same previous quality when he/she purchases the same trademark. In other words, it reflects that any good or service of any trademark owned by an enterprise would offer the same quality in its other goods or services.[267]. Accordingly, consumers could hesitate related to the quality of goods or services

[263] Öçal, p.16.
[264] CJEU C-324/09 *L'Oréal SA, Lancôme parfums et beauté & Cie SNC, Laboratoire Garnier & Cie, L'Oréal (UK) Ltd - eBay International AG, eBay Europe SARL, eBay (UK) Ltd, Stephen Potts, Tracy Ratchford, Marie Ormsby, James Clarke, Joanna Clarke, Glen Fox, Rukhsana Bi*, paragraph 80 *"In the second place, a trade mark, the essential function of which is to provide the consumer with an assurance as to the identity of the product's origin, serves in particular to guarantee that all the goods bearing the mark have been manufactured or supplied under the control of a single undertaking which is responsible for their quality"*. C-206/01 *Arsenal Football Club plc - Matthew Reed*, paragraph 48.
[265] CJEU C-39-97 *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc.* Article 28"*Moreover, according to the settled case-law of the Court, the essential function of the trade mark is to guarantee the identity of the origin of the marked product to the consumer or end user by enabling him, without any possibility of confusion, to distinguish the product or service from others which have another origin. For the trade mark to be able to fulfil its essential role in the system of undistorted competition which the Treaty seeks to establish, it must offer a guarantee that all the goods or services bearing it have originated under the control of a single undertaking which is responsible for their quality"*.
[266] Çağlar, p.34.
[267] Tekinalp, p.378.

which would be put on the market recently [268]. Besides, guarantee function of any trademark includes technical support services in addition to the goods or services [269].

4.3.4. Communication, Investment and Advertising Function

Elements of advertising are being oriented to commercial purposes, the will of advertising and promotion. Goods or services of a trademark could be introduced, and consumers are made to purchase the relevant goods or services, with a successful advertising. Promotion of a trademark and transmission of the same to the consumer are provided with advertising.

Promotion and marketing activities made for the transmission of goods or services of an enterprise to consumers are handled through trademark [270]. Enterprises make serious amount of investment in advertising for the purpose the goods or services of their own trademark to be purchased [271]. As the trademark owner has the purpose of informing the consumer by using its trademark, he/she has the right to block use of any mark which is the same with his/her trademark, without his/her prior consent[272].

Although the communication, investment and advertising function of trademark is important for the promotion of goods or services, goods or services should be qualified in order for the trademark right holder to be successful [273]. In other words, quality and guarantee functions are either important factors for the communication, investment and advertising function. In this direction, quality perception is created related to goods or services, by the consumers and that could gain function of advertising within the course of time[274].

4.4. Actions Assumed as Trade Mark Infringement

Right of exclusive use of trademark belongs to the trademark right holder. Trademark right holder has the right to ask for the prevention of actions constituting infringement

[268] Çağlar, p.34.
[269] Öçal, p.18; Kaya, p..61.
[270] Çağlar, p.34.
[271] Çolak, p.14.
[272] Çolak, p.14; CJEU C-120/04 *Medion AG v Thomson multimedia Sales Germany & Austria GmbH* Article 23 *" The essential function of the trade mark is to guarantee the identity of the origin of the marked goods or service to the consumer or end user by enabling him, without any possibility of confusion, to distinguish the goods or service from others which have another origin."*.
[273] Kaya, p.61-62; Hasan Dursun, *Marka Hukuku*, Ankara, 2008, p.14.
[274] Kaya, p.61-62.

without his/her consent and compensation of his/her losses resulting from the aforementioned actions.

Actions assumed as trademark infringement are mentioned in SMK Article 29/1. When the aforesaid law is analyzed, taking some actions without the consent of trademark owner constitutes trademark infringement. These actions are using the trademark in the way mentioned in Article 7 of SMK, imitating the trademark, using the products carrying trademark in trade and extension of rights given through license without any consent or their transfer to third parties. Abovementioned actions are mentioned in the law conclusively.

As can be understood from the above-mentioned arrangements, holder of a registered trademark right may prevent the use of the trademark by third parties without any consent. Likewise, right holder whose trademark right has been infringed, in case the conditions are met, may ask for the detection, prevention, suspension of infringement, compensation of his/her material and moral damages, appropriation of goods and recognition of property rights on the said goods, removal or destruction of trademarks found on the packings of goods and announcement of the court decision, according to SMK Article 149. In this section of our thesis, conditions which are assumed as trademark infringement and usage evidence exception will be analyzed separately.

4.4.1. Conditions Assumed as Trademark Infringement

4.4.1.1. Breach of Scope of Trademark Protection

According to SMK Article 29/1-a *"to use the trademark in the ways indicated in the Article 7 without the consent of the trademark owner"* is assumed as trademark infringement. According to the aforesaid Article, use of trademark in the way mentioned in SMK Article 7 constitutes trademark infringement. These issues are mentioned in SMK Article 7 conclusively. "unfair models of use" found in SMK Article 7/2 and then "unfair ways of use" found in SMK Article 7/3 will be analyzed below.

4.4.1.1.1. Models of Unfair Use

4.4.1.1.1.1. Trade Mark Infringement by Means of Using the Same of Registered Trade Mark

According to SMK Article 7/2-a, without the consent of trademark owner *"Any mark that is same with the registered trademark is used in goods or services within the scope of registration"* constitutes trademark infringement. The purpose of the aforementioned law provision is to prevent the use of the same mark in the same good or service group.[275]. Here, the purpose is to prevent pirate trademarks [276]. For example, use without the consent of trademark holder in the group which is the same with A trademark registered in 43th class would constitute trademark infringement. Another example is *"aytaç"* trademark registered in the category of meat products being used again in the same class as *"aytaç"* would constitute trademark infringement within the scope of SMK Article 7/2-a. In these kinds of trademark infringement conditions, trademark breach is clearly obvious[277]. In any case, incase exactly the same trademark is used in the same or dissimilar class, except known trademarks, that would not constitute trademark infringement [278].

Although the trademark is not used, attempting to use trademark is not assumed as trademark infringement [279]. Likewise, in a decision of Yargıtay, it was mentioned that the absolute application made with unreal documentation in order to obtain the approval of Turkish Standards Institution does not mean the use of trademark and for that reason, that it would not constitute trademark infringement[280].

Besides, incase trademark registration application is made with the same name and with the same good or service group, without any trademark owner, that would be an absolute reason for rejection according to SMK Article 5/1-ç and partial reason for rejection as per Article 6/1. For that reason, incase registered trademark is registered with exactly the same name and for the same good or service group, it is rejected by Turkish Patent and Trademark Office, on its own motion. None the less, in case the

[275] Kaya, p.266.
[276] Çağlar, p.109.
[277] Arkan, p. 97.
[278] Yargıtay 11 HD, T.18/10/2010, E.2009/4034, K.2010/10367 cited by Çolak, p.408.
[279] Çolak, p.409.
[280] Yargıtay 11 HD, T.14/10/2010, E.2009/3529, K.2010/10266 cited by Çolak, p.409.

party constituting trademark infringement registers his/her own trademark, then the trademark owner comes up against a registered trademark. In the period of Decree Law No. 556, while it was interpreted that use of a registered trademark is a fair use and that would not constitute trademark infringement within the course of the registration period, that should be changed together with SMK. Because, according to SMK Article 155, it was ensured that the trademark owner could not assert the trademark right he/she has owned as a defense justification in the lawsuit of infringement related to the trademarks having priority or application date before himself/herself.

4.4.1.1.1.2. Trademark Infringement by Creating the Possibility of Being Confused with the Registered Trademark

Trademark infringement by creating the possibility of being confused with the registered trademark is arranged in SMK Article 7/2-b. According to the aforementioned Article *"Usage of any mark that is same or similar to the registered trademark comprises the goods or services that are same or similar to the goods or services which are under the scope of the registered trademark and thus there is potential of confusion, including the possibility of association by the public with the registered trademark"* have the qualification of trademark infringement. When the provision of the aforesaid Article is analyzed, use of trademark which is the same with or similar to the registered trademark in good or service groups which are the same with or similar to the registered trademark and in case there is the possibility of confusion of that by the public, including linking, for the said reason, then it is said that there is trademark infringement. In addition, although average consumers understand that both trademarks are different, if they think that the owners of trademarks are the same, then it is assumed that there is the danger of confusion in between trademarks[281].

In case the registered trademark is the same with goods or services, although making an assessment is so easy, analysis of the similarity of trademark and goods or services could sometimes be difficult in some cases In these kinds of cases, whether the trademark has the danger of being confused in the eyes of average consumers could

[281] Arkan, p.98; Sabih Arkan, "İşaret ile Marka Arasında Bağlantı İhtimali ve İltibas (Karıştırma) Tehlikesi", *BATİDER*, Vol.20, Issue. 2, December, 1999, p.6.

be detected by thinking whether the goods or services of the registered trademark are similar with goods or services of the other trademark. Although "E.C.A." trademark is registered, Yargıtay decided that the use of EDA [282], phrase in the same good or service group is trademark infringement and although there is a registered trademark named as PENTİ, Yargıtay decided that the use of P&T [283] phrase in the same good or service group is trademark infringement. Besides, in a decision of Yargıtay, the following decision was made: *"The use of 'Farey' phrase in the goods of Defendant constitutes infringement to the trademark of 'Fairy' which belongs to the plaintiff*[284]. In another decision of Yargıtay, it was mentioned as follows "The phrase of "*Umut Hastanesi" has been used by the plaintiff for the first time and besides the word "UMUT" was not descriptive for the services of hospital and for that reason, that the objection that it was one of the marks which could be used by anybody, was invalid, that the defendant used words "Umut" or "Umut Hastanesi" by bringing these to the fore and by writing word "Yeni" with small letters and that would be assumed as trademark infringement"*[285].

4.4.1.1.1.3. Trademark Infringement Through the Unfair Use of Famousness of the Registered Trademark

The principle of protection of well-known trade marks has, for the first time, been found in Paris Agreement [286]. Well-known trade marks are trademarks which are accepted by and adopted in the majority of the society [287]. Well-known trade marks are defined in the doctrine in various ways. According to **YASAMAN;** well-known trade marks are the ones which are registered in a specific country and which are

[282] Yargıtay 11 HD, T.14/6/2010, E.2009/875, K.2010/6795 cited by Çolak, p.420.
[283] Yargıtay 11 HD, T.27/11/2006, E.2005/11914, K.2006/12253 cited by Çolak, p.420.
[284] Yargıtay 11 HD, T.30/3/2015, E.2014/18705, K.2015/4399 www.lexpera.com.tr (15/04/2019).
[285] Yargıtay 11 HD, T.14/1/2010, E.2008/4134, K.2010/280 cited by Çolak, p.423.
[286] Paris Convention for the Protection of Industrial Property Article 6bis *"(1) The countries of the Union undertake, ex officio if their legislation so permits, or at the request of an interested party, to refuse or to cancel the registration, and to prohibit the use, of a trademark which constitutes a reproduction, an imitation, or a translation, liable to create confusion, of a mark considered by the competent authority of the country of registration or use to be well known in that country as being already the mark of a person entitled to the benefits of this Convention and used for identical or similar goods. These provisions shall also apply when the essential part of the mark constitutes a reproduction of any such well-known mark or an imitation liable to create confusion therewith.*
(2) A period of at least five years from the date of registration shall be allowed for requesting the cancellation of such a mark. The countries of the Union may provide for a period within which the prohibition of use must be requested.
(3) No time limit shall be fixed for requesting the cancellation or the prohibition of the use of marks registered or used in bad faith.".
[287] Füsun Nomer Ertan, *Tanınmış Marka:Nike*, İstanbul, 1999, p.499.

known by the competent authorities in the country where protection is requested or by the society related to the goods or services[288]. According to **DİRİKKAN**; the concept of trademark found in Paris Agreement and the concept of well-known trade mark are different. He mentioned that well-known trade marks within the scope of Paris Agreement are not obliged to have qualitative elements such as economic value, reputation which are sought to be a well-known trade mark[289]. **TEKİNALP** describes the concept of well-known trade mark as follows: *"Trademark known by the countries which are a member to Paris Agreement and, even, by some of the countries who are a member"* and he mentions that Paris Agreement is a more general agreement covering well-known trade marks in the said regard[290]. Yargıtay defines the well-known trade mark as follows: *"a connotation arising in the form of a reflex by the people in the same environment, connected to a person or enterprise strictly with being oriented, guarantee, quality, strong advertising distribution system, without making any discrimination between clients, relatives, friends, enemies and without making any differentiation about geographical borders, culture, age difference"*[291].

Some of the individuals using well-known trade marks think that the use of well-known trade mark and use of services of well-known trade mark are an indicator of respectability in in the social environment and they are proud to use these trademarks[292]. Well-known trade marks are found not only on a country basis but also all around the world. Accordingly, there are some risks such as unfair use of famousness of the well-known trade mark, harming the reputation of trademark or harming its distinctive character. For that reason, well-known trade marks are protected both by Paris Agreement and within the scope of SMK.

Trademark infringement through unfair use of famousness of the registered trademark has been arranged in SMK Article 7/2-c When the aforementioned law provision is analyzed, *"Without a justified reason, usage of any mark which is same with or similar to the registered trademark, regardless of whether it is in same, similar or different goods or services, and which can gain unfair benefit from the reputation of*

[288] Yasaman and Others, p.253.
[289] Hanife Dirikkan, *Tanınmış Markanın Korunması*, Ankara, p.53-54.
[290] Tekinalp, p.383.
[291] Yargıtay 11 HD, T.13/3/1998, E.1998/5647, K.1998/1704 www.kazanci.com (11/04/2019).
[292] Ertan (1999), p.498-499.

the trademark due to its recognition level reached in Turkey or shall harm its distinctive character" is against the law and it constitutes trademark infringement. This position, at the same time, provides protection against the use of the trademark and enabling the use of the real owner of the trademark in Turkey, as a reason for invalidity.

Yargıtay made a decision of reversal in the case of *Glasurit v Gasserit* trademark [293], *"it should be accepted the plaintiff trademark has been registered and reached the famousness level in more than a hundred foreign countries. Local court and court expert report also support this. However, is it possible for this trademark to be used for other goods or services? Conflict is here. There is no doubt that the defendant trademark will make use of the well-known trade mark of plaintiff and will increase its sales in the said regard, that is to say it will gain an unfair advantage. Concerning the fact that the protection foreseen in Article 9/1c has been occurred".*

4.4.1.1.2. Shapes of Unfair Use

4.4.1.1.2.1. Attachment of Mark on Goods or Packing

According to SMK Article 7/3-athe mark should be attached on the good or the packing in order for the action trademark infringement to happen. Attachment of the trademark on the good or packing is an exclusive right of the trademark holder. Use of this right without having any consent would constitute trademark infringement in the light of this provision. Here, the mark attached on the good should be in a qualification enabling the mark not to be removed easily and it should be attached in a place where the consumer will see easily and that will be sufficient. For example, sewing the mark of the trademark Lacoste on a shirt will constitute trademark infringement within the said framework[294]. It is not a must that the trademark is put on the market [295]. Putting the good on the market is a subject of trademark infringement within the scope of SMK, Article 7/3-a.

Besides, it should be mentioned that attachment of the mark on the good or the packing should be for commercial purposes according to the Article. For example, if a

[293] Yargıtay 11 HD, T.3/7/2000, E.2000/5331 K.2000/6265 www.lexprea.com.tr (13/04/2019).
[294] Çolak, p.428; Arkan, p. 211.
[295] Hakan Karan and Mehmet Kılıç, *Markaların Korunması-556 Sayılı KHK Şerhi ve İlgili Mevzuat*, Ankara, 2004, p.261; Arkan, p.211-212. Çolak, p.428.

person attaches trademark of a luxurious computer on his/her computer which has no print or logo on it, then that will not constitute trademark infringement as it does not have any commercial purpose. None the less, storage of goods which have not been put on the market and having mark on the goods or packing or preparing those for the sales would constitute trademark infringement[296].

In a decision of Yargıtay [297] *"the defendant putting the goods with Ender "şokopiramit" trademark found in disrupted-teared packs in the market at least 8 and a half months after their manufacture and delivery dates, constitutes trademark infringement of the plaintiff and accordingly the plaintiff is entitled to be compensated for his/her material and moral damages..."* and accordingly, material and moral compensation are concluded to be made as the aforesaid action constituted trademark infringement.

4.4.1.1.2.2. Putting the Good Having the Mark in The Market, Offering That It could be Delivered, Storage for These Purposes or Offering Services Under the Mark or Offering that These could be Provided

After the mark is put on the good, whether that would be put on the market or not shall be a decision of the trademark holder. Without the consent of the trademark holder *"the goods baring the mark to be launched into market, offered to be delivered, stocked for these reasons or services under the mark to be rendered or offered to be rendered"*[298] constitutes trademark infringement.

Although putting goods carrying the mark in the market, use of them in commerce [299] constitute trademark infringement, according to Yargıtay, it is not a must for the good to be put in the market to constitute trademark infringement [300]. How the good or services are put in the market is also not important for the trademark infringement. Putting in the market, sale, renting, leasing or similar methods can be used [301].

Storage of the goods having the mark for the purpose of putting that in the market also constitutes trademark infringement within the scope of this Article. Likewise,

[296] Çolak, p.428.
[297] Yargıtay 11 HD, T.23/11/2012, E.2010/14827, K.2012/19031 www.kazanci.com (16/04/2019).
[298] See SMK Article 7/3-b.
[299] Tekinalp, p.412.
[300] Yargıtay 11 HD, T.2/6/2005, E.2004/7923, K.2005/5758 www.lexpera.com.tr (20/04/2019).
[301] Arkan, p. 212; Çolak, p.430.

Yargıtay made the following decision, *"..plaintiff's counsel mentioned that production and marketing of pencils with "Adel" trademark were made by the principal company according to the license of his/her principal and the license provided by Faber-Castell to his/her principal, that one of the defendants, Çakıroğlu Ltd.Şti, kept the imitation goods carrying Adel trademark in their warehouse....that the court case related to Çakıroğlu Ltd. Şti. To be accepted, that the defendant offering pencils carrying the trademark Adel to the market and having those goods constituted trademark infringement and that to be prevented ..."*[302].
When the provision of the law is analyzed, the storage of goods is not sufficient to provide a more effective protection to the holder of the trademark right, and it is a must to store those for the purpose of putting them in the market.

It is not a must for the goods to get prepared in order for the trademark infringement to happen through offering the delivery of the goods carrying the mark [303]. In other words, it is sufficient to only offer that the goods will be delivered. The catalogue, related to the goods carrying the trademark in an unfair way, being put in the market would also constitute trademark infringement[304]. Besides, offering services under the mark would also constitute trademark infringement. For example, the waiter servicing with the uniform of the business carrying its trademark [305] would constitute trademark infringement in this regard. Principally, offering that such service would be supplied also constitutes trademark infringement according to the law and offering to an organization company that the service would be supplied with uniforms carrying the trademark of the business, can be shown as an example to this case.

After the trademark right holder or any other person, with the consent of the right holder, puts the goods carrying the trademark in the market, the trademark right would have been exhausted. Thus, people acquiring the trademark could not be prevented from putting these goods on the market again[306]. This principle is called "exhaustion of trademark right". None the less, although the person manufacturing the good related to the trademark has manufactured with the consent of the trademark

[302] Yargıtay 11 HD, T.23/2/2004, E.2003/7146, K. 2004/1610 www.kazanci.com (20/04/2019).
[303] Arkan, p. 213.
[304] Sevilay Uzunallı, *Markanın Korunmasının Kapsamı ve Tazminat Talebi*, Ankara, 2012, p. 274.
[305] Karan and Kılıç, p.262.
[306] Arkan, p. 212.

owner, if he/she puts the same good in the market without the consent of the trademark owner, then trademark infringement will come into question[307].

4.4.1.1.2.3. Import or Export of The Good Carrying the Mark

Export of goods, produced without the consent of the trademark owner, out of Turkey or their import to Turkey from foreign countries constitute trademark infringement. When this was as follows in Decree Law No. 556 Article 61/c *"where being aware or should being aware that a mark is plagiarized, sell, distribute or put the commercial use or import or keep in possession for these purposes the goods carrying the infringed trademark"* , it was modified as follows with the validation of SMK: *"export or import of the good baring the mark"*[308]. The concept of "customs territory" found in Decree Law No. 556 is also found in Customs Law 4458 and it is an unfamiliar concept for our legislation. Accordingly, the aforementioned concept being removed with the modification made in SMK and "*imported*" and "*exported*" concepts being brought instead was a very appropriate action, in our opinion[309].

As the trademark owner has an exclusive authority on the trademark, he/she has the authority to restrain actions of people importing or exporting the counterfeit goods. Likewise, Yargıtay made the following decision for Vitra case*, "Plaintiff trademark, Vitra, is a well-known trade mark registered in Turkey. Vitra trademark of the defendant is a trademark registered abroad and it doesn't have any registration in Turkey. In the face of this position, the trademark registered in Turkey as a well-known trade mark of the plaintiff should be protected against the trademark which doesn't have any registration in Turkey without being subject to any limit for goods or services and the right to prevent the import of these goods carrying the mark is also included in the scope of the said protection"* and Yargıtay ruled that the trademark not having any registration in Turkey could not use the mark of the registered trademark. In this direction, except the consent of the trademark owner, the manufacturer is all the time responsible for putting the trademark on the good or

[307] Uzunallı, p. 278.
[308] See SMK Article 7/3-c.
[309] In accordance with that Çağlar, p.112-113.

packing and parties importing and exporting counterfeit goods are responsible in the same way[310].

4.4.1.1.2.4. Use of The Mark in Business Documents and Advertisements of the Enterprise

"Mark to be used on the business documents and advertisements of the enterprise" by third parties without the consent of the trademark owner constitutes trademark infringement in accordance with SMK Article 7/3-ç. Accordingly, it is not a must for the trademark to be put on the market. Business card, letter, postcard, invoice headings, price lists, product catalogues, menus, brochures could be shown as example to the business documents [311].

The trademark owner could also restrain the use of the mark in the advertisement without any consent. In this regard, if that is used in TV advertisements, billboards and suchlike courses, the trademark owner could ask for the relevant advertisements to be removed from broadcasting or the posters to be pulled off. For example, use of the same or similar trademark in newspaper advertisements would constitute trademark infringement within the scope of this paragraph[312]. Besides, in case the advertisement is a comparative advertisement, it could also constitute unfair competition in the presence of the conditions and, at the same time, it could constitute trademark infringement.

In any event, in case the dealer or third parties selling the goods carrying the trademark do not make an impression that they produced the goods and they don't misdirect the consumer related to the quality of goods, the advertisement of goods could be made[313]. Besides, use of goods carrying the trademark of the trademark owner in advertisements by the authorized dealer could not be restrained by the trademark owner within the scope of "exhaustion of trademark right[314].

[310] Çolak, p.437-438.
[311] Yargıtay 11 HD, T.21/12/2006, E.2005/13204, K.2006/13704 cited by Çağlar, p.113.
[312] Yargıtay 11 HD, T.1/3/2010, E.2008/11595, K.2010/2242 www.kazanci.com (22/04/2019).
[313] Çolak, p.455; CJEU C-63/97 *Bayerische Motorenwerke AG (BMW) and BMW Nederland BV v Ronald Karel Deenik*.
[314] Çağlar, p.114.

4.4.1.1.2.5. Use of the Same or Similar Mark in Internet in a way to Make a Commercial Effect

According to SMK Article 7/3-d *"usage of same or similar of the mark on internet media as domain name, directing code, key word or similar ways in order to create a commercial effect, provided that the person using the mark has no rights or legal connections regarding the usage of the mark"* constitutes trademark infringement. When the provision of the aforementioned Article is analyzed, the use of the same or similar mark in internet channels without the consent of the trademark owner has been forbidden. The trademark could be used through internet in accordance with the law. For example, in case any party receives permission of trademark owner due to his/her dealership or commercial relation with trademark owner, in case the mark creating the trademark is his/her unregistered trademark he/she used antecedently, then legitimate use could be mentioned [315]. Despite that, if parties not having any relation with the trademark owner even sell the original products of the trademark owner, they do not have any legitimate connection, and this would constitute trademark infringement[316].

The action should be used in a way to make commercial effect in order for the said action to constitute trademark infringement. The concept of commercial effect is discussed provided that there is no personal use in a way not to give rise to commercial results[317]. Other than that, studies made to have monetary gain or within the direction of commercial purposes have commercial effects. For example, if a technical service of the trademark HONDA supplying technical service to the automobiles registers a domain name as www.barhonaservis.com with the expression HONDA BAR in a way to go beyond its purpose of informing clients constitutes trademark infringement[318].

Although aspects whose use could be restrained are not mentioned conclusively, the use of the mark as a domain name, referrer code or key word of constitutes trademark infringement. In case the mark generating the trademark is used as a domain name provided that it would have a commercial effect, in case the domain name holder does

[315] Çolak, p.458.
[316] Yargıtay 11 HD, T.9/5/2013, E.2012/9670, K.2013/9502 www.lexpera.com.tr (23/04/2019).
[317] Çolak, p.458.
[318] Yargıtay 11 HD, T.13/2/2012, E.2010/10309, K.2012/1766 cited by Çolak, p.459.

not have any legitimate right, then trademark infringement is discussed[319]. Besides, the use of the mark as a referrer code or keyword without the consent of the trademark owner is also forbidden. Nowadays, advertising types, where words of referrer code or key word are used, are qualified as *"adwords advertisements"*. The word of *adwords* is the abbreviated form of "advertising words" and those are advertisements made by the businesses in internet searches through the agency of key words[320].

In adwords advertisements, advertisement publisher makes a commercial use by viewing its web site on the searching page [321]. Such kind of use, at the same time, constitutes trademark use in the point of the advertisement publisher [322]. Accordingly, use of trademark in adwords advertisements in a way to make commercial effect without the consent of the trademark owner constitutes trademark infringement.

Besides, as a result of trademark being used in adwords advertisements, commercial strategy of the trademark owner could be affected and incase trademark owner uses his/her own trademark as key word, he/she is obliged to pay more costs in order to rise to the top in advertisements[323].

4.4.1.1.2.6. Use of the Mark as Trade Name or Business Name

Rights arising from trademark registration in accordance with SMK belong to trademark owner exclusively. One of those rights is to use trademark. The right to use the trade name belongs only to its owner, according to TTK *"mark to be used as a trade name or business title"*[324] found in our legislation together with SMK. In any case, registration of trade name similar to the trademark after the registration of the trademark or use of trademark in a way it has been registered in the registry constitutes trademark infringement in accordance with SMK Article 7/3-e Additionally, trade name should be registered in the same or similar good or service groups in order for the trade name to constitute trademark infringement. In other words, as there is a low possibility to confuse trade name registered in different good

[319] Çolak, p.460.
[320] Savaş Bozbel, (Adwords), p.106.
[321] CJEU C- 558/08 *Portakabin Ltd, Portakabin BV v Primakabin BV,* parahraph 27.
[322] CJEU C- 558/08 *Portakabin Ltd, Portakabin BV v Primakabin BV,* paragraph 28.
[323] Zeynep Kandemir, "Vuitton-Google Kararı", *Fikrî Mülkiyet Hukuku Yıllığı,* 2010, p.336; Çolak, p.465.
[324] See SMK Article 7/3-e.

or service groups with trademarks, we think trademark infringement would not be an issue, except well-known trade marks.

Business name is defined in TTK Article 53 as names used to introduce the business and distinguish that from similar businesses. Accordingly, above mentioned trademark infringement from the point of trade name is also valid for the business name.

Trademarks are registered in Turkish Patent and Trademark Office and trade names are registered in trade registry. For that reason, as trademarks and trade names are registered in different courses, in our opinion, the detection of trademark or trade name infringement is difficult in case there is no concrete discrepancy.

4.4.1.1.2.7. Use of The Mark in Comparative Advertisements in A Way Not Compatible with Law

Comparative advertisements are advertisements made by means of not having any confusion in between goods or services of the advertisement publisher and his/her competitor. In these types of advertisements, it is mentioned that advertisement publisher's own goods or services have a better quality than or has the same quality with goods or services of the competitor. While comparative advertisements are made, a number of basic criteria should be considered. Some of those criteria found in Article 8 of Regulation are related to the subject of trademark infringement through comparative advertising.

According to Article 8/1-a of Regulation, while comparative advertisements are made *"product name, trademark, logo, trade name, business name or other distinctive elements of the competitors should not be used"*. With the addition of the aforesaid provision in the Regulation, direct comparative advertising has been blocked. Although direct comparative advertising is allowed in comparative law, direct comparative advertising is not allowed in our law. Accordingly, trademark infringement through comparative advertising constitutes contradiction with both the Regulation and the provisions of SMK.

According to SMK, unfair use of the reputation of a trademark which is the same with or similar to a registered trademark and well-known trade mark, harming its

reputation and harming its distinctive character forms the subject of both the relative rejection cause and trademark infringement. In our opinion, making comparison with goods or services of the trademark known by the consumers, in order to introduce goods or services of the advertisement publisher in comparative advertising is a situation faced more frequently compared to the conditions of trademark infringement for the other trademark. In other words, action of trademark infringement through comparative advertising is generally taken by means of making unfair use of the reputation of the famous competitive trademark. Accordingly, while comparative advertising is made, the advertisement publishing trademark should not make an unfair use of the famousness of the other trademark which is the subject of the advertisement, by also taking the provisions of Regulation into consideration. This respect is defined as trademark infringement through the agency of dilution of the trademark, in the doctrine [325].

This situation can be detected according to the solid event or within the direction of specific criteria;

i. Comparison of a product introduced in to the market recently having an unknown trademark with the same product group having a known trademark in the market, by the advertisement publisher, could make unfair use of the famousness of the known trademark. For example; When camera, speed, image quality and such kind of specifications of A trademark mobile phone are compared with the same of an Apple mobile phone, comparison of A trademark with Apple trademark could result in the fact that A trademark makes unfair use of famousness of Apple trademark product. Because, consumers perceive that A trademark product is better than Apple trademark product in terms of so many specifications. As direct comparative advertising is forbidden in our law, this situation constitutes contradiction with both provisions of Regulation and provision of SMK.

ii. Comparison of a product introduced in to the market recently having an unknown with the same product group having an unknown trademark in the market, by the advertisement publisher, could not be beneficial for the advertisement publisher. Although this situation does not have any negative result in terms of the compared

[325] Bozbel (2006), p.101.

trademark which is the subject of the advertisement, we think that it will not have any positive result for the advertisement publisher. Accordingly, although there is contradiction with the provisions of Regulation, there is no trademark infringement in this case.

iii. Although, comparison of a product introduced in to the market recently having a known trademark with the same product group having a known trademark in the market, by the advertisement publisher constitutes contradiction with the criteria found in Article 8 of Regulation, as it would not provide any unfair advantage to the advertisement publisher, that would not be assumed as trademark infringement. This probability constitutes an exceptional case as it does not provide any advantage to the advertisement publisher. Despite that, comparison of a product introduced in to the market recently having a known trademark with the same product group having an unknown trademark in the market, by the advertisement publisher, may not provide any advantage to the advertisement publisher. But, if advertisement publisher compares his/her own product with a less known trademark, as quality and guarantee functions of the other trademark would not be developed as the same functions of the advertisement publisher trademark, that would affect the famousness of the advertisement publisher in a negative way. This situation would even affect the other trademark being compared with the advertisement publisher, whose quality and guarantee functions are high and known, in a positive way.

iv. Comparison of a product introduced in to the market recently having a known trademark previously for different goods or services groups with the same product group having a known trademark in the sector, by the advertisement publisher, there should be two types of evaluations by taking the famousness of both trademarks into consideration. In the first probability, in case the trademark of the advertisement publisher is less famous than the competitor trademark, there is an unfair use of the competitor trademark, and in that case, there is trademark infringement. In the second probability, if the trademark of advertisement publisher is more famous than the competitor trademark, in that case, if it harms the reputation of the competitor trademark, there is trademark infringement. For example, X is a known mobile phone trademark all over the world and Y is a

known mobile phone trademark in the country, incase X makes comparative advertising in the direction of the fact that quality of Y trademark is low, the reputation of the competitor trademark could be damaged.

In respect of the fact that comparative advertisements may constitute trademark infringement, Yargıtay decided that the products of the defendant are used to make a comparison with products having DAVIDOFF trademark, and that those were assimilated to each other and that the said action caused an unfair advantage being provided from the famousness and reputation of the trademarks of the plaintiff[326].

Besides that, the subject that in which cases comparative advertisements would constitute trademark infringement and in which conditions those would be compatible with the law was discussed by CJEU in the case of *L'Oréal SA v Bellure NV*[327]. In the said case, L'Oréal company and its group companies are owners of the trademark of the name, perfume bottle and packing of *Trésor, Miracle, Anaïs-Anaïs and Noa* trademarks. Bellure manufactures 'Creation Lamis' and 'Dorall'. Additionally, Bellure especially sells imitation of Trésor perfume under the name 'La Valeur' and imitation of Miracle perfume under the name 'Pink Wonder' in similar appearance and packings. In other words, it sells imitation of some perfumes of L'Oréal. While these companies market the products, they use *"comparison list"*[328] and which trademark fragrance belongs to which company is mentioned in the said list.

Therewith, L'Oréal filed court cases against these companies. In this court case, it is asserted that imitations of beautiful fragrances belonging to trademarks *Trésor, Miracle, Anaïs-Anaïs and Noa of* L'Oréal which are produced by Bellure and marketed by Starion and Malaika companies as 'Creation Lamis', were offered in the form of 'comparison list' and thus, there was a comparative advertising. Then, L'Oréal brought court case against Bellure and others with the assertion that there was trademark infringement through comparative advertising. In the court case, firstly it mentioned that comparison lists made by Starion and Malaika constituted trademark

[326] Yargıtay 11 HD, T.24/11/2004, E.2014/11469, K.2014/18167 cited by Çolak, p.502.
[327] CJEU, C- 487/07**,** *L'Oréal SA- Bellure NV.*
[328] CJEU, C- 487/07, paragraph 21*"In marketing perfumes in the 'Creation Lamis', 'Dorall' and 'Stitch' ranges, Malaika and Starion use comparison lists which they provide to their retailers and which indicate the word mark of the fine fragrance of which the perfume being marketed is an imitation ('the comparison lists')".*

infringement against Trésor, Miracle, Anaïs-Anaïs and Noa and Noa word and figurative marks and that the said situation was in contradiction with its own legislation, Trade Mark Act Article 10/1[329]. Secondly, it stated that Bellure infringed its trademark right according to Trade Mark Act Article 10/3[330].

In conclusion of the court case, these assertions were analyzed in High Court of Justice of England and Wales. The High Court reverted and asked opinion to CJEU with (5) questions in order to make a preliminary decision for the trial.

CJEU, first of all, handled Directive 89//104[331] Article 5/2[332] and answered the 5th question. According to CJEU, Article 5/2 of this directive predicted a wider type of protection compared to Article 5/1[333] and according to the aforementioned Article, goods or services of the former trademark takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the trade mark. Here, the public makes a connection in between the well-known trade mark and the next trademark, however, it does not confuse trademarks. Additionally, probability of confusion is not needed in between the well-known trade mark and third-party trademark, a connection made by the relevant category of the society is sufficient[334].

Firstly, detriment to distinctive character, secondly, detriment to the repute of that mark and thirdly, take unfair advantage the distinctive character or the repute of trade mark are harming conditions[335], presence of one of them is sufficient for Article 5/2 of the Directive to be implemented [336]. Accordingly, although reputation and distinctiveness of the well-known trade mark are not damaged, gaining an unfair advantage may have unfair quality [337].

Additionally, CJEU mentioned that a global evaluation should be made by taking all factors into consideration in order to find whether the trademark brings unfair advantage or not and that the damages will be as much more powerful as the

[329] See SMK Article 29/1-b.
[330] See SMK Article 6/5.
[331] See Directive 89/104/EEC.
[332] See SMK Article 7/2-c.
[333] See SMK Article 7/2-a and b.
[334] CJEU, 487/07, paragraph 36.
[335] CJEU, 487/07, paragraph 38.
[336] CJEU, 487/07, paragraph 42.
[337] CJEU, 487/07, paragraph 43.

distinctive character of the trademark[338]. CJEU, in the present case, stated that Malaika and Starion used the low qualified imitation of packings and bottles of well-known trade marks which are registered by L'Oréal and other [339] Besides, it mentioned that the referring court had a connection with the court case subject trademarks and that the said connection brought commercial advantage to the defendant [340].

In addition, CJEU mentioned that the advantage gained from the use of the similar of the well-known trade mark was an unfair gain made from the famousness and distinctive character of the well-known trade mark. Besides that, it stated that the purpose of the third party was to exploit the well-known trade mark by making use of the awareness, prestige and attraction force of the well-known trade mark without paying any financial cost[341].

Then, CJEU answered first and second questions. Here, it is mentioned that the comparison lists made, had the characteristics of comparative advertisement and that an evaluation should be made in terms of comparative advertising[342]. CJEU expressed that comparative advertisements where the same trademark or a similar trademark used could be restrained by the trademark owner [343]. Despite that, if comparative advertisements satisfy the conditions found in Article 3/a-1 of the directive 84/450, then those are compatible with the law and these kinds of comparative advertisements could not be restrained by the trademark right holder[344].

CJEU, mentioned in the concrete case that the defendant used the same trademarks with the plaintiff in comparison lists, accordingly that this respect was found within the scope of Article 5/1-a of the directive, that "*comparison list*" used by Malaika and Starion did not have any definitive quality, that whether such kind of use would affect functions of the trademark would be determined by the court asking opinion, that incase use of the well-known trade mark in the comparison list brought unfair

[338] CJEU, 487/07, paragraph 45.
[339] CJEU, 487/07, paragraph 46.
[340] CJEU, 487/07, paragraph 47.
[341] CJEU, 487/07, paragraph 49.
[342] CJEU, 487/07, paragraph 51-52.
[343] CJEU, 487/07, paragraph 53.
[344] CJEU, 487/07, paragraph 53.

advantage without bringing any damage to the trademark owner, that could be restrained by the trademark owner[345].

Finally, CJEU who answered third and fourth questions, mentioned that there were cumulative matters needed to permit comparative advertisements, in provisions 3/a-1-a up to h of the Directive 84/450. A balance is aimed to be redressed in between the advantages of consumers, competitor companies and trademark right holder, together with the said conditions[346]. According to provision 3/a-1-h of the directive, use of counterfeit goods, imitation and replica goods in comparative advertisements are also prohibited [347]. [348]. In this case, additionally, there is no need for the comparative advertisement to cause the probability of being misleading or being confused [349].

In the concrete case, it is indisputable that the main purpose of defendants using *'comparison list'* is to draw the attention of consumers. Besides, it is so clear that these lists are imitations of trademarks connected to L'Oréal and Others and that the defendants sold imitation perfumes through the agency of comparative advertising within the context of Article 3/a-1-h of Directive 84/450[350]. Besides that, according to Article 3(a)1-h of the same directive, 'take[s] unfair advantage' of that reputation is discussed through the agency of *'comparison list'*[351]. Accordingly, all these actions are not compatible with fair competition and those are in contradiction with the law and those bring an unfair advantage to the defendant through the agency of such type of advertising[352].

[345] CJEU, 487/07, paragraph 61-64.
[346] CJEU, 487/07, paragraph 71 *"As is apparent from recitals 13 to 15 in the preamble to Directive 97/55, the object of those conditions is to reconcile the interest of the proprietor of the mark in benefiting from protection of his exclusive right, on the one hand, and the interest of the proprietor's competitors and of consumers in having effective comparative advertising which objectively highlights the differences between the goods or services offered".*
[347] CJEU, 487/07, paragraph 73; Directive 97/55/EC of European Parliament and of the Council Article 3/a/1-h **"***it does not present goods or services as imitations or replicas of goods or services bearing a protected trade mark or trade name".*
[348] CJEU, 487/07, paragraph 73; Directive 97/55/EC of European Parliament and of the Council Article 3(a)/1-h **"***it does not present goods or services as imitations or replicas of goods or services bearing a protected trade mark or trade name".*
[349] CJEU, 487/07, paragraph 74.
[350] CJEU, 487/07, paragraph 76.
[351] CJEU, 487/07, paragraph 77.
[352] CJEU, 487/07, paragraph 79.

Comparative advertising should be made in accordance with the conditions found in Directive 2006/114/EC Article 4[353] in order for them to be made in accordance with the law. In the same direction, comparison of the products of the advertisement publisher and advertisement subject other trademark should be made in accordance with the justice. In that case, although comparative advertising is not made in our law, in our opinion, comparing trademarks whose market shares are close to each other and which are same or similar in terms of their famousness before average consumer would be compatible with the justice. In case the advertisement publisher who is the owner of the well-known trade mark, compares the same products with the advertisement subject other trademark, although it is thought that there would be a positive impression in terms of the other trademark, reputation of the trademark trying to find a place in the market could be decreased before the consumer and that should not be ignored.

4.4.1.2. Imitation of Trademark

According to SMK Article 29/1-b *"to imitate the trademark via using the trademark or indistinguishably similar one without the consent of the trademark owner* is assumed as trademark infringement. The aforesaid Article provision coincides directly with SMK Article 7/2[354]. When the Article of the law is analyzed it is

[353] Directive 2006/114/EC of The European Parliament and of the Council Article 4 *"Comparative advertising shall, as far as the comparison is concerned, be permitted when the following conditions are met:*
(a)it is not misleading within the meaning of Articles 2(b), 3 and 8(1) of this Directive or Articles 6 and 7 of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market ('Unfair Commercial Practices Directive') (7);
(b)it compares goods or services meeting the same needs or intended for the same purpose;
(c)it objectively compares one or more material, relevant, verifiable and representative features of those goods and services, which may include price;
(d)it does not discredit or denigrate the trade marks, trade names, other distinguishing marks, goods, services, activities or circumstances of a competitor;
(e)for products with designation of origin, it relates in each case to products with the same designation;
(f)it does not take unfair advantage of the reputation of a trade mark, trade name or other distinguishing marks of a competitor or of the designation of origin of competing products;
(g)it does not present goods or services as imitations or replicas of goods or services bearing a protected trade mark or trade name;
(h)it does not create confusion among traders, between the advertiser and a competitor or between the advertiser's trade marks, trade names, other distinguishing marks, goods or services and those of a competitor.".
https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:376:0021:0027:EN:PDF (24/09/2018).
[354] See SMK Article 7/2.

separated into two as imitating the trademark and imitating the similar of the trademark with a similarity to a degree that can't be distinguished. Likewise, imitation is defined as use of trademark or use of the similar of the trademark to a degree which could not be distinguished[355]. Accordingly, although use of the similar of the trademark results in confusion, as it is not imitation, it is not a subject of trademark infringement[356]. According to Article 29/1-b of SMK, parties purchasing goods or services (average consumers) could not make an easy distinction between goods or services carrying the real trademark and goods or services of the trademark which is so similar to the original one in a degree which could not be distinguished[357]. In other words, if average consumers could understand the distinction in between trademarks easily, then trademark infringement could not be an issue.

In SMK Article 29/1-a it is mentioned that violation of Article 7 of the law would constitute trademark infringement. In SMK Article 7/2-b of, it is mentioned that the use of registered trademark and the same or similar of that, could be prevented by the trademark. Accordingly, whether Article 29/1-b of the law is repetition of Article 29/1-a is discussed[358]. Concerning this issue, **ARKAN** mentioned that Article 29/1-b was unnecessary and that this paragraph should not be found in the law[359], in spite of that, **TEKİNALP** stated that concepts of *"similar"* and *"similar in a degree that could not be distinguished"* were different and that the first concept caused confusion and that the second concept created imitation[360]. **YASAMAN**, having the same opinion, expressed in (b) and (c) paragraphs of Article 29 of the law that use of "*trademark or its similar one in a degree that could not be distinguished*" was perceived as imitating the trademark and that the said case was arranged especially for paragraph (b)[361].

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[355] Necati Meran, *Marka Hakları ve Korunması,* Ankara, 2015, p.500; According to TRIPS Agreement Article 51 footnote; *"For the purposes of this Agreement:*
(a) "counterfeit trademark goods" shall mean any goods, including packaging, bearing without authorization a trademark which is identical to the trademark validly registered in respect of such goods, or which cannot be distinguished in its essential aspects from such a trademark, and which thereby infringes the rights of the owner of the trademark in question under the law of the country of importation;
[356] Tekinalp, p.455.
[357] İrfan Dönmez, *Markalar ve Haksız Rekabet Davaları,* İstanbul,1991, p.52.
[358] Yasaman and Others, p.1012.
[359] Arkan, p.216.
[360] Tekinalp, p.499.
[361] Yasaman and Others, p.1013.

4.4.1.3. Use of Products Carrying the Trademark in Trade

According to SMK Article 29/1-c *"to sell, distribute, place on trade in any other way, import, export, keep for commercial purposes or to offer contract on the products baring this trademark through infringement while knowing or being required to know that trademark is imitated via using the trademark or indistinguishably similar one"* is one of the conditions of trademark infringement.

According to the aforesaid Article of the law; selling, distributing, bringing to the commerce area, exporting and importing, making contracts for products carrying trademark or marks which are similar to the trademark in a degree that could not be distinguished would constitute trademark infringement. It is mentioned clearly in the law that parties knowing or who should know that the trademark is imitated could take the said action. In other words, law-maker seeks bad faith condition here. Accordingly, if the party, putting the trademark or the similar of that, in a degree which could not be distinguished, in the market, does not know or is in a position not to know or is not in a position to know that the goods or services are put on the market with imitation trademarks or he/she does not keep these products for the purpose of trading, then trademark infringement could not be an issue[362].

According to **TEKİNALP,** three basic conditions should be satisfied in order for the said Article to be implemented [363]:

a) There should be imitation. In other words, there should be goods *"Carrying the trademark or a similar one to a degree that could not be distinguished"*

b) The party putting infringement into practice should put that into practice although he/she knows or should have known that there is trademark infringement (the trademark is imitated).

c) There should be a commercial purpose. In other words, keeping the goods should have a commercial purpose.

Bad faith condition found in the Article of the aforementioned law is detected according to the characteristics of the solid case. The obligation to behave like a

[362] Çağlar, p.107 q.v.
[363] Tekinalp, p.423.

prudent merchant which was arranged in Article 18/2 of TTK is also important related to this subject[364]. For example, in case the person, selling these kinds of goods for years and knowing trademarks used in this area, purchases imitation subject goods at a very lower price than the market price, he/she is in a position to know that the trademark has been imitated[365].

4.4.1.4. Extension of Rights, Granted Through License, without any Permission or Transfer of those to Third Parties

One of the conditions which is assumed as trademark infringement is as follows mentioned in SMK Article 29/1-ç *"to expand the rights given by the trademark owner via license or transfer these rights to third parties without consent"*tir. The main aspect separating the aforesaid Article from others is that there is a contractual relation in between the trademark owner (licensor) and aggressor (licensee)[366]. Accordingly, legal liability of the aggressor is at the same time evaluated within the frame of provisions of contradicting with the contract in recognition of TBK[367].

As a principle, trademark right holder has the right to make license agreement for all or a part of the registered goods or services. There are two types of license rights in accordance with SMK Article 24/2[368]: exclusive and non-exclusive license. Licensor could not issue a license for a third party in exclusive license agreements and he/she himself/herself could also not use the trademark unless he/she keeps his/her right to do so explicitly in the agreement. If the fact that the agreement has the characteristics of exclusive license explicitly, then exclusive license agreement is discussed. Licensor can use the trademark in non-exclusive license agreements, and he/she can also issue license for third parties incase otherwise is agreed with the agreement[369].

By means of licensee behaving in a contradictory way, extension of rights granted through license or transfer of these rights to third parties would constitute both

[364] Çolak, p.426-427.
[365] Çolak, p.385.
[366] Yasaman and Others, p.1016.
[367] Yasaman and Others, p.1016.
[368] See SMK Article 24/2 *"License can be given as exclusive license or non-exclusive license. Unless otherwise agreed on the contract, license is not exclusive. In non-exclusive license contracts, licensor can use the trademark itself and also can distribute other licenses to third parties. In exclusive license contracts, licensor cannot give licenses to others and cannot use the trademark itself unless explicitly reserved its rights".*
[369] See SMK Article 24.

contradiction with the agreement and trademark infringement. Yargıtay decided that trademark infringement is discussed in case the trademark is used by the licensee although the trademark right holder granted a license right to a third party and the license has been expired[370].

ARKAN, defended that extension of rights granted through license without any permission or transfer of these rights to third parties should be evaluated as contradiction with the agreement and that should not be evaluated as trademark infringement[371]. In spite of that, **YASAMAN** defended that constitute trademark infringement there was no obstacle for the licensee behaving in contradiction with the agreement and related to this aspect, incase licensee agreement is made related to putting trademark on the tie and if licensee extends that right and uses the trademark also on shirts, then he asserted that that also constituted trademark infringement[372]. Provisions of unfair competition found in TTK shall prevail related to non-registered trademark infringement [373].

According to **TEKİNALP**, extension of license right can be in 4 ways [374]: In extension *in terms of location*, licensee uses in a different region than the one mentioned in license agreement. In extension *in terms of goods*, licensee uses the trademark for the goods other than those mentioned in license agreement. In extension *in terms of usage style*, licensee does not take the limitations, brought for the usage mentioned in the agreement, into consideration[375]. In extension in terms of *use of trademark with another trademark or mark,* licensee uses the trademark with another trademark. Related to this, use of the license subject trademark by the licensee with his/her own trademark could be shown as an example[376].

In addition to four elements of **TEKİNALP, YASAMAN** also added the element of *extension in terms of time period* [377]. For example, in case the licensor restricts the use of her trademark in terms of time period and location and if the licensee does not obey

[370] Yargıtay 11 HD, T.1/2/2010, E.2008/10012, K. 2010/1075 www.kazanci.com (27/06/2019).
[371] Arkan, p.219.
[372] Yasaman and Others, p.1016.
[373] Suluk, Karasu and Nal, p.162.
[374] Tekinalp, p.453.
[375] For instance, although the licensor permits the use of the trademark only on signage, located in the sales or service area, the licensee's use of the trademark on the products also constitutes a violation of the trademark right. Tekinalp, p.448.
[376] Tekinalp, p.450.
[377] Yasaman and Others, p.1017-1018.

the said rule of restriction, then this will constitute trademark infringement[378]. Despite that, if not complying with the conditions of the license agreement does not have the characteristics of trademark infringement, then it can be said that there is a contradiction with the agreement and trademark owner could not make any claim by depending on the trademark right[379]. . In that case, trademark owner could assert his/her rights originating from his/her registered trademark against the licensee according to SMK Article 24/4.

4.4.2. Plea of Evidence of Usage

After SMK enters into force, evidence of use could be asserted as a plea in infringement cases. In SMK Article 29/2 plea of evidence of usage takes place as follows: *"the provision of the Article 19 Clause 2 can be used as a plea in the infringement lawsuits. In this case in determining the five year period regarding the usage the lawsuit date is taken as basis".*

In SMK Article 19/2[380], in objections made within the scope of SMK Article 6/1[381] objection holder was obliged to submit an evidence regarding the fact that objection subject trademarks were used in Turkey seriously or he/she had justified reasons not to use those.

Thus; the party, against whom a lawsuit was brought with the allegation of trademark infringement, may assert that the plaintiff did not use his/her trademark, which was asserted as a ground for infringement assertion, at least for five years although it was registered at least for more than 5 years and, for that reason, that he/she could not

[378] Suluk, Karasu and Nal, p.162.
[379] Tekinalp, p.457.
[380] See SMK Article 19/2 *"In the objections done within the scope of the Article 6 Clause 1, provided that the trademark made grounds to the objection is registered for at least five years in Turkey on the date of application or priority of the application subject to the objection, the demurrer shall be requested, upon the demand of the applicant, to show evidences that within the five year period before the date of application or priority of the application subject to the objection, the demurrer was using substantially within Turkey the trademark made grounds to the objection regarding the goods or services the demurrer presented as the basis for the objection or that the demurrer has rightful reasons not to use them. In case that these issues are not proved by the demurrer the objection is denied. In case it is proved that the trademark made grounds to the objection is used only for a part of the goods or services within the scope of the registration, only on the basis of goods and services of which the usage is proved are reviewed as basis".*
[381] See SMK Article 6/1 *"In case of a trademark applied for registration, due to the sameness or similarity in the goods or services of a trademark applied on a prior date, there is a possibility for confusion, including the a possibility of association by the public with an already registered or previously applied trademark, then upon objection the application shall be rejected".*

assert an infringement claim[382]. In that case, date of court case is taken as basis for the determination of 5 years period.

Together with this arrangement, usage of the registered trademark in the market effectively and prevention of unnecessary and malicious usage of foundation for objection to broadcast, are aimed [383].

4.5. Legal Claims Based upon Trademark Infringement

4.5.1. Court Cases

4.5.1.1. Trade Infringement Declaratory Action

Declaratory action is a type of action determining whether a right or legal relation is present or not[384]. According to SMK Article 149/1-a right holder whose trademark right was violated has the right to ask from the court for the determination of whether the said action was an infringement or not. In practice, the said action could be brought with prevention, suspension, cancelment actions and sometimes action for compensation[385].

Trademark infringement declaratory action is a declaratory action in terms of its quality in accordance with HMK and it should not be confused with the request of recording of evidence The party bringing this action should have a legal benefit to bring the action, other than exceptions. AS trademark infringement declaratory action may be brought every time, prescription period will not work.

4.5.1.2. Action of Prevention (Prohibition) of Probable Infringement

Prohibition action which was named as “prevention of probable infringement” in SMK Article 149/1-b arranged in Decree Law No. 556 Article 149/1-b and as a result of up-to-date modifications made, could be brought in case there are strong and serious indications that there was a danger of infringement or its repetition.[386]

[382] Suluk, Karasu and Nal, p.228.
[383] See the preamble of SMK Article 29.
[384] Ayhan, Özdamar and Çağlar, p.374
[385] Suluk, Karasu and Nal, p.408.
[386] Ayhan, Özdamar and Çağlar p.376; Çolak, p. 660; Ülgen and Others, p.501; Çağlar p.122.

Action of prevention of probable infringement is an action for performance in terms of its quality[387]. The presence of illegal action constituting infringement is sufficient in order to bring prohibition action by reason of trademark infringement or probable infringement. In addition, defect or damage conditions are not sought[388]. Prohibition action could be asked with the claim to suspend infringement within the course of the infringement. In cases where the state of infringement came to an end, it could be brought to prevent the repetition of infringement. Accordingly, prescription will not work in actions of prevention of infringement.

If the mark constituting trademark infringement takes place in trade name of the party making the infringement, in case of the presence of conditions, actions of both infringement prevention and renouncement of trade name from trade registry could be brought[389].

The fact that prohibition action was not arranged in Decree Law No. 556 explicitly brings discussions related to whether the said action could be brought or not, in the doctrine and generally accepted opinion was in the direction that it could be evaluated in action of suspension as action of prevention was not arranged explicitly[390]. The aforementioned doctrinal discussions were solved when action of prohibition took its place in SMK by being re-named. The elimination of the said space was sound, in our opinion.

4.5.1.3. Suspension of Infringement Actions

The right holder whose trademark right was violated with one of the actions mentioned in SMK Article 149/1-c, could ask for the suspension of infringement [391] being continued against its trademark with the action of suspension of infringement [392]. Infringement or danger of infringement should be solid in order to bring the action of infringement suspension [393]. In action brought for the suspension of trademark infringement, the plaintiff may ask for provisional injunction in order to suspend the

[387] Çolak, p. 661; Ülgen and Others, p.501; Kaya, p. 283; Arkan, p.238; Tekinalp, p.497.
[388] Ülgen and Others, p.501; Çolak, 661; Yasaman and Others, p.1121; Kaya, p.284; Arkan, p.234; Karan and Kılıç, p. 493; Tekinalp, p. 497.
[389] Yargıtay 11 HD, T.22/3/2004, E.2003/8486, K.2004/2848 www.lexpera.com.tr (27/06/2019).
[390] Çağlar, p.122; Çolak, p.733; Yasaman and Others, p.1121; Arkan, p.234; Tekinalp; p.420; Kaya; p.283.
[391] Tekinalp, p.497; Arkan p.234.
[392] Çolak, p. 660; Ayhan, Özdamar and Çağlar p.376.
[393] Çağlar, p.122.

practices [394]. There are opinions in the doctrine asserting that the action of infringement suspension is, at the same time, a protective action [395].

Action of infringement suspension is action for performance in terms of its qualification [396]. Action of infringement suspension could be brought within the course of the infringement [397]. Accordingly, time prescription will not work in the action of infringement suspension [398]. In such an action, the defect and damage of the party making the infringement are not sought [399].

4.5.1.4. Action of Eliminating (Prohibition) Infringement

The right holder whose trademark right was violated may ask for the removal of the material results of the case against the law, resulting from infringement with the action of eliminating infringement according to SMK Article 149/1-ç[400]. This action has the characteristic of restoration[401]. Continuance of the infringement or presence of the danger of its repetition are not sought to bring prohibition action[402]. There should be the practice of trademark infringement in order for the action to be brought. In the said action, presence of results against the law, brought by the infringement, are sufficient. That is to say; incase the manufacture of a product is started with trademark infringement or if the manufacture is already started, prevention of the manufacture resulted from trademark infringement is possible with the prevention action. Destruction of the manufactured products could be made with the prohibition action. In practice, those two types of action could be claimed upon one petition[403].

Aspects, that could be claimed by the right holder with prohibition action, are arranged in Article 149 of SMK. Appropriation and destruction measures for the prevention of the continuance of infringement are found in Article 149/1-d and f of SMK.

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[394] Yasaman and Others, p.1121.
[395] Yasaman and Others, p.1121; Reha Poroy and Hamdi Yasaman, *Ticari İşletme Hukuku*, İstanbul, 2010, p.535.
[396] Çolak, p.661; Ülgen and Others, p.501; Kaya, p.283; Arkan, p.238; Tekinalp, p. 497.
[397] Çolak, p 682; Tekinalp, p. 497; Ayhan, Özdamar and Çağlar p.376.
[398] Çolak, p.669; Çağlar, p.123.
[399] Çolak, p. 734; Arkan, p.234.
[400] Ülgen and Others, p.501; Çolak, p.679.
[401] Ayhan, Özdamar and Çağlar, p.376.
[402] Ülgen and Others, p.501; Çolak, p. 679; Kaya, p.285.
[403] Suluk, Karasu and Nal, p.409.

According to that, right holder whose trademark right was infringed in accordance with Article 149/1)-d of the law, may ask for the following: *"Seizing of the products that cause infringement and require penalty, and device and machine like tools used only for the production of them, without preventing the production of products other than the products subject to infringement"*.

According to SMK Article 149/1-f, right holder whose trademark right was infringed may ask for the following: *"Taking precautions to prevent the continuation of the infringement, especially on the infringer's expense; modification of the shapes of the tools like devices and machines and the products seized according to the Item (d), deletion of the trademarks on them or if it is impossible to prevent the industrial property right infringement then destruction of them*".

Additionally, in SMK Article 149/1-e, entitlement of property right to the plaintiff was foreseen in order to prevent the continuance of infringement.

According to SMK Article 149/1-e, right holder whose trademark right was infringed may ask for the following: *"Assign of the property rights to him/herself on the seized products, devices and machinery in accordance with the Item (d)"*.

Besides, it should be mentioned that presence of defect and damage is not sought in this type of an action as it is the case for the action of trademark infringement[404]. However, although time prescription does not work for the prevention action, it works for elimination action [405].

4.5.2. Actions for Compensation

4.5.2.1. Action for Material Compensation

The party, who damaged another party imperfectly with unfair action, is obliged to compensate that damage in accordance with Article 49 of TBK. There should be a proper causal link in between the illegal action, damage, damage resulted from illegal action and the damaging party should be liable in order to talk about tort liability in

[404] Çolak, p. 680; Kaya, p. 285; Tekinalp, p. 498; Yasaman and Others, p. 1126; Ülgen and Others, p.501.
[405] Suluk, Karasu and Nal, p.409.

the doctrine[406]. Liability to damage born from the violation of trademark rights is also an unfair action inherently, in SMK[407]. Accordingly, abovementioned conditions are applicable for the compensation actions which will be brought by reason of trademark right.

Right holder, whose trademark right was violated, may ask for the compensation of his/her material damages from courts in accordance with SMK Article 149/1-ç, incase conditions are met.

Compensation amount is calculated according to income items which are forfeited with the actual damage. Actual damage is the decrease in actives or increase in passives of assets. Forfeited income is a type of damage arising from the prevention of the increase in assets resulted from the violation of trademark rights.[408] Evidence collection costs made for the detection of attack related to trademark expert and lawyer fees incurred incase legal procedures are started, vast of investment during the said time, destruction, storage costs of products constituting infringement could be shown as examples to actual damages[409]. The burdens of proving the presence of damages and amount of damages are on the plaintiff, whose trademark right was infringed.

Right holder, whose trademark was infringed, may prefer one of the choices foreseen in SMK Article 151/2 for the calculation of his/her forfeited income. According to the aforementioned Article, right holder may prefer one of the following evaluation modes;

a) *If there was no competition caused by the infringer of the industrial property right, the possible gain which the right owner would acquire*

b) *The net profit which the infringer of the industrial property right acquired*

c) *The license fee required to be paid by the infringer of the industrial property right if he/she had used this right legally via a license contract*

[406] Çolak, p. 685.
[407] Ülgen and Others, p.502; Çolak, p. 685.
[408] Suluk, Karasu and Nal, p.410.
[409] Çolak, p.69; Ülgen and Others, p.503.

In case the right holder does not use his/her preferential right, the court will, firstly, make election right and then the decision is made afterwards[410]. Besides that, although right holder makes any preference, calculation method may be changed afterwards[411].

Criteria such as economic importance of trademark, validity period at the moment the trademark infringement takes place, number and type of licenses of trademark are important for the calculation of forfeited income[412].

4.5.2.2. Action for Moral Compensation

Right holder whose trademark right was violated by reason of infringement may ask for the compensation of his/her moral damages. Moral compensation is pain, passion, physical and psychological shocks resulted from the wrongful actBesides the forfeited income or material losses by reason of wrongful act, negative views which would be raised related to the character of the trademark owner as a result of the imitation goods not being in the same quality and disappointment of customers, trademark owner who has made a great effort in the market for long years and who has already come to a specific position distresses the trademark right holder[413]. Accordingly, it is aimed to diminish the sadness of the trademark right holder resulted from the act of infringement.

For the indication and determination of moral compensation, court should consider SMK Article 149/1/ç in addition to TBK Articles 51, 52, and 58. According to this, moral compensation is appreciated according to the extent of moral damages and defective ratio, right and fairness principles, defect-damage-proper causal link relation.[414]

4.5.2.3. Action for Reputational Compensation

According to Article 150/2 of SMK, right holder, whose reputation was damaged as result his/her trademark being produced and used in an inappropriate way and release of the said products into the market in an inappropriate way, may ask for

[410] Suluk, Karasu and Nal, p.410; Ülgen and Others, p.503.
[411] Çağlar, p.127.
[412] Ayhan, Özdamar and Çağlar, p.378; Ülgen and Others, p.504.
[413] Çağlar, p.130.
[414] Ülgen and Others, p.504.

compensation[415]. Right holder may have material and moral damages as a result of reputational losses. If this is the case, reputational compensation is different from material and moral damages and it could be claimed separately[416].

4.5.3. Temporary Legal Protection Claims

4.5.3.1. Provisional Injunction

The injunction is one of the temporary legal protection methods used in respect of trademark law. the injunction is regulated, both HMK Article 389 ff. and SMK Article 159. In the case of injunctive relief requests, first SMK provisions are applied and in cases where there are no provisions in SMK, HMK provisions are applied.

According to SMK Article 159/1, persons who have the right to sue can request an injunction. Persons who have the right to sue must prove that their industrial property rights have been infringed, or that there is a serious danger that it will be infringed.

Plaintiff party can demand injunction if *"Prevention and stop of the acts constituting the infringement of the industrial property right of the plaintiff"* or *"confiscation and storage of the products subject to infringement that are produced or imported via infringing the industrial property right, the devices used exclusively for the production of these or the devices used in the performance of the patented method, without preventing the production of the products other than the products subject to infringement, within the borders of Turkey, including customs and free port or zones"* or *"Giving warranty regarding the compensation of any damages"*[417].

4.5.3.2. Recording of Evidence

Recording of evidence has been foreseen in Article 400 of HMK. Recording of evidence is not an action, principally. In practice, generally, it is brought as different transaction file. According to that, before bringing action for compensation, right holder may ask for the submission of the documents related to the right usage, to the courts by the party liable for the compensation, in order to detect the evidences. This is also valid for the determination of amount of damages in an action brought for

[415] Suluk, Karasu and Nal, p.411.
[416] Çağlar, p.128; Suluk, Karasu and Nal, p.411; Ülgen and Others, p.505.
[417] SMK Article 159/2.

compensation. Recording of evidence is a claim for the prevention of tampering with evidences related to the action which will be brought in the future and it is not to determine whether the acted has a character of infringement or not.

In practice, recording of evidence is made by going to the place of evidences without giving any information to the party liable for the compensation, in order to prevent him/her from tampering with evidences[418].

4.5.4. Parties

4.5.4.1. Plaintiff

Actions of suspension, prevention and elimination of infringement could be brought by trademark owner, the party who made an application for the trademark and who published his/her application in official bulletin and license right holder. Action could be brought against parties being involved in trademark infringement and distributing those, putting those in the market (making contribution to those). In actions brought by trademark application holder, court could not make a decision until the trademark is registered.

4.5.4.2. Defendant

The case may be filed against persons who constitute and distribute, market (and contribute to) the act of infringement on the trademark right. In infringement cases, the title of the defendant must be determined according to the types of cases. In this respect, in case of determination of whether the act is an infringement or not, prevention of a possible infringement, stop of the infringement acts cases, everyone who realizes the infringement action is the defendant. Faults are essential in compensation cases. Hence, sue can not be opened the persons who are not fault.

4.5.5. Criminal Liability

Criminal liability for infringement of the trademark right appears in various ways. These;

a) The person who produces goods or renders services, offers for sale or sells, imports or exports, purchases, keeps, ships or stores for commercial use via

[418] Suluk, Karasu and Nal, p.408.

infringement in the trademark right of others through quotation or ambiguity, shall be punished with jail time from one year to three years and imposed punitive fine of up to twenty thousand days[419].

b) The person who, without authorization, removes the sign that indicates the trademark protection from the good or packaging, shall be punished with jail time from one year to three years and imposed punitive fine of up to five thousand days[420].

c) The person who, without authorization, transferring, licensing or pledging someone else's trade mark shall be punished with jail time from two year to four years and imposed punitive fine of up to five thousand days[421].

d) In case that the crimes in SMK Article 30 are committed within the framework of "legal entities" activity, additional security measures special to these are applied[422].

e) The trademark must be registered in Turkey in order to be fined for the offence contained in Article 30 of the SMK. In addition, investigation and prosecution of these crimes depends on the complaint[423].

f) The person who sells the imitation goods or offers them for sale shall not be punished if they are reported where they are obtained and the goods that are produced are confiscated[424].

[419] SMK Article 30/1.
[420] SMK Article 30/2.
[421] SMK Article 30/3.
[422] SMK Article 30/4.
[423] SMK Article 30/5- 6.
[424] SMK Article 30/7.

CONCLUSION

Together with the developments in advertisement sector, advertisement publishers offer their own goods or services to consumers by showing that their goods or services are in the same quality with or more qualified than the same of the competitors through the agency of comparative advertising. Thus, consumers could see differences or common aspects of advertisement subject goods or services by making comparison of advertisement subject goods or services with quality, price and such kind of parameters and they can make a choice in the direction of their needs by comparing goods or services appropriate for their needs. Comparative advertisements ensure increase in competition in free market economies and they offer healthier choices to consumers in the light of objective information.

Although comparative advertisement affects consumers to an important extent in the market, there is no arrangement in our law which could completely respond to the needs. Comparative advertisements are found in TKHK and those are arranged with details in Article 8 of Regulation which forms the basis of the aforesaid law. When the reference arrangement is analyzed, some criteria has been defined for comparative advertising and making comparative advertisements other than those criteria is forbidden.

Principally, while direct comparative advertising is forbidden in our legislation in Regulation dating January 10th, 2015, together with the modification made in Article 8 of aforesaid Regulation on January 4th, 2017, direct comparative advertising was permitted. Despite that, another modification was made in Regulation on December 28th, 2018 and paragraph (a) was added to Article 8 before examples related to direct comparative advertising were put into practice. Thus, while comparative advertisements are made, elements such as product name, trademark, logo, trade name, business name were restrained, and comparative advertisements were forbidden. With this, only indirect comparative advertisements are permitted in our legislation.

The subject of our study is determined as infringement of trade mark rights by comparative advertising and the subject was analyzed within the scope of TTK, in terms of unfair competition and then it was handled within the scope of SMK and

Regulation and analysis was made in the light of Yargıtay's decision, together with CJEU and legislation related deficiencies are mentioned. Unfair competition through the agency of comparative advertising found in our study is a situation which could be faced frequently in both direct comparative advertising and indirect comparative advertising. For that reason, after we discuss actions constituting unfair competition in our study, we analyzed unfair competition through comparative advertising.

Infringement of trade mark rights by comparative advertising is regulated SMK Article 7/3-f. In order to infringement of trade mark rights by comparative advertising, the mark of the competitor's trade mark must be used in comparative advertising by unlawful means. Thus, infringement of trade mark rights by indirect comparative advertising is less common than infringement of trade mark rights by direct comparative advertising. Likewise, indirect comparative advertisements do not contain competitor's information. However, in indirect comparative advertising, although the information of the competitor is not included, if the advertiser uses the competitor's trade mark in the promotion of their goods or services, the trademark right may be infringed. In addition, in direct comparative advertisements, infringement of the trademark right is mentioned in case of the use of the mark of the competitor due to the explicit information of the parties.

Infringement of trade mark rights by comparative advertising, which is the main subject of our study, generally appears in comparisons made with well-known trade marks. Likewise, in the action of *L'Oréal v Bellure,* it was explicitly shown that Bellure put names of the products belonging to L'Oréal and other companies, to its imitation products, by using 'comparison list'. As Bellure used imitation product without the consent of the trademark owner, it infringed trademark right of L'Oréal and group companies and, at the same time, it took the said action through comparative advertising, by using 'comparison list'. Although direct comparative advertising is not allowed in our law, comparative advertising made by mentioning the name of competitors' trademarks, using the imitation of competitor's goods or services or usage of actions assumed as trademark infringement through comparative advertising constitute contradiction in terms of both SMK and Regulation.

The advertiser may use the mark of competing trade mark in his/her own goods or services, at the same time may indicate that his/her goods or services are of a better

quality than the competing trade mark goods or services. This, also constitutes comparative advertising with regard to unfair competition.

Although indirect advertising is allowed in comparative law, direct comparative advertising is not allowed in our legislation. If comparison is made in indirect comparative advertising, enterprises other than the advertisement publisher are not known and for that reason consumers could not be informed with details. Consumers evaluate competitor's goods or services in the direction of objective criteria, through the agency of direct comparative advertising and they know which goods or services are found in evaluation criteria.

Although there is a danger of infringing or unfair competition while making comparative advertising legally comparative advertising has significant benefits for both advertisers and consumers. For that reason, although direct comparative advertising is not allowed in our legislation, when examples in comparative law are analyzed, direct comparative advertising should be allowed in our law. For that reason, our legislation should again be revised.

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CJEU Case Number: C-321/03 *Dyson Ltd v Registrar of Trade Marks*

CJEU Case Number: C-324/09 *L'Oréal SA, Lancôme parfums et beauté & Cie SNC, Laboratoire Garnier & Cie, L'Oréal (UK) Ltd - eBay International AG, eBay Europe SARL, eBay (UK) Ltd, Stephen Potts, Tracy Ratchford, Marie Ormsby, James Clarke, Joanna Clarke, Glen Fox, Rukhsana Bi*

CJEU Case Number: C-206/01 *Arsenal Football Club plc - Matthew Reed*

CJEU Case Number: C-39-97 *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc.*

CJEU Case Number: C-120/04 *Medion AG v Thomson multimedia Sales Germany & Austria GmbH*

CJEU Case Number: C-63/97 *Bayerische Motorenwerke AG (BMW) and BMW Nederland BV v Ronald Karel Deenik*

CJEU Case Number: C- 558/08 *Portakabin Ltd, Portakabin BV v Primakabin BV*

CJEU Case Number: C- 487/07 *L'Oréal SA- Bellure NV*

Board of Advertisement Decisions

11.01.2005 dated 112 numbered Board of advertisement case 2004/150.

Agreements

TRIPS Agreement

Paris Convention for the Protection of Industrial Property

ÖZGEÇMİŞ

KİŞİSEL BİLGİLER

Adı Soyadı : Necmi AKSOY

Uyruğu : T.C.

Doğum Tarihi ve Yeri : 25 Nisan 1992, Muş

Elektronik Posta : ncm.aksoy@gmail.com

EĞİTİM

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Lisans	Marmara Üniversitesi Hukuk Fakültesi	2015

İŞ TECRÜBESİ

Tarih	Kurum	Görev
2015-2016	Doğan Hukuk Bürosu	Stajyer Avukat
2016-2018	Aksoy Hukuk Bürosu	Avukat
2018-	Türkiye Sağlık Enstitüleri Başkanlığı	Avukat

YABANCI DİL BİLGİSİ

İngilizce : İleri düzey

RESUME

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FOREIGN LANGUAGES

English : Advanced