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Başak SOMEREN ALP

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ÖZET

Tez kapsamında, reklam uygulamalarına ilişkin Türkiye'de yürürlükte olan mevzuatın gelişim aşamalarının ve nihai anlamda gelinen noktanın, Avrupa Birliği mevzuatı ve uluslararası platformda yer alan ilgili düzenlemeler çerçevesinde incelemesi yapılmış; aynı zamanda global ölçekte ve bölgesel anlamda Avrupa Birliği üyesi ülkeler bağlamında, güçlü ulusal uygulamaların değerlendirilmesi, bu ulusal uygulamaların Avrupa Birliği ilgili mevzuatı ile uyumu konusu irdelenmiş ve sürecin Türkiye ile karşılaştırılması yapılmış; tüm süreçteki oluşumların hukuki olarak sağlıklı kurulup kurulmadıklarının değerlendirilmesi, öncelikle ve özellikle denetim mekanizmalarının kuruluşunun karşılaştırmalı olarak değerlendirmesinin yapılması ve gerektiği düzeyde doğrudan Avrupa Birliği üyesi ülkeler ve global ölçekte dikkat çekici düzenlemelerin ele alınması ile sağlanmaya çalışılmıştır.

ABSTARCT

Under this study, I tried to do an analysis of the development phases of the Turkish legislation in force relevant to the advertisement applications and the ultimate point that was reached within the framework of the European Union legislation and relevant legislation at the international stage; assessment of the constitutions within such process if they were settled in an appropriate nature; at first hand and particularly, comparative assessment of the constitution of the control mechanisms and arguing out the significant regulations of the member states of the European Union and regulations at the global scale to the extent of necessity.

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LIST OF ABBREVIATIONS AND ACRONYMS

AA	Advertising Association
AAAA	American Association of Advertising Agencies
ANA	Association of National Advertisers
Art.	Article
ASA	Advertising Standards Authority
ASBOF	Advertising Standards Board of Finance
ASRC	Advertising Self-Regulatory Council
BCAP	Committee of Advertising Practice
BIAC	Business and Industry Advisory Committee
C.	Cilt
CAA	China Advertising Association
CAP	Committee of Advertising Practice
CARU	Children's Advertising Review Unit
CCA	China Consumers' Association
DG EAC	Directorate General - Education and Culture
DW	Deutscher Werberat
EASA	The European Advertising Standards Alliance
EC	European Commission
EEC	European Economic Community
ERSP	Electronic Retailing Self-Regulation Program
etc.	et cetera (and others)
EU	European Union
FAO	Food and Agriculture Organization of the United Nations
FCC	Federal Communications Commission
FDA	Food and Drug Administration
FTC	Federal Trade Commission
GATT	General Agreement on Tariffs and Trade

ICC	International Chamber of Commerce
ITA	Independent Television Authority
NARB	National Advertising Review Board
NARC	National Advertising Review Council
No.	Number
OECD	Organization for Economic Co-operation and Development
OFT	The Office of Fair Trading
p.	Page
RG	Resmi Gazete
SAIC	State Administration For Industry & Commerce
SRO	Self-Regulatory Organization
TRT	Turkish Radio Television
UN	United Nations
USA	United States of America
Vol.	Volume
WHO	World Health Organization
WTO	World Trade Organization
ZEN	Zentrale zur Bekämpfung Unlauteren Wettbewerbs e.V

INTRODUCTION

I believe that two expression may exactly visualize the concept 'advertising' in our minds. Truthfully, these expressions are quite simply able to encapsulate the starting point of my concern to the advertising practices. The first expression is by Robert Guerin, who works on advertising psychology and has studies in this area: *'The air that we breathe is composed of oxygen, nitrogen, and advertisement.'* The second expression is by Walter Thompson, who is the founder of a leading advertising agency and the pioneer of many important advertising techniques: *'Advertisement is the shortest distance between producer and consumer.'*[1]

Free market economy almost obliges its agents to use of more improved, more intrusive and more effective weapons in the compelling circumstances that are getting more difficult everyday. When we look at the issue from the perspective of the integration of local economies to unions that cover economic sphere within regional formations or to global economy; it is clear that, it is not enough to be a strong and reliable player of the local economy, but instead there is a need for information that can convey and promote the player to the integrated region or to the dense global market. In this respect, the element of advertising comes to fore as an important tool in informing the consumer and as one of the most important tools of modern marketing for the mentioned players. Within the modern economic order in the sense of both regional and global, in which the personal bond between the producer and consumer is disappearing and in which both sides are alienating from each other, advertising is functioning as a bridge.

Advertising is fundamentally an activity of promotion. The specification of all the functioning rules of this activity that concerns the whole production chain from the

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[1] MATTELART, Armand: **Reklamcılık**, İstanbul – 1994, p. 105; PEKTAŞ, Hasip: *Reklam Nedir? İşlevi ve Etkileri Nelerdir?*, **Ondokuzmayıs Üniversitesi Eğitim Fakültesi Dergisi**, 1987, No.: 2, p. 221; http://www.jwt.com/en/worldwide/people/jameswalterthompson/ (26.11.2014).

producer to the consumer, and its attaining a place within the legal system through regulation, lead us to the concept of advertising law. More particularly, intense promotion activities in local economies based on competition, or in regional or global free market in the form mentioned above, brought the need for regulations within advertising law as an agenda.

Furthermore, it is clear that, either within countries or globally, developments in the field of information communication technologies have gained momentum to direct advertising practices. In this respect, there has been an increasing focus on the deepening of legal regulations on advertising practices in Turkey after the transition from the period of single channel radio and television to the rapid launching and spreading of various radio and television channels, the launching of many websites in many areas in Turkey in parallel to the spreading of Internet around the world and the widespread use of these websites, the progress in mobile communication having a direct impact on advertising practices like in all other areas (reaching the consumers through various advertising methods via mobile phones and POS devices). In addition to these, the expansion of advertising media from the roadside panels traditionally to the newest medium like the back of the public toilet doors can be counted among the reasons that increase the demand for the functionality of legislation.

When we analyze the evolution of advertising practices and its legal branch through the political conjuncture of Turkey, we clearly observe that both the bilateral or multilateral relations at the international level, and the intensive period of harmonizing legislation during the negotiations with the EU have directly effected the legislation regarding advertising practices and control mechanisms, which we can count among the newest areas of legislation.

Concerning all these points, the topic of this thesis can be summarized as the study of legislation on advertising practices that is in force in Turkey, its phases of development and the stage it has reached, from within the framework of the EU

legislation and related regulations that take place at the international level; the evaluation of strong national practices within the scope of the members of the EU regionally, as well as globally, analyzing the issue of harmony of these national practices with the EU legislation; the assessment whether the formations during the whole process is legally healthy or not; providing a comparative evaluation on the establishing especially and primarily of control mechanisms, and the analysis of remarkable regulations in the member states of the EU and at the global level.

Within this framework, the dominant approach of this dissertation is going to be the legal approach. However, there will also be assessments, where necessary, on the local, international, and regional conditions within the EU context in which the practices are interacting with each other as a result of the impact of free market on advertising practices. In this context, a comparative method of analysis will be applied, and various examples of application in these comparisons will be examined. At the stage of assessing these analyses, we will question whether these examples with different qualities can take place in a common legal substructure. At this point, it should be emphasized that, within the context of control methods regarding advertising practices, lawsuits and criminal processes that could be followed due to advertising practices are going to be evaluated as well; however, such assessments are going to be discussed within the limits of the subject of this thesis.

Within this general framework outlined above, firstly the first chapter of the dissertation will analyze the basic concepts of advertising practices in relation to regulations directly on advertising practices or mention these practices indirectly within the Turkish Law, as well as the regulations of entities that work on advertising practices, also in related points with international regulations and the regulations of the EU. Another subject that will be examined under the same chapter is the significant developments within the history of advertising practices in Turkey and in the world. In this respect, the birth and evolution period of advertising will be discussed, through

dealing with its touchstones, both within our country locally and around the world globally.

The second chapter of the thesis will analyze the regulations on advertising practices at the international level. In this context, we will deal with the regulations of international organizations, the United Nations, the Organization for Economic Cooperation and Development and the World Trade Organization which do studies on the topic. Following this, we will analyze the principles of the ICC on the subject, which constituted the most significant regulation on the international platform that effects legal regulations on advertising practices at the national level. The second part of the chapter will be completed by analyzing the countries which have remarkable examples of legal practices, at the regional level and and distinctly United States of America, China, Britain and Germany, which are widely studied in the literature, in detail.

The third chapter deals with regulations regarding advertising practices in the EU and Turkey. Within this scope, we will firstly analyze the evolution of the EU and its relationship with Turkey, and then the regulations on advertising practices in the EU and Turkey in the last part. Before this last part, we will attempt to establish the foundation of the topic by providing information and evaluations on the functioning of the EU legal system to which these regulations belong to. The last part of the chapter will analyze in detail the regulations on advertising practices both within the EU and in Turkey by making the distinction between direct and indirect legislation and by focusing on particular regulations.

The last chapter of the dissertation will attempt at explaining the control mechanisms within the scope of regulations on advertising practices through lawsuits, administrative control, criminal proceeding, self-regulatory bodies, which are the four methods that are applied in control of the advertisement practices that are incompatible with legal regulations within the larger part of the legal systems. Following general clarification of 'control' as a concept, regulations regarding control mechanisms

regarding advertisement practices in EU and in Turkey are going to be examined in detail. After examining the practices of self-regulatory systems at the level of the member states of the EU in general, we will evaluate the European Advertising Standards Alliance, which is an effective body founded in the area of self-regulation concerning advertising practices within the union, especially in relation to its principles that are effective globally. The regulations regarding control of advertising practices in Turkey will be examined with respect to the basic distinction made above, and the Board of Advertisement and the Advertising Self-Regulatory Board, which are both effective institutions, are going to be especially detailed within this scope.

At the conclusion and final assessment, by analyzing the whole picture at the level of Turkey, the EU and international platform, criticisms are going to be examined basically within the context of control mechanisms and comparisons and under the light of evaluation that were made within the scope of this dissertation; suggestions and possible substructural formations that we try to build are going to be evaluated. Especially the procedures on control mechanisms, within the the context of the decisions taken by related institutions, are going to be evaluated by providing comparisons from the EU regulations and with examples from the member states.

CHAPTER 1

BASIC CONCEPTS IN ADVERTISING PRACTICES

1. Terms

Before beginning to make assessments, the first step of a research is to identify that which it is going to assess. Therefore, before beginning to make assessments on advertising practices and regulation, first we will try to provide definitions of the term 'Advertising' that are going to be assessed, and later clarify the concepts that are involved in the content and functioning of this term.

1.1 Advertising

The concept of advertising is defined in various ways and presented in different expressions both in many disciplines such as communications, economics and related disciplines as well as in various legal documents that are created by local legislation, international or regional formations. Therefore, it will be useful to briefly mention the definition of advertising both in various disciplines and in various legal documents within this scope in consideration of the importance of basic definitions as stated above.

The term in Turkish 'reklam' has been taken from the French word of 'réclame' that is used in the sense of 'trying to be in the public eye' which originates from the Latin word 'clamare' that means 'to call or summon'.[2]

Here is a brief exposition of the various definitions of the term 'advertising' in different disciplines; the general definition provided by the Turkish Language Association (TDK) is "All of the ways used in order to introduce, recommend and

[2] KULA DEMİR, Nesrin: *Kültürel Değişimlerin Reklamlarda Kadın ve Erkek Rol-Modellerine Yansıması*, **Fırat Üniversitesi Sosyal Bilimler Dergisi**, Vol. 16, No. 1, Elazığ - 2006, p. 287; KARPAT, Işıl: **Kurumsal Reklam**, İstanbul - 1999, p. 35.

thereby promote the circulation of something to the public; any writing, photograph or film, etc. that is used for this purpose"; and the economic definition provided by this same institution is, "One of the activities a company does in order to increase sales with the purpose of increasing the demand to its product by affecting the tastes and choices of the customers."[3] In various sources, in terms of conceptual content, advertising is either defined in detail such as: "An announcement that is displayed by purchasing a place or period from communication instruments, or reproduced and distributed through other means, such that it is created in return for a fee is evident (in other words, the identity of the person or the organization that provided the financial support is evident), and which is created in order to persuade people to act in a certain way voluntarily, to direct them toward a certain idea, to try to focus their attention on a product, service, idea or organization, to inform them about that thing, to change their opinion and attitude about that thing or to ensure that they adopt a certain opinion or attitude," or explained in short and clear terms such as: "Advertising is convincing messages which are being designed with the purpose of selling of a product or service." and "A marketing activity that conveys the most persuasive sale message for a product or a service, at the lowest cost to the appropriate population."[4]

Samples of definitions of advertising that are provided by various foreign or local institutions or organizations are as follows. The definition, for instance, that takes place in the Obligatory Vocational Resolution on Honest Advertising issued by Istanbul Chamber of Commerce is as follows: "Advertising is the publicizing of various messages through various means in return for a fee with public knowledge of the identity of who is placing the advertisement, in order to convey to the masses a product, brand, organization, service, opinion, or an idea. This definition comprises the modes of advertising that are done for goods and assets, including ads on packages and labels, materials used at points of sale, regardless of the source of advertising." The definition

[3] http://tdkterim.gov.tr (06.04. 2014).
[4] GÜLSOY, Tanses: **Reklam Terimleri ve Kavramları Sözlüğü**, İstanbul - 1999, p. 9; MUTLU, Erol: **İletişim Sözlüğü**, Ankara - 2004, p. 286; MELEK, Leyla (Derleyen): **Reklam Terimleri Sözlüğü**, İstanbul - 1995, p. 9.

of advertisement provided by the American Marketing Association, a foreign body, is as follows: "Any publicity or persuasive message placed in the mass media in paid or donated time or space by an identified individual, company, or organization."[5]

Following these definitions, it will be in-place to turn over lastly to local, regional or international legal definitions in related legislation. Although there are provisions in various regulations on advertising practices in Turkish legislation, some of them do not give place to any definition. Among those legislations which do not include any definitions are the prior Law on Consumer Protection numbered 4077, and the Turkish Code of Obligations (Old Code of Obligations numbered 818, and New Code of Obligations numbered 6098). However, the new Law on Consumer Protection numbered 6502, art. 61/1 gives the following definition: "Commercial advertisements are announcements, qualified as marketing communication, that are made through written, visual, auditory or similar means in any medium by those who place the advertisement in order to inform or persuade the target masses, and to ensure the sale or rent of a product or a service in relation to a trade, business, craft or profession." While there is a provision in another regulation that provides a definition, the Law on the Constitution of Press Announcement Institution numbered 195, that counts "announcements that are made in writing, photography, or drawing in newspapers and journals that have the purpose of gaining financial or moral benefit such as commercial purposes like increasing the sales, or increasing demand for a thing or an idea" as advertisement, the Law on the Foundation and Broadcasts of Radio and Television numbered 3984 art. 3(u), which was annulled by the Law on the Foundation and Broadcasts of Radio and Television numbered 6112, provides a clear definition of advertisement: "Advertisement; implies the announcements made to the public during the period of transmission that is allocated to advertiser in return for a fee or a similar compensation, in order to improve the sale, purchase or rent of a product or a service, to propagate a cause or an idea, or to create some other effects that the advertiser wants."

[5] YAZICI, Vildan: **Reklamcılık Sektör Profili**, İstanbul Ticaret Odası, May - 2004, p. 14; GÖLE, Celal: **Ticaret Hukuku Açısından Aldatıcı Reklamlara Karşı Tüketicinin Korunması**, Ankara - 1983, p. 34.

Definitions that are included in local legislation that are directly related to advertising practices are Turkish Radio and Television Corporation Advertising Regulation[6] art. 3(f): "Advertising: implies the auditory, visual or written promotion of a product, service, activity, or corporate identity" and the definition that takes place in Regulation on the Application Rules and Principles Concerning Commercial Advertisement and Announcement[7], art. 4(h): "Commercial advertisement and announcement: implies announcements, qualified as marketing communication, that are published in any medium by those who place the advertisement in order to publicize a product, service or brand, to inform or persuade the target masses, and to ensure the sale or rent, or increase the sale or rent, of a product or a service." Lastly, regarding local regulation that are directly related to advertising, it will be apt to add that, the Required Conditions for Advertising numbered TS-9300 issued by the Turkish Standards Institution, created by benefitting both from local and international regulations, includes a definition synthesizing above mentioned definitions.[8]

Finally, if we examine the relevant legislation in the context of regional and international formations, the definition that takes place in International Code of Advertising Practice, issued by ICC, which is a document on the basic international principles, is as follows: "The term advertising, in the broadest sense, includes any type of advertisement that are done for goods and services regardless of the medium."[9] Within the body of EU, which we will discuss in relation to regional formations, there are provisions on advertising in various regulations. Among the regulations that we will examine in detail, we find the definition of advertising in "Council Directive 84/450/EEC of 10 September 1984 Relating to the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Misleading Advertising"[10] art. 2(1) as follows: "'advertising" means the making of a representation in any form in

[6] RG. 26.8.2009, S. 27331.
[7] RG. 14.8.2003, S. 25138.
[8] Türk Standartları Enstitüsü: **TS-9300 Reklamlarda Uyulması Gereken Kurallar**, Ankara – February 2002, p. 2.
[9] http://www.iccwbo.org/uploadedFiles/ICC/policy/marketing/Statements/330%20Final%20version%20of%20the%20Consolidated%20Code%20with%20covers.pdf (26.11.2014).
[10] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31984L0450:EN:HTML (26.11.2014).

connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immovable property, rights and obligations."

1.2 Medium

Either in international legislation on advertising practices or in related EU regulations that we consider as regional, it is observed that the definitions provided concerning advertising are not restrictive definitions. In this context, the concept of medium is also used in the broadest sense.

Whereas in Turkish Law, Regulation on the Application Rules and Principles Concerning Commercial Advertisement and Announcement[11] art. 4(g) includes the following definition of "medium": "Medium implies the place or the environment (television, any type of printed media, internet, radio, communication channels such as cinema, and materials that carry advertisements such as printed work in open spaces), where a person, group or community who is conveying or receiving the advertisement or publicity message, gathers."

As seen, there is avoidance from having a restrictive attitude concerning the definition of the term "medium." The transition from the period of single channel radio and television to the rapid launching and spreading of various radio and television channels, to the launching of many websites in many areas in Turkey in parallel to the spreading of Internet around the world, to the widespread use of these websites, and the progress in mobile communication having a direct impact on advertising practices like in all other areas (reaching the consumers through various advertising methods via mobile phones and POS devices) and similar examples clearly demonstrate that restricting the concept of medium would hamper the regulations on advertising in achieving their purposes.[12]

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[11] RG. 14.08.2003, S. 25138.

[12] DİŞBUDAK, Aylin: **Türk Hukukunda Aldatıcı Reklamlar**, Unpublished Master Thesis, Ankara - 2007, p. 13-16.

At this point, when we examine a couple of decisions, whose brief summaries are provided below, taken by the Board of Advertisement that constitutes one wing of the control mechanism on advertising practices in the country, we observe that it inclines against the view which conceives the presence of an instrument a required aspect of advertisement[13], in contrast of the view that advertisement should be made through an instrument as indicated in the definitions above and concerning medium:

- In the decision numbered 2004/86, the Board took the decision to impose an administrative fine and stoppage penalty on the grounds that "the facility named Kaplan Paradise Hotel, owned by Otek İnş. Tat. Tur. Tic. ve San. A. Ş. that operates in the city of Antalya, has been publicizing itself as a 4 star hotel at publicity instruments (on the door and nameplate) to the contrary of the 3 Star Hotel Partial Tourism Trial Operation Licence issued by the Ministry of Tourism."[14] As is seen, the expression used at the door of the hotel was accepted as advertisement, without searching whether it was emitted through a medium.

- In another decision dated 2006/23, the Board decided to impose an administrative fine and stoppage penalty on the grounds that "the menu titled 'Welcome' which belongs to the company named Muhabbet Simit Sarayı (Mehmet Gültekin Kar - Yahya Kopuz), operating in the city of Rize, used the exact photographs on the menu of the Dergah Pastaneleri, operating in the same city, contrary to the provision art. 16, titled "Imitation," of the Regulation on the Application Rules and Principles Concerning Commercial Advertisement and Announcement: "Advertisements shall not imitate the general outline, text, slogan, visual presentation, musical and sound effects or similar attributes in a way that misleads or confuses consumers."[15] In this decision, even the menu list of a bakery was considered as an advertisement.

[13] İNAL, Emrehan / BAYSAL, Başak: **Reklam Hukuku ve Uygulaması**, İstanbul - 2008, p. 9-10.
[14] https://www.sanayi.gov.tr/webedit/gozlem.aspx?sayfaNo=2319 (26.11.2014).
[15] https://www.sanayi.gov.tr/webedit/gozlem.aspx?sayfaNo=3131 (26.11.2014).

1.3 Advertiser

Even though the definition of the term "advertiser" does not take place in regulations of ICC or EU, which are mentioned among international or regional documents, it is openly expressed that these regulations are directly related to these people. However, in Turkish Law, again in the Regulation on the Application Rules and Principles Concerning Commercial Advertisement and Announcement[16], art. 4(d), it was deemed necessary to include the following definition: "Implies a real person or legal entity who has the advertisements that include his/her company or goods/service brand which s/he had prepared in order to publicize, or increase the sales of, the goods/services s/he produces or markets, or in order to create and reinforce its image; published, distributed, or displayed through other means." Beyond this clear definition, it is necessary to state that the name of that which is going to be advertised, or the name of the advertiser, is the sole instrument to be used to link the message of the advertisement to the source of the message, and therefore that it aims at the increase of consumption, which is the main purpose.[17]

2. Significant Developments in the History of Advertising Practices in Turkey and around the World

The point where advertising practices reached and the speed of their development clearly shows that the criteria that are going to be used in their assessment have to be open to development as well. In this context, it will be useful to go over the history of these practices briefly. There are many sources which indicate that advertising began during the ancient ages, among which is counted what was practiced orally by criers and touts, texts, notice boards and signboards in the Babylonian, Egyptian and Roman civilizations as the written precursors of advertising.[18]

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[16] RG. 14.08.2003, S. 25138.

[17] HIRSH, Ernst: *Reklam Hakları*, **Hukuk Dünyası**, Vol. I, No.: I, 1944, p. 3; GÖLE (1983), p. 36.

[18] TAŞKAYA, Merih: **Türkiye'de Neo-Liberal Süreçte Örtülü Reklam Deneyimi: Düzenlemeler, Denetim ve Aktörler**, Doctorate Thesis, Ankara - 2008, p. 43; KOCABAŞ Füsun / ELDEN Müge: **Reklamcılık Kavramlar, Kararlar, Kurumlar**, İstanbul – 1997, p. 14; TENEKECİOĞLU, Birol: İşletmelerde Reklam, **Dünya'da ve Türkiye'de Reklamcılık - Reklamın Gücü**, Ankara – 1988, p. 22.

We can say that the period when we came closer to the approach of advertising practices of today began in 12. century when the paper arrived at Europe and when Johannes Gutenberg invented, what is considered as the most important developments in the history of communications, the mechanical moving type printing, and we can say that printing also revolutionized advertising. With the use of movable type printing, the first examples of newspaper and then periodicals, leaflets and similar prints provided the ability to reach to a large mass of people and this field proved itself as the efficient medium that advertising was looking for.[19]

When we look briefly at the developments in the United States of America, we observe that the advertising industry there developed in parallel to the developments in Europe. Following the Great Depression of 1929, the boycotts in the United States of America consequently led companies to search for foreign markets where they would sell their goods and this very much affected the advertising sector. During the following period, we can say that the most significant developments in the area of advertising took place in the 1950s and 60s which is considered as a creativity revolution in advertising.[20]

As we move to 1980s, as the economic restrictions began to be lifted rapidly all around the world, the circulation of capital became easier in this sense and as the population that comprises the consuming mass started to increase rapidly, a phase was entered in which advertising began to go beyond classical and traditional ways and started to use all kinds of methods that besiege consumers completely. Lastly, in 1990s and 2000s, following the extensive technological developments, new methods of communication between advertisers and consumers were introduced, and diversification in the quality of advertisements began to be observed with the emergence of defined consumer class.[21]

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[19] PEKTAŞ, Hasip: *Reklam Nedir, İşlevi ve Etkileri Nelerdir?*, **Ondokuzmayıs Üniversitesi Eğitim Fakültesi Dergisi**, Samsun - 1987, No. 2, p. 221; TAŞKAYA (2008), p. 43; KOCABAŞ / ELDEN (1997), p. 15.

[20] GENÇTÜRK HIZAL, Senem: *Reklam Endüstrisinin Topografyası: Türkiye Örneği*, **İletişim Araştırmaları Dergisi**, Ankara - 2005, Vol. 3(1-2), p. 113

[21] GENÇTÜRK HIZAL (2005), p. 114.

The benchmarks in the history of advertising practices in Turkey begin with the newspaper Ceride-i Havadis, published between 1840 and 1864, which announced in 1840 that it will print announcements that are similar to the classified advertisements of today.[22] These announcements were sold for 10 kuruş per line, and when compared with the price of the newspaper which is 3.5 kuruş, it is clear that the cost on the price list of advertisements was very high.

Newspaper and journal advertising, that began in this way, was followed very lately by the radio advertising. Even though radio broadcasting began in 1927, it was not possible to place an advertisement on radio until 1951.[23] Later, television broadcasting began in 1968 but it was not until 1972 that television broadcasting started to take advertisements, and advertising began to grow rapidly after that in Turkey. It was after the 1960s that the entrance of international brands into Turkey increased, and depending on the ongoing economical conjecture around the world as described above, it was after 1980s and increasingly between 1990s and 2000s, that advertising practices began to appear in front of the consumers in increasingly intensifying and professionalizing way.[24]

[22] GENÇTÜRK HIZAL (2005), p. 114; TENEKECİOĞLU (1988), p. 24.
[23] http://ilef.ankara.edu.tr/reklam/yazi.php?yad=6007 (26.11.2014).
[24] PEKMAN, Cem: *Çok-uluslu Reklamcılık, Uluslararası Düzenlemeler ve Ulusal Uygulamalar: Kuralları Kim İster?*, **Medya Politikaları**, May – 2001, p. 210, 215-216.

CHAPTER II

INTERNATIONAL REGULATIONS ON ADVERTISING PRACTICES

Before studying the regulations on advertising practices in Turkish Law, we will evaluate a couple of examples with strong regulation on advertising practices in the legal systems at the level of countries, in order to provide a comparison point that can determine the point reached in our legal system, as well as to address the current situation in the international platform which also serves as a source for these regulations. Namely, both regulations in this area, by either global or regional formations, and the local regulations of countries whose regulations are outstanding will shed a light on the progress in advertising laws and will provide the foundation for the projections we will propose to be included in our legal system in the future process.

1. International Institutions

Under this part we are going to begin with brief assessment of regulations of various international organizations, that have the quality to conduct either comprehensive regulations or suggestions and specifications on the advertising practices at international level and then examine the legal regulations on advertising practices of ICC which effects regulations at the level of the countries.

As international organization, we mean, in the broadest term, any type of joining which does not have any commercial purpose and which concerns more than one country; but which does not bear the qualifications of a state and that which operates at an international level. Feature of these organizations is that, through meetings and negotiations, they establish a ground for countries to cooperate with each other.[25] Within the scope of the subject matter of this study, we will assess these organizations in their legal structures that are specific to each with regard to their particular purpose, form of organization, authority and other aspects, and the place of advertising in these structures.

[25] PAZARCI, Hüseyin: **Uluslararası Hukuk Dersleri**, Ankara - 1999, p. 122-140; GÖNLÜBOL, Mehmet: **Uluslararası Politika**, Ankara - 1993, p. 384-394.

According to main criteria in the classification of international organization, the following organizations will be included in our study:

1.1 United Nations (UN), as universal organization,

1.2 Organisation for Economic Co-operation and Development (OECD), as specialized organization that coordinate between countries,

1.3 World Trade Organization (WTO), as technically specialized international organization.[26]

1.1 The United Nations (UN)

The United Nations is an international organization, founded in 1945 to stabilize international relations and build a solid ground for peace, and it continues to work in many diversified areas from human rights to the struggle against poverty, from economic development to the peaceful use of atomic energy.[27]

The works on advertising practices began subsequent to the request of the United Nations Economic and Social Council from the United Nations Secretary General a report on the available standards and procedures on protecting consumers in developed countries in order to help developing countries in their regulations on advertising and marketing with the support of United Nations.[28] In this context, the following article takes place under the section titled 'Promotion and Protection of Consumers' Economic Interests' in the III. section titled 'Guidelines' in the 'United Nations Guidelines for Consumer Protection' that passed at the United Nations' General Assembly on April 16, 1985 and expanded at the meeting of the Economic and Social Council on July 26, 1999:[29]

25. Governments, in close collaboration with manufacturers, distributors and consumer organizations, should take measures regarding misleading environmental

[26] PAZARCI (1999), p. 125.
[27] http://www.un.org.tr (26.11.2014).
[28] http://www.un.org.tr (26.11.2014).
[29] United Nations Conference on Trade and Development: **United Nations Guidelines for Consumer Protection (as expanded in 1999)**, New York and Geneva 2001, p. 5-7.

claims or information in advertising and other marketing activities. The development of appropriate advertising codes and standards for the regulation and verification of environmental claims should be encouraged.

In order to clarify United Nations' works on the subject, we will examine some certain specific regulations as examples and complete this section regarding United Nations:

The World Health Organization (WHO) and the Food and Agriculture Organization (FAO), which are both agencies of the United Nations, published the "International Code of Conduct on the Distribution and Use of Pesticides – Guidelines on Pesticide Advertising". This guideline makes references to the regulations of FAO on pesticides, and intends to explain the provisions that appear under art. 11 titled "Advertising". Within the scope of these provisions, there are certain aspects that determine the limits of advertising practices, such that:

- all statements used in advertising are technically justified,
- especially in terms of safety, advertisements should not mislead the consumer,
- advertising does not encourage uses other than those specified on the approved label,
- advertisements do not misuse research results,
- advertisements do not contain any visual representation of potentially dangerous practices,
- false or misleading comparisons are not made.[30]

Furthermore, it has been clearly stated in the mentioned guideline that this regulation is advisory, and would not present a situation contrary to current legal regulations. Lastly, the scope of the guideline includes the topic of self-regulation, and makes reference to the regulation of the ICC which we will discuss below. On the subject of self-regulation, even though the limitation of the punitive power of an independent

[30] World Health Organization, Food and Agriculture Organization: **International Code of Conduct on the Distribution and Use of Pesticides – Guidelines on Pesticide Advertising**, March - 2010, p. 10-13; http://www.fao.org/docrep/005/Y4544E/y4544e02.htm#bm2.11 (26.11.2014).

authority is mentioned, it expresses the quick activation quality and the capacity of exercising power over the members of these control mechanisms that are formed by the advertisers among themselves. It is observed that there were references to the ICC regulation regarding application areas for it, and hence we can conclude that regulations within the body of UN are grounded on the regulation of ICC.[31]

Another regulation we will examine is the 'International Code of Marketing of Breast-milk Substitutes' that was put into action by World Health Organization.[32] Included among the purpose of the code is ensuring the distribution of breast-milk substitutes through appropriate marketing methods, within its content, 'breast-milk substitutes' includes: 'infant formula, other milk products, foods and beverages, including bottle-fed complementary foods, feeding bottles and teasts'. Along with the advertising of these equivalent products that are included in the scope of the regulation, the point of sale advertising, providing sample, or the use of any promotional instruments are prohibited.[33]

1.2 The Organisation for Economic Co-operation and Development (OECD)

The Organisation for Economic Co-operation and Development, one of the specialized organizations, is founded after the Organisation for Economic Co-operation and Development (OEED), which was formed in order to coordinate the aids done for the reconstruction of Europe after the World War II, completed its mission.[34]

The aims of the organization according to its founding convention are; the improvement of living standards both in the countries where financial stability is promoted simultaneously and in the developing countries; assisting and supporting

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[31] WHO - Food and Agriculture Organization (2010), p. 13-14; http://www.fao.org/docrep/005/Y4544E/y4544e02.htm#bm2.11 (26.11.2014).

[32] BODDEWYNN J. J. : *Advertising Regulations in the 1980s: The Underlying Global Forces*, **Journal of Marketing**, Winter - 1982, p. 27-35; http://www.who.int/nutrition/publications/code_english.pdf (26.11.2014).

[33] http://www.ilca.org/files/events/ilca_conference/Exhibitor%20Resources/CodeSummary09.pdf (26.11.2014); http://www.develidh.gov.tr/egitim/uluslararasi_mama_kodu.pdf (26.11.2014).

[34] http://www.oecd.org/about/history/ (26.11.2014).

policies that provide continuous and balanced economic development; eliminating unemployment; inspiring economic growth policies and supporting coordinated socio-economic development; and, supporting the development of the world trade multilaterally in such a way that does not distinguish between countries and in accordance to the international obligations.[35]

We come across regulations made by the OECD on advertising in the 'Guidelines for Multinational Enterprises' issued by the organization. The aim of these guidelines is the global improvement of economic, environmental and social development with the contributions made by enterprises. Even though the guidelines are advisory, they express the common values of countries most of which are the place of birth of multinational enterprises and from which international direct investments originate. The guidelines serve as the leading international instrument for the development of responsible commercial practices. In this context, we find specifications on advertising practices under the section VIII of the guidelines, titled 'Consumer Interests' This section indicates the need for enterprises to conduct their operations as fair trade, marketing and advertising practices, and to take the necessary steps in order to maintain the quality and safety of their products and services, and the topic is further detailed in articles. Within the scope of articles, the following points are dealt with in detail:

- ensuring all agreed or legally required standards for consumer health and safety are met,
- providing accurate, verifiable and clear information that is sufficient to enable consumers to make informed decisions,
- providing consumers with access to fair, easy to use, timely and effective non-judicial dispute resolution and redress mechanisms, without unnecessary cost or burden,
- not making representations or omissions, nor engage in any other practices, that are deceptive, misleading, fraudulent or unfair,

[35] http://www.oecd.org/general/conventionontheorganisationforeconomicco-operationanddevelopment.htm (26.11.2014).

- support consumer education,
- respecting consumer privacy (such as personal data),
- co-operating fully with public authorities to prevent and combat deceptive marketing practices (including misleading advertising and commercial fraud).[36]

The study made on the section VIII titled 'Consumer Interests' is conducted together with ICC which we will mention below. Furthermore, the section titled 'General Policies' also talks about the benefits of self-regulation on the process provided that it remains within the confines of law.[37] Lastly, the reports on group profiles for related policies published by OECD - Business and Industry Advisory Committee (BIAC) in the years 2011, 2012 and 2013, refers to the issue of conducting studies with governments to get across successful self-regulation attempts and to defend the values of self-regulation shaped by the industry as the priorities of the task force on consumer policies every year.[38]

1.3 The World Trade Organization (WTO)

The World Trade Organization, one of the technically specialized international organizations, replaced the temporary General Agreement on Tariffs and Trade (GATT) as a result of the negotiations at the Uruguay Round and established with the World Trade Organization Agreement signed by the members and began to operate on January 1, 1995. The basic functions of the World Trade Organization are the following:

- ensuring the implementation and control of multilateral trade agreements that constitutes the organization,
- providing a forum for multilateral trade negotiations,
- helping the resolution of commercial conflicts,

[36] OECD: **OECD Guidelines for Multinational Enterprises**, OECD Publishing - 2011, p. 3-4, 51-55.
[37] OECD (2011), sf. 19-27.
[38] http://www.biac.org/policygrp/2011_BIAC_Policy_Group_Profiles(Rev).pdf (26.11.2014); http://www.biac.org/policygrp/2012_BIAC_Policy_Group_Profiles.pdf (26.11.2014); http://www.biac.org/policygrp/2013_BIAC_Policy_Group_Profiles.pdf (26.11.2014).

- reviewing national trade policies of the member states,
- coordinating with other international organizations on global economic policies,
- assisting the developing, least-developed and low-income countries in transition to adjust to WTO rules and disciplines through multilateral trade system.[39]

Before the specifications of World Trade Organization regarding the advertising practice, if we briefly describe the system of the organization to clarift the situation; within the system, member states identify the limitations they implement to foreign service providers within the service sector with commitment lists. These lists are generated based on the regulations made under the titles of market access and national treatment. When these commitments are declared, explanations are given about the related service sector on the basis of four modes of trading services. These modes are: cross-border trade, consumption abroad, commercial presence, and the movement of natural persons.[40]

The specifications of the World Trade Organization on advertising services take place in its report dated 1998. In these specifications, it is expressed that the commitments cover ten of the world's twelve largest markets for advertisement, and includes the following aspects that we briefly explain below:

- The majority of commitments in the sector are without significant limitations on Market Access and National Treatment except for the movement of natural persons.
- Most commitments cover the sector in full and do not exempt any specific market segments. Where exemptions have been made, these have not necessarily

[39] HOEKMAN, Bernard: *The WTO Functions and Basic Principles,* **Development, Trade and The WTO,** 2002, p. 41-50; BÜYÜKTAŞKIN, Şener: **Dünya Ticaret Sistemi (GATT, Dünya Ticaret Örgütü ve Türkiye)**, Ankara - 1997, p. 2-6, 21-28; Gelir İdaresi Başkanlığı: **GATT Bilgilendirme Rehberi**, Yayın No: 95 – 2009, p. 6-12.

[40] http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm6_e.htm (26.11.2014); Gelir İdaresi Başkanlığı (2009), p. 15-16.

been motivated by trade policy considerations; they relate to advertisements for goods which may be considered sensitive for health and safety reasons and/or have been made subject to import authorization.

- Some member states have scheduled Market Access and/or National Treatment limitations under cross-border trade and commercial presence.
- The member states have generally referred to their horizontal limitations concerning the movement of natural persons.
- There may be a scope for domestic policy initiatives to improve competitive conditions and, thus, enhance business opportunities for both domestic and foreign advertisers in aiming at enhancing the industry's flexibility.[41]

Another aspect that is worth mentioning about this document is, lately, self-regulatory bodies are either directly involved in legal controls or supporting related governmental bodies in a complementary character, with a reference to the ICC regulation on self-regulation which we will examine below. While the document states that self-regulation may have negative effects, it also underlines its aspect of rapid arriving to a solution.

1.4 International Chamber of Commerce

ICC was founded in 1919 in order to 'fight against protectionism, promote international trade and cooperation, reinforce private enterprise, improve and standardize the conditions needed by international business world.' This aim was later developed and expanded to include activities toward supporting market economy, representation of the business world in the international platform in every aspect, working toward solving economic problems, creating a dialogue between the business world and international organizations. The organization was founded with the lead of Belgium, France, Italy, England and the USA, and has become a large business organization with many members from 139 countries.[42]

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[41] World Trade Organization: **Advertising Services Background Note by the Secreteriat**, 9 July 1998, p. 3-8.

[42] http://www.iccwbo.org/id93/index.html (26.11.2014).

Before looking into the ICC's regulations on advertising practices that are globally very effective, it will be better to specify the position of ICC on the concept of the codes of practice and the history of the concept in the international platform. Even though this concept doesn't have a specific definition, basically it's possible to explain the concept simply as aiming to the presentation of the standards and provisions that guide those who want to be oriented toward acting in a certain way; hence, these instruments are regulatory and have gained significance as regulatory responses on the axis of the globalizing world economy at the second half of 20th century when the globalization wave began. The most significant feature of these is that they function on the basis volunteerism rather than legal bound. When we look at the history, the leading role in commercial codes of practice was performed by ICC, at first with the International Code of Advertising Practice dated 1937. In addition to this code, the ICC prepared the following codes on the subject, listed below with their dates:

- International Code of Sales Promotion (1987)
- Code on Environmental Advertising (1991)
- International Code on Sponsorship (1992)
- International Code on Marketing and Social Research Practice (1995)
- International Code of Advertising Practice (1997)
- International Code of Direct Marketing Practice (1998)
- Guidelines on Marketing and Advertising Using Electronic Media (1998)
- International Code of Direct Selling (1999).[43]

Among the reasons ICC provides for making the above listed regulations in its explications are; to arrive at universal standards that would be adopted by different cultures; and, to respond rapidly to changing social sensibilities and technological innovations unlike legal frameworks that generally take many years to change. The above mentioned regulation dated 1937 is considered one of the most successful voluntary self-

[43] KELLER, Helen: **Corporate Codes of Conduct and Their Implementation: The Question of Legitimacy**, Macmillan – 2011, p. 3-12.

regulatory practice in the marketing and advertising sector. Nevertheless, since this regulation is more likely to lead fair results when implemented with other regulations listed above, ICC has begun to work on gathering all these regulations under the same roof. As a result of these efforts, ICC Commission of Marketing and Advertising has created a single Consolidated ICC Code of Advertising and Marketing Communication Practice, an integral code prepared by taking into account national and international regulations, with the purpose of setting down high moral standards through professional self-regulation in the field of marketing, which is already included in the mission statement of the organization. This code not only brings all these regulations under the same roof but also contains new additions within a large framework changing from advertising practices on the Internet to what is appropriate and inappropriate in advertisements about children. These guidelines, based on the idea of self-regulation, are designed as instruments of self-regulation also serve the function of a document to which relevant legal authorities can consult. The main objectives of the principles that take place within the code are listed as follows:

- to demonstrate responsibility and good practice in advertising and marketing communications across the world,
- to enhance overall public confidence in marketing communication,
- to respect privacy and consumer preferences,
- to ensure special responsibility as regards marketing communication to children/young people,
- to safeguard the freedom of expression of those engaged in marketing communications (as embodied in art. 19 of the United Nations International Covenant of Civil and Political Rights),
- to provide practical and flexible solutions,
- to minimize the need for detailed governmental and/or inter-governmental legislation or regulations.[44]

[44] International Chamber of Commerce Department of Business Policy and Practice Commission on Marketing and Advertising: **Frequently Asked Questions**, ICC - 2006, p. 1-4; KURTULUŞ, Kemal / KURTULUŞ, Sema (Editörler): **Konsolide Edilmiş ICC Reklam ve Pazarlama İletişimi Uygulamaları**

The Consolidated ICC Code of Advertising and Marketing Communication Practice is composed of 'General Provisions'in 26 articles and 5 'Detailed Chapters'.

The 'General Provisions' are to be implemented in all marketing communication activities, yet, it would be adequate to deal with them in relation to the specialized chapters that we will briefly explain further below. Under the 'General Provisions' we are introduced to a detailed regulation covering a broad spectrum of provisions that are changing from qualifying explanatory provisions such as 'Decency' (Art. 2), and 'Honesty' (Art. 5); provisions that detail and clarify types such as 'Comparisons' (Art. 11), and 'Testimonials' (Art. 13); provisions that deal with and detail specific issues, such as 'Safety and Health' (Art. 17), 'Children and Young People' (Art. 18), and 'Data Protection and Privacy' (Art. 19); and, provisions that deal with practices and legal framework, such as 'Implementation' (Art. 25), and 'Respect for Self-Regulatory Decisions' (Art. 26). The 'Detailed Chapters', on the other hand, refer to aspects whose sections and explanations are provided below:

- Chapter A: 'Sales Promotion' (The chapter in general emphasizes, being impartial and fair, giving transparent and clear explanations as the key elements of responsible sales promotion. Among the provisions that are included in the chapter are: the presentation and administration of promotions, safety and suitability, information responsibilities, and certain requirements of promoters and intermediary institutions.)

- Chapter B 'Sponsorship' (This chapter shall be applied to all types of sponsorship that engage with all sorts of corporate image, brand, product, activity or events that are commercial or not. It includes all parts of the sponsorship within all other marketing activities such as sales promotion and direct marketing, as well as sponsorship parts that are within the corporate social responsibility program.)

Kodu, p. 1-10; KURTULUŞ, Kemal: **Serbest Ticari İletişim ve Uluslararası Denetim Esasları**, Reklamcılar Derneği Yayınları, p. 5-15.

- Chapter C: 'Direct Marketing' (This chapter involves ethical conduct to be followed in all forms of direct marketing, in addition clear presentation of consumer rights related to any offer, clear presentation of the terms and requirements for the fulfillment of that offer. This chapter also covers the new content of what is required when using electronic media and telemarketing for direct marketing.)

- Chapter D: 'Advertising and Marketing Communications Using Digital Interactive Media' (This chapter presents standards of ethical conduct that all parties (marketers, agents, media, etc.) that are involved in all advertising and marketing communications using electronic mass media communication tools and telephone that needs to be followed.)

- Chapter E: 'Environmental Claims in Marketing Communications' (By considering environmental claims in marketing, this chapter is updated in accordance with the ICC Framework for Responsible Environmental Marketing Communications, which is an international standard and guideline source.)[45]

2. Examples of Legal Practices in Some Countries

After the international organizations, it will be useful to examine local bodies briefly, in order to trace the development progress of regulations on advertising practices, and to assess the practices in EU and in Turkey more objectively. The need to such assessment is supported by the fact of national and international regulatory authorities' periodical communication with each other and procurement of parallelism among regulations by exchanging information and/or joining each other's committees. As an example, the employees of the Federal Trade Commission (FTC), an independent agency of the US government, are customarily in communication with the EU and the Organisation for Economic Co-operation and Development, while Organisation for

[45] http://www.codescentre.com/images/downloads/660%20consolidated%20icc%20code_2011_final%20with%20covers.pdf (26.11.2014).

Economic Co-operation and Development and the Council of Europe are in cooperation with the EU Commission's Consumer Protection Service.[46]

We will first evaluate regulations on advertising practices around the world by region briefly; and then we are going to look into USA and China as because they are counted as leading economies of the world, United Kingdom and Germany as because both of them had very advanced regulations on advertising practices in addition to their relation with the EU.

2.1. Analyzing Countries by Region

In our regional analysis, we will first look into Switzerland and Scandinavian countries by focusing on Denmark and Norway. In our analysis, it will become clear that these countries consider the issue within the scope of consumer protection, and create more public (executed by the state) regulations on advertising practices by assigning 'Konsumerombudsman', 'Consumer Ombudsman' and with their special Marketing Court which was established to deal with issues regarding advertising and marketing. Furthermore, with regulations named 'Consumer Sales Act' and 'Law on Marketing Abuses', issues such as taxing advertisements in media, toughening provisions on protecting consumers (change characterization of advertising from inviting consumers to buy, to the invitation of the seller to consumer), recognizing the special court the power of retention and prohibition in any cases deemed necessary within the scope of protecting consumer rights.[47]

When we take a general look on the countries in South America, we see that there is high taxing policy on advertising practices at a lot of Latin American countries which is around 25% on advertising spending, plus at some countries having an additional tax on invoice on top of that. Furthermore, practices with a nationalistic

[46] BODDEWYN (1982), p. 33.
[47] International Advertising Association: *The Global Challenge to Advertising*, **Journal of Advertising,** 1974, 3(1), sf. 23.

approach which aims obtaining easiness to local enterprises effectiveness in the advertising sector in these countries.[48]

Lastly, among the countries in the Far East Asia, we see that the main law enacted on consumer protection in Japan was legislated for two main objectives; product safety in commercial transactions and consumer protection, promoting competition and fighting against price increases within fair trade rules. Furthermore, taxation with regard to advertising practices is also one of the high points in the regulations. When we look at Hong Kong and Taiwan in the region, we notice that state legislated regulations are in the majority, and that regarding self-regulation even though both countries have regulatory bodies which are independent commercial organizations, their role remains very minor. Mostly state legislated and executed regulations are grounded on the same basic principles in general; which is the understanding that the advertisements should be accurate, honest and ethical. Hence, we can say that these regulations were met on the same common substructure.[49]

2.2 The United States of America

Even USA is having some problems about the governing law on national level and the local laws that are effective in its federation states, like in the EU that we are going to examine below, it does not generally experience a lot of problems about legal practices at the national level since the system is well-established.[50] We will analyze the basic characteristics of practices at the national level.

The most important body authorized on regulating advertising practices in the United States of America is the Federal Trade Commission which was established with

[48] International Advertising Association (1974), sf. 24.
[49] International Advertising Association (1974), p. 23; GAO, Zhihong: *Harmonious Regional Advertising Regulation?*, **Journal of Advertising**, Vol. 34, No.: 3, Fall 2005, p. 75-87; H C LO, Stephan: *Consumer Remedies for Misleading or Deceptive Merketing Practices: Reform of the Law in Hong Kong*, **Common Law World Review**, 37 (2008), p. 117-146.
[50] PETTY, Ross D.: *Advertising Law in the United States and the EU*, **Journal of Public Policy and Marketing**, Vol. 16 (1), Spring - 1997, p. 11-12.

the Federal Trade Commission Act in 1914. This commission was established as an independent regulating agency within the scope of antitrust policies principally to prevent unfair competition and later its jurisdition was expanded to target inaccurate and misleading advertising practices by widening its scope not only to 'unfair' practices, but also to 'deceptive' practices. Its unit that deals directly with advertising practices is 'The Bureau of Consumer Protection'. The commission can file a lawsuit against unfair or deceptive advertisements ex officio; it can also take action with the complaint of a consumer, competitor, Congress or administrative authority. Basically, it conducts investigation on whether advertising practices are deceptive or unfair. In the passing years, the commission has prepared many guidelines in this field and it should be mentioned that, the commission has an authority on almost all advertising practices in certain specific fields such as food, drugs, and cosmetics.[51] Furthermore, beside the commissions at national level have authority to regulate in prescribed areas; there are also local offices to implement FTC standards at the level of federal states.[52]

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[51] American Association of Advertising Agencies: **Advertising and the Law**, p. 9-11; PETTY, Ross D.: *The Evolution of Comparative Advertising: Has the Lanham Act Gone Too Far?*, **Journal of Public Policy and Marketing**, Vol. 10 (2), Fall - 1991, p. 164-165, 172-173;
http://www.ftc.gov/ (26.11.2014).

[52] - ***The Food and Drug Administration***: Functioning under the Federal Food, Drug, and Cosmetic Act, this unit works closely with FTC. It traces advertising practices that are to be presented to consumers within the scope of the act.
- ***The Federal Communications Commission***: Advertising practices broadcasted on television and radio are under this commission. Even though the commission is stripped of the power to censor or regulate after the amendments made to the Communications Act, it can put limitations on advertising practices, especially on those about children.
- ***The US Postal Service***: This unit is authorized on any kind of advertising practice that is performed through mail. Postal inspectors are executing provisions that are related to fraud, obscenity, illegal draw. - ***The Bureau of Alcohol, Tobacco, Firearms and Explosives***: This unit is authorized in preventing advertising practices that are related to inaccurate, deceptive, misleading or misinforming advertising practices on alcoholic drinks. Since infringements can have drastic consequences such as losing the federal licence, the regulations of the bureau is carefully followed by those involved in advertising practices.
- ***The US Securities and Exchange Commission***: The authority which maintains that advertisements that are related to interstate securities trade are accurate and real is on this commission.
- ***The US Patent and Trademark Office***: This office oversees the advertising practices of attorneys and agencies that are operating in the field of patents.
- ***The US Department of Commerce***: It oversees advertisements of employers and associations on topics that are related to workers.
- ***The US Department of the Treasury***: It puts limitations on advertising practices that are related to money, coins, bonds and the equivalents.
- ***The US Consumer Product Safety Commission***: It can request corrective advertising practices when it finds a mistake in consumer products.
- ***The US Department of Agriculture***: It regulates advertising practices about meat products, seeds, and agrochemicals. Even though it seems like a small area of operation, this department works with FDA and FTC on food labels.

The Association of National Advertisers, the American Association of Advertising Agencies, the American Advertising Federation and the Council of Better Business Bureaus which are the leading organizations in the country established the National Advertising Review Council (NARC), an independent self-regulatory authority, in 1971. The organization later changed its name to Advertising Self-Regulatory Council (ASRC). It defines its founding mission as: *'... fostering truth and accuracy in national advertising and adherence to industry standards through voluntary self-regulation ...'* and states that it focuses on the three objectives below:

- minimizing the state interference in advertising activities,
- providing a movement area for resolving conflicts among competing advertisements,
- encouraging brand commitment by improving public trust in the reliability of advertising.[53]

Even though the Advertising Self-Regulatory Council does not have the authority to impose penalty as a result of its findings and rather can only appeal to state agencies directly, it is regulating policies and standards for the self-regulation of the advertising practices market. It establishes the policies and procedures through the National Advertising Division (NAD), the Children's Advertising Review Unit (CARU), the National Advertising Review Board (NARB), the Electronic Retailing Self-Regulation Program (ERSP) and the Online Interest-Based Accountability Program. Its self-regulation system is managed by the Better Business Bureaus.[54]

2.3 The People's Republic of China

Study on the advertising practices in China reveals that the history and regulations do not go back so far. That means, during the administration of 1949 through 1979, since there was no need for any advertising practices, there was naturally no need to develop any regulations. After 1979, commercial advertising market began to be

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- ***The US Department of Transportation***: It oversees advertising practices about airlines with respect to certain angles.

[53] American Association of Advertising Agencies: **Advertising and the Law**, p. 14-15.

[54] http://www.asrcreviews.org/about-us/ (26.11.2014).

established again and it grow to a limited extent in the 1980s, but boomed later as China transitioned to a market based economy in 1992. The first national regulation was the 'Provisional Regulation on Advertisement' that was accepted by central Chinese government in 1982. It was followed by 'Detailed Rules for Implementing Provisional Regulation on Advertisement' proposed by the State Administration for Industry and Commerce (SAIC). With these regulations, SAIC and its local divisions were authorized to regulate advertising practices. It is possible to separate the agencies that were authorized alongside the State Administration for Industry and Commerce into two; the State Administration of Radio, Film and Television, and the General Administration of Press and Publication on media; and, the Ministry of Health, the State Drug and Food Administration, and the Ministry of Education on goods/services that are advertised.[55]

The last regulation was the Advertising Law of the People's Republic of China dated 1995 which was followed by rules and regulations that attempted to clarify such law and make it accessible. The basic objectives of this law can be summarized as follows:

- Standardizing the advertising business activities,
- Promoting the healthy development of the advertising industry,
- Protecting rights and interests of consumers,
- Safeguarding the social and economic order,
- Promoting the positive role of advertising in the socialist market economy.[56]

Lastly, when we analyze self-regulatory mechanisms on advertising practices in China, we observe that voluntary self-regulation plays a very limited role within the Chinese system. The only national trade organization in the field of advertising practices is the China Advertising Association (CAA), established as a semi-official body which is a public organization and its senior executives are employees of the State Administration for the Industry and Commerce. However, this organization does not have the authority to

[55] BING, Xu / XING Zhou: *An Introduction to Chinese Advertising Law*, **Uluslararası Reklam Hukuku Sempozyumu (8-9 Mayıs 2008)**, İstanbul 2009, p. 229-231; GAO, Zhihong: *Controlling Deceptive Advertising in China: An Overview*, **American Marketing Association**, Vol. 27 (2), Fall - 2008, p. 166.
[56] BING / XING (2009), p. 231-232.

monitor the compliance of practices or receive complaints; it functions rather as a contact point between public administration and advertising industry. Furthermore, in the capacity of consultancy services, it inspects the legal compliance of advertisements for agencies and related parties of advertising against a fee. This association has local offices in various regions of the country. The China Consumers' Association (CCA), which serves as an agency to protect the consumers, is a member of the China Advertising Association.[57]

2.4 United Kingdom

United Kingdom applied to EU membership first in 1961 and for the second time in 1967, but refused with the vetos of France; however, after de Gaulle resigned from French presidency, United Kingdom became a member on January 1, 1973. As United Kingdom's relationship with EU is maintained rather in a different way and also as its regulations on advertising practices are remarkable we would like to mention this country in our study. In its relations with EU, United Kingdom is in a different position because of its approach of not implementing some of the union policies in certain areas; yet, it is still one of the strongest members of the union.[58]

When we analyze the regulations on advertising practices and control and monitoring authorities in United Kingdom, we notice that the regulations are performed by self-regulatory bodies that were established on a strong substruture. Another aspect of United Kingdom in this respect is that it is noted in the literature to be one of the countries where the self-regulatory system is the most advanced and seen as the best practice model within the EU.[59] We will examine the evolution and structure of this system since it sustains a very effective system setup.

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[57] GAO (2005) p. 79-80; GAO (2008), p. 167.
[58] http://www.abgs.gov.tr/index.php?p=109 (26.11.2014); http://www.culturaldiplomacy.org/pdf/case-studies/cs-bojana-perisic.pdf (26.11.2014).
[59] HARKER, Debra / CASSIM, Shahida: *Towards Effective Advertising Regulation: A Comparison of UK, Australian and South African Schemes*, **South Africa Journal of Business Management**, 33 (4), 2002, p. 4.

When we look at the history in order to trace the evolution, we notice that the control of advertising practices began with the inclination to regulate the content of television advertisements after television were introduced to homes widely and emerged as a growing medium. Namely, in Britain, the commercial television broadcasting began in 1955, and the contents of advertising firstly on radio and then on television began to be regulated in 1954 with the Television Act and in following years with various legal regulations, and taken under the authority of the Independent Television Authority (ITA) and later under the Office of Communications until 2004. The complaints about the content of advertising practices that are outside these broadcasts began to be responded by the Committee of Advertising Practice (CAP) which was established after the Advertising Association (AA) and other associations in the market met and reached a consensus on the need to ensure that these advertisements are reliable for the consumers. It is during this period that the United Kingdom Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing was first issued. Later in 1962, the Committee of Advertising Practice established the Advertising Standards Authority (ASA), an independent arbitrator, in order to set up a new self-regulatory system within the scope of the new code. In 1974, the Advertising Standards Board of Finance (ASBOF) was established, and in this way, a sufficient and reliable financing for the system was maintained through collecting tax on advertising expenses, and furthermore, the Advertising Standard Authority was kept away from these processes and in this way its independence was safeguarded. During the following period, through the Control of Misleading Advertisements Regulations made in 1988, it was made possible for the Advertising Standards Authority to refer to the Office of Fair Trade (OFT) for legal action for those against whom there are frequent claims regarding conduct of misleading advertising practices and those who refuse to cooperate with self-regulatory bodies; however, it should be added that it is emphasized that this course of appeal is being used as a final solution and used very rarely. As stated above, the control authority over advertising practices on television and radio broadcasting, which was under the Office of Communications, passed on to the Advertising Standards Authority / the Committee of

Advertising Practice (CAP) in 2004, as a result of the successful self-regulatory practices of more than 40 years.[60]

The way the system functions is such that the self-regulatory system promotes the objective that all advertising practices are legal, fair and accurate in maintaining the greatest standards in advertising practices through the consensus of advertisers, agencies and media owners. The system is based on the idea of 'transparent as much as effective' that demands to be as open to the public as possible. Regulations on advertising practices are regulated and maintained by two organizations; the Committee of Advertising Practice (CAP) and the Broadcast Committee of Advertising Practice (BCAP). While CAP is responsible for the regulations on practices outside broadcasting such as sales promotion and direct marketing; BCAP is responsible for the regulations on broadcasted advertising practices. Furthermore, these two organizations also provide a broad spectrum of advice and training services to people related to advertising. The Advertising Standards Authority is composed of a 12 people council made up of 2/3 independents and the rest from the related market, and is managing the regulations and investigating complaints. The system is not based on voluntariness, rather, the provisions that are taken by the Advertising Standards Authority are supported by sanctions. The Advertising Standards Authority does not directly receive complaints that come from the competitors, rather, these complaints are firstly directed to the Committee of Advertising Practice that is composed 2/3 of advertising organizations, agencies and all types of media. The basic approach the CAP uses in the resolution of disputes has the objective of reaching a solution in the simplest and the most direct way. Namely, after investigating a small print of advertisement, it contacts the concerned party and tries to convince before taking the next step, and most of the files are closed after the relevant person's application of the

[60] BROWN, Andrew: *Advertising Regulation and Co-regulation: The Challenge of Change*, **Institute of Economic Affairs**, 2006, p. 31-32; FORBES, Claire: *The Advertising Standards Authority and Advertising Self-Regulation in the UK*, **Uluslararası Reklam Hukuku Sempozyumu (8-9 Mayıs 2008)**, İstanbul - 2009, p. 19-23;
http://www.asa.org.uk/About-ASA/Our-history.aspx (26.11.2014).

required change. However, in case of refusal, the official inspection period is initiated at this stage.[61]

2.5 Germany

The other country that we are going to analyze in relation to the EU is Germany, one of the founding members of the union. The legal regulations on advertising practices in Germany dates back to a hundred years and Germany is one of the first countries to make regulations in this area in the world. The fundamental regulation in this area is the Law Against Unfair Competition (UWG) and the art. 28 of this law covers the legal grounds of commercial communication. We observe two provisions that are intended for all purposes; the prohibition of misleading advertisements and the prohibition of violation of widely accepted moral principles through advertising practices. In terms of misleading advertising activities, any types of activity form are prohibited, yet, the criterion of what is misleading is not specified. Hence, in the event of a dispute, the judges make subjective assessments or in case of doubt the expert appraisal is resorted to. The effect of the article about moral principles on advertising practices is that the courts prohibit comparative advertisements on the grounds of this article. Germany's regulations regarding advertising practices have been the toughest regulation in the EU for many years because of these two articles. One of the most significant events that caused the German courts to soften their attitude toward misleading advertisements was that they replaced their method of taking a decision on the idea that consumers are 'superficial, uninformed and unconcerned' with the decision of the European Court of Justice that expressed the necessity to assess on the basis of that the consumers are 'reasonably well-informed, reasonably attentive and cautious'. Furthermore, less rigid directives and regulations of the union also led in general to the softening of more rigid local German regulations.[62]

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[61] http://www.cap.org.uk/ (26.11.2014); HARKER / CASSIM (2002), p. 6-9; FORBES (2009), p. 20

[62] SCHOTTHÖFER, Peter: *A Revolution in German Advertising Laws*, **Uluslararası Reklam Hukuku Sempozyumu (8-9 Mayıs 2008)**, İstanbul 2009, p. 167-170; SCHWAIGER, Manfred / RENNHAK, Carsten / TAYLOR, Charles R. / CANNON, Hugh M.: *Can Comparative Advertising Be Effective in Germany? A Tale of Two Campaigns*, **Journal of Advertising Research**, March - 2007, p. 4.

In addition to the law mentioned above, 'Ordinance Regulating Free Gifts' was accepted in 1932 in order to prevent from being attracted and misled consumers by free gifts and enticing them to buy something. Following this ordinance, the 'Rebate Law' was passed with a similar intention of preventing consumers from being misled by discounts. In 1938, comparative advertisement practices were prohibited by a decision of the Supreme Court. In 1950s, regulations were made that specified the offering of special prices only during designated periods or dates and that prohibited offering different prices to different consumers groups.[63]

After the abovementioned developments, new regulations on the field of unfair competition needed and firstly the 'Ordinance Regulating Free Gifts' and the 'Rebate Law' were ceased, and later on, the new version of 'Law Against Unfair Competition' (UWG) came into force in 2004. During the following period, further revolutionary contributions to the advertising laws were made by the Federal Constitutional Court. It would not be wrong to add that Germany's regulations on advertising standards are directly derived from EU regulations. In conclusion, we can say that the intention of adjusting German regulations to those of the EU have led to the rescinding of many regulations such as the 'Law Against Unfair Competition', and to the softening of others.[64]

With regard to the self-regulatory bodies and self-regulation system that are operating in Germany, we notice that there is two self-regulatory bodies. These are the German Advertising Standards Authority (Deutscher Werberat - DW) and the Centre for Combating Unfair Competition (Zentrale zur Bekämpfung Unlauteren Wettbewerbs e.V-ZEN). Both of these institutions have the functions that are listed below; however, they do not have the authority to take binding decisions. The Center for Combating Unfair Competition does not create self-regulatory practice codes, but implement unfair competition regulations that are in effect. As indicated in its functions listed below, the German Advertising Standards Authority constitutes codes and rules, and uses ICC Code

[63] SCHOTTHÖFER (2009), p. 168.
[64] SCHOTTHÖFER (2009), p. 172-174.

as a marker to reach admissible standards. Among the rules it regulates, we can count the rules that cover advertisements and tele-shopping of alcoholic drinks, advertisement that include or address children on television and radio, and advertisement photographs that increase the risk of extent. The German Advertising Standards Authority is a panel that is composed of representatives from various line of business and in this way, it safeguards the monitoring of the content and format of any type of advertising practices. The body acts as an arbitrator in settling complaints and acts with the intent of having the company make the changes in the advertising or in the advertising campaign on its own by forwarding the complaint to the company.[65]

The functions of the Center for Combating Unfair Competition are:

- investigating complaints about misleading advertising and unfair competition,
- initiating legal action in the civil courts against companies that infringe advertising legislation if the advertiser does not comply to warning notice,
- enforcing the Unfair Competition Law working in cooperation with judicial authorities,
- offering advice to its members.[66]

The functions of the German Advertising Standards Authority are:

- devising and implementing product and sector-specific codes and rules,
- adjudicating the complaints,
- adjudicating the written appeals,
- monitoring advertisements,
- responding to competitor or consumer complaints.[67]

[65] http://ec.europa.eu/avpolicy/docs/library/studies/finalised/studpdf/minadv_de.pdf (26.11.2014); http://www.werberat.de/ (26.11.2014); http://www.gwa.de/fileadmin/media-center/Dokumente/Self_Regulation_in_Germany.pdf (26.11.2014).
[66] http://ec.europa.eu/avpolicy/docs/library/studies/finalised/studpdf/minadv_de.pdf (26.11.2014); http://www.werberat.de/ (26.11.2014); http://www.gwa.de/fileadmin/media-center/Dokumente/Self_Regulation_in_Germany.pdf (26.11.2014).
[67] http://www.gwa.de/fileadmin/media-center/Dokumente/Self_Regulation_in_Germany.pdf (26.11.2014).

CHAPTER III
REGULATIONS ON ADVERTISING PRACTICES IN THE EUROPEAN UNION AND TURKEY

1. The case of the European Union and Turkey

If we do count the amateur plans of social architects such as thinkers, authors and politicians of maintaining permanent peace in the European continent, the roots of the idea of an integrated Europe dates back to 13th and 14th centuries. The adoption of the ideas toward integration could only be possible after the World War II. The concerns about the economic dependancy created by the financial aid made within the framework of 'Marshall Plan' by USA in order to stimulate Europe which was devastated after the war was the first reason in the attempts toward a EU, and the other reason can be counted as the intention to dispel the tension between Germany and France toward a camaraderie through this union.[68]

After the period we summarized, European Coal and Steel Community was founded in 1951, as a result of the invitation of the French Foreign Minister Robert Schuman, through Schuman Declaration which aimed the transfer of decisions taken about coal and steel industries to an independent and supranational community. In the following period, the focus was on economic integration and two new European communities were founded; the European Atomic Energy Community and the European Economic Community with the treaties signed in 1957. These three communities began to be referred to as 'European Communities' after the Merger Treaty signed in 1965, and were renamed as 'European Union' by the Maastricht Treaty signed in 1992.[69] The objective of the EU, which was established through a long historical process, is the economic integration of member states so that national markets come together to form a

[68] ÜNAL, Şeref: **Avrupa Birliği Hukukuna Giriş**, Ankara - 2007, p. 13-15; GÜNUĞUR, Haluk: *Avrupa Birliği Bütünleşmesinin Tarihsel Gelişimi*, **Avrupa Birliği El Kitabı**, Ankara - 2005, p. 13-20; http://europa.eu/about-eu/eu-history/ (26.11.2014).

[69] ÜNAL (2007) p. 17-23;
http://www.tuicakademi.org/index.php/kategoriler/avrupa/3086-avrupa-birliginin-tarihsel-gelisimi (26.11.2014);
http://www.abgs.gov.tr/files/pub/antlasmalar.pdf (26.11.2014).

common market where services, people, capital and goods freely circulate, and common policies can be established.[70]

After our general review of the case of the EU, it will be adequate to conclude with clarifying the current state of affairs in the history of the relationship between Turkey and the EU. A short time after the European Economic Community was established, Turkey applied to become a member on July 31, 1959; however, received the response that its level of development was not sufficient to fulfill the requirements of full membership and hence was proposed a partnership that would be effective until membership requirements are met. In this context, it is clear from the art.s 2 and 28 of the Ankara Agreement executed on September 12, 1963 that the ultimate objective is the full membership of Turkey. An Association Council set up by the parties pursuant to the Agreement as a decision making body.[71] At the Additional Protocol, which became effective after the preparation period that was designated by the Ankara Agreement, the conditions of the transition period were determined. However, as because Turkey could not fulfill its commitments as a result of the economic crises and the political conjuncture of Turkey during this period, the relationship was frozen and only commercial commitments of the Additional Protocol continued to be effective, all the other provisions remained inactive.[72]

During the following period, Turkey both applied to full membership and, on the other hand, put into effect again the customs duties accord and reduction calendar which was delayed. The full membership application was denied with the suggestion that the European Economic Community waits until it completes its process of deepening within itself until the coming enlargement, and that in the meantime the customs union process would be completed. The conditions were evaluated positively by the Turkish side and the customs union became effective on January 1, 1996 in accordance with the decision

[70] TECER, Meral: **Avrupa Birliği ve Türkiye Sorular-Yanıtlar,** Ankara - 2007, p. 11.
[71] GÜNUĞUR, Haluk: *Türkiye ve AB İlişkileri Tarihçesi,* **Avrupa Birliği El Kitabı,** Ankara - 2005, p. 181-182;
http://www.ikv.org.tr/icerik.asp?konu=tarihce&baslik=Tarih%C3%A7e (26.11.2014);
http://www.abgs.gov.tr/index.php?p=111 (26.11.2014);.
[72] GÜNUĞUR (2005) p. 181;
http://www.ikv.org.tr/icerik.asp?konu=tarihce&baslik=Tarih%C3%A7e (26.11.2014).

of the Association Council number 1/95.[73] The Agenda 2000 Report, which was announced in 1997 and which evaluates the enlargement process, stated that Turkey cannot be included in the enlargement process because of its political and economic problems. In the following Luxembourg Summit, a strategy was proposed to Turkey. In response, Turkey made a statement announcing that it is going to suspend its political relations. At 1999 Helsinki Summit, which was the milestone in the relations between Turkey and Europe, it was decided that Turkey will participate in the process on an equal position with the other candidates, and the progress reports in the accession process and Accession Partnership Document were prepared. National Programme, which indicates a calendar in such process and which was under Accession Partnership Document that covers the short-term and medium-term objectives toward the completion of Turkey's complying with Copenhagen Criteria and adoption of EU legislation, was accepted by Turkey. It was declared at the Brussels Summit in 2004 that Turkey has sufficiently fulfilled the political criteria and the membership negotiations began in 2005; however, in relation to the attitudes of term presidents of the EU toward Turkey, the process is can be changing when dragged to its political and diplomatic basis from the stable legal basis attained at the Ankara Agreement and hence the progress is continuing in a slow pace.[74]

According to the 'Negotiation Framework' document that describes the procedure and principles of the EU-Turkey negotiation process, the adoption and implementation of the '*acquis communautaire*' which covers the sources of EU Law that we will mention below, is one of the three priorities in the process.[75] The concept '*acquis communautaire*' which has a dynamic structure is continually improving with deepening. In this context, the group of candidate countries, to which Turkey belongs to, should catch up with this dynamism and follow the movement. On the other hand, the word negotiation refers not to a bargain process, but to an adoption process; hence, Turkey has

[73] http://www.ikv.org.tr/icerik.asp?konu=tarihce&baslik=Tarih%C3%A7e (26.11.2014); http://www.abgs.gov.tr/index.php?p=111 (26.11.2014); http://www.avrupa.info.tr/en/eu-and-turkey.html (26.11.2014).
[74] ÜNAL (2007), p. 27-36; http://www.ikv.org.tr/icerik.asp?konu=tarihce&baslik=Tarih%C3%A7e (26.11.2014).
[75] BÖREKÇİ, Havva / YURDAKUL, Mehmet Onur: **Avrupa Birliği ve Türkiye'nin Birliğe Katılım Sürecinde MASAK**, Maliye Bakanlığı Strateji Geliştirme Başkanlığı, Yayın No: 2011/411, Ankara – 2011, p. 127, 131; http://europa.eu/abc/eurojargon/ (26.11.2014).

to make acquis a part of its national legislation and implement it.[76] The adoption into the national law includes the process of following all measures taken toward implementation, application of the implemented regulations and any type of amendment such as the abrogating/changing conflicting provisions in our legislation.

There are 35 sections classifying the acquis in the Accession Partnership document of Turkey which covers specific political areas and hence the positive outcome of the negotiations is the key condition for membership (there has to be full agreement; temporary closure means that the parties retain the right to open the related section again).[77] The sections that cover the regulations on advertising practices are section 10, 'Information Society and Media' and section 28, 'Consumer and Health Protection'. Section 10 covers electronic communication, provisions on information society services and audiovisual services, especially electronic commerce and conditional access services. For instance, regulations on television advertising are covered within this scope. Section 28 covers the principles of consumer policies, the protection of the health and economic interests of the consumer, and providing the protection of the consumer. In this section, regulations on the issues of misleading advertisements and advertisements of tobacco products can be given as examples that are related to our subject of study. Negotiations of both sections are now open. Works continue in order to achieve complete compliance of the legislation which is one of the criteria for closing the section.[78]

2. The Legal System of the European Union, its Constitution and Functioning

Before the last section in which we will analyze the regulations on advertising practices in the EU, we will provide its background with information and analysis on the functioning of the legal system of the EU, that involves these regulations.

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[76] BÖREKÇİ / YURDAKUL (2011), p. 128-129; DÜZEL, Osman: **Türkiye'nin Avrupa Birliği Üyeliği ve Türk Hukuk Sistemi**, Uzmanlık Tezi, Ulusal Program Dairesi, Ankara – Mayıs 2004, p. 72.

[77] BÖREKÇİ / YURDAKUL (2011), p. 129-130; http://ec.europa.eu/enlargement/pdf/enlargement_process/accession_process/how_does_a_country_join_the_eu/negotiations_croatia_turkey/overview_negotiations_tr_en.pdf (26.11.2014).

[78] http://www.euractiv.com.tr/3/link-dossier/turkiyenin-abye-uyelik-muzakerelerinde-son-durum-000141 (26.11.2014); http://www.ab.gov.tr/files/ardb/evt/3_ab_bakanligi_yayinlari/AB_Rehberleri/07_rehber.pdf (26.11.2014).

2.1 The Legal System of the European Union and its Characteristics:

The phenomenon which characterizes the EU among other regional bodies is that the movement of integration has been directed toward realizing its goals through establishing a unique legal system as distinct from other international movements. The basic distinction is that the national law (domestic law) is composed of the rules that are generated by the law-making methods accepted by a certain state while international law is the totality of the rules that are generated collectively by states and/or international organizations, within a intra-state legal order, in order to coordinate their relationship within the framework of the equality of sovereignty. However, the legal system of the EU with its unique, supranational character is a system peculiar to its integration objective shared by its member states. The following characteristics of the EU's legal system, listed and analyzed below, will clarify its implementation and functioning.[79]

The qualities of the EU's legal system are a supranational structure, direct effect and primacy over national law. The aim of these qualities is implementation of the EU law in the domestic law through individuals. In cases of no enforcement or breach of the EU Law by member states, it gives individuals the right to file a lawsuit against the member state against national courts and introduces the liability of the concerned state in case of violation.[80] The provisions related to these qualities are not presented in the founding treaties but rather in the resolutions of the European Court of Justice. The most important of these are; *Costa v ENEL*[81] (supranationality), *Van Gend en Loos v Nederlandse Administratie der Belastingen*[82] (direct effect), *Amministrazione delle Finanze dello Stato v Simmenthal*[83] (primacy) and *Francovich v Italy*[84] (state liability).

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[79] GÜNUĞUR, Haluk: **Avrupa Topluluğu Hukuku,** Ankara - 1996, p. 1-5; ARAT, Tuğrul: *Avrupa Toplulukları Hukuku,* **Avrupa Birliği El Kitabı,** Ankara - 2005, p. 29-50; PAZARCI, Hüseyin: **Uluslararası Hukuk,** Ankara - 2005, p. 2-3; ARAS, Salih: *Uluslarüstü (Supranasyonel) Hukuk ve Avrupa Topluluğu Anlaşmalarının Uluslarüstü Karakteri,* **Ankara Barosu Dergisi,** 1988/4, p. 559-570.

[80] ADAOĞLU, Hacer Soykan: *Frankovich'ten Köbler'e AT Hukukunda Devletin Sorumluluğu Prensibi,* **Ankara Üniversitesi Hukuk Fakültesi Dergisi,** 2005, p. 249-267.

[81] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61964CJ0006:EN:PDF (26.11.2014).

[82] http://eurlex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61962J0026 (26.11.2014).

[83] http://eurlex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&numdoc=61977J0106 (26.11.2014).

[84] http://eurlex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&numdoc=61990J0006&lg=en (26.11.2014).

Supranationality can be described as a structure; established with an agreement, to which the members transfer part of their sovereign authorities, which can designate binding legal norms through majority of votes, and where these legal norms are directly or indirectly implemented within the national laws of member states and have legal consequences.[85] Direct effect can be explained as the inclusion of a legal norm into the national law of a member state without need for any supplementary national norm for its implementation, in such a way that this legal norm leads to rights and obligations of natural or legal persons, and can be directly alleged against national judiciary body. The right acquired through directly effective norm is a vertical direct effect if it can be alleged against the state, and is a horizontal direct effect if it can be alleged among individuals.[86] Lastly, primacy implies that when there is a national legal regulation which is in conflict with the EU Law, the national rule will not be implemented by means of the national judge's not implementing, not exercising those norms in conflict with the legal norms of the EU and thereby nullifying those norms.[87]

2.2 The Sources of the Legal System of the European Union:

It is possible to provide a general list of the sources of the legal system of the EU as follows; a) primary law, b) secondary law, c) international agreements made with non-member states, d) general principles of law, e) the case law of the Court of Justice, f) legal custom, g) doctrine.[88]

The primary law comes mainly from the founding treaties that are at the top of the hierarchy of norms of the EU Law, including annexes, protocols amendments. Treaties do not only bring rights and obligations within the member states, but also create

[85] GÜNUĞUR (1996), p. 18; ARAT (2005), p. 43-44.
[86] KRAMER, Tomasz: **Main Characteristics of EU Law Relations Between EU Law and National Legal Systems,** EIPA – 2011, p. 1-15; KWEICIEN, Roman: *Primacy of EU Law over National Law Under the Constitutional Treaty,* **German Law Journal,** Vol. 6, No.: 11, p. 1479-1496; GÜNUĞUR (1996), p. 44-48.
[87] GÜNUĞUR (1996), p. 74-75.
[88] BORCHARDT, Klaus-Dieter: **The ABC of EU Law,** EU - 2010, p. 80; http://europa.eu/legislation_summaries/institutional_affairs/decisionmaking_process/l14534_en.htm (26.11.2014).

an organization that has a legal personality in order to achieve its projected goals through its specific institutions and authority, and constitutes norms on fundamental rights.[89]

The founding treaties of the EU implicitly recognize the legislative authority of its institutions and hence the legal instruments developed based on this are called secondary law. The secondary law can be analyzed in two main groups; binding and non-binding sources (recommendations and comments). Binding sources can be classified as directly binding sources (regulations and general decisions) and indirectly binding sources (directives and decisions). The directly binding sources, regulations and general decisions, have the same structural features and in a sense can be called as the EU statutes. Thus, they confer rights and impose obligations to the citizens of the member states in the same way as domestic law, and they are directly exercised. Directives, which are indirectly binding sources, bind the member states to achieve a certain result and require the transposition (harmonization) into the domestic law in order to be implemented but leaves the national authorities free to choose the type of the national legal regulation. Within the enlargement perspective of the EU, the directives bear significance for candidate countries for harmonizing domestic law with the acquis. Recommendations and comments as non-binding sources, either suggest an approach on a certain topic or provide opinion, and even though they are not binding, they are sources to follow in creating policies.[90]

Lastly, the other sources that we can qualify as supplementary law are association agreements especially distinguished among international agreements, partnership agreements and trade agreements. General principles of law, resolutions of the Court of Justice, legal custom and doctrine become important in making assessment and arriving at a solution in cases where the written sources do not provide rules.[91]

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[89] ÜNAL (2007), p. 81; BORCHARDT (2010), p. 81; AYDIN, Sabir: **Siyasi ve Hukuki Olarak Avrupa Birliği,** Ankara – 2008, p. 219; GÜNUĞUR (1996), p. 163.

[90] GÜNUĞUR (1996), p. 200, 205-207; AYDIN (2008), p. 222; ÜNAL (2007), p. 82; BORCHARDT (2010), p. 88-96; TAŞDEMİR, Hakan: **Avrupa Birliği Ders Notları,** Ankara – 2008, p. 209, 212; KRAMER, Tomasz: **Primary and Secondary Sources of EU Law Practical Analysis of EU Legal Instruments,** EIPA – 2011, p. 6-8.

[91] GÜNUĞUR (1996), p. 252-253; ÜNAL (2007), p. 83-85; ARAT (2005), p. 50.

3. Regulations on Advertising Practices in the European Union

When we look at the founding treaties of the EU, we observe that there are no direct regulations on the advertising practices; yet, fundamental principles[92] are used to take action. On the path to integration, which is the principal aim of the EU, the objective in relation to the advertising practices as an instrument of commercial operation is to establish a unitary advertising law that can be implemented in all member states within the internal market.[93]

The abovementioned fundamental principles that are included in the founding treaties of the EU can be listed, by evaluating the provisions on public good, morality and health, the well-being of humans, animals and plants, the protection of national heritage, the protection of industrial and commercial goods, as follows; prohibition of any quantity restrictions or measures with the equivalent effect that restrain trade among member states, prohibition of the institution of new restrictions, the lifting up of the current restrictions; provision on the gradual lifting of the obstacles with regard to the free movement of services; provision on issuing directives in order to approximate the administrative or legal systems of member states.[94]

Among the difficulties in harmonizing regulations across the EU, we can count the presence of many number of legal regulations on advertising practices within domestic laws; the great variation in legal areas in regulations on basic topics, such as unfair competition, among countries; the inclusion of regulations on this topic even within the criminal law in some countries; serious discrepancies in the interpretation of local judiciary bodies with respect to advertising practices; the need for deeply examination of the regulations on the protection of the consumer, which is directly related

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[92] In this context, principles at the section of articles from 30 to 36, and at the section after article 59 regarding free movement of goods and services, as well as the article 100a that is on the approximation of national laws with the goal of establishing an internal market and in this way removing obstacles for commerce within the domestic laws of member states in the Treaty establishing the European Economic Community have been instructive.
http://www.ab.gov.tr/files/ardb/evt/1_avrupa_birligi/1_3_antlasmalar/1_3_1_kurucu_antlasmalar/1957_treaty_establishing_eec.pdf (26.11.2014).

[93] GREER, Thomas / THOMPSON, Paul: *Development of Standardized and Harmonized Advertising Regulation in the European Economic Community*, **Journal of Advertising**, Vol. 14, No.: 2, 1985, p. 23.

[94] FORD, Gary T.: *Regulation of Advertising in the European Community: an Overview*, **European Advances in Consumer Research**, Vol. 1, 1993, p. 559-564.

to advertising practices, across the EU; diversity of perspectives in various nations on health, environment, alcoholic drinks, tobacco products, the protection of minors issues; the inability to achieve harmonization among aims of the EU regulations regarding advertising practices; different organizational regulations in self-regulatory practices; difficulties experienced in relation to optional practices and practices that are related to self-regulatory bodies.[95]

Regulations on advertising practices, that began in the EU within the scope of guiding provisions listed above, find an area of implementation mainly within the scope of protection of the consumer, as explicit from the section titles of negotiations mentioned above, as well as in information technologies, evaluations in the field of unfair competition, and under the title of commercial communication.

Within the EU, efforts in the area of protection of the consumer gained importance primarily after 1972. During this period, member states referred to the need to focus on the social and humane issues beside the financial outlook of the EU and in this context the policies to protect consumers got in the targets. In the following period, functionality to these policies tried to be provided through programs that emerged from researches and meetings, and through preparation of the drafts of the regulations; however, it was with the Maastricht Treaty that consumer policies were recognized as an autonomous policy and asked to be integrated with other policies in 1993. In the meantime, comprehensive regulations of the EU on advertising practices began to be discussed since 30 years before the directive on misleading advertising practices was issued in 1984.[96] In the following period, the EU addressed the difficulties on changing practices in the member states, and under the Green Paper on Commercial Communications in the Internal Market issued by the European Commission in 1996 pointed at the issue of harmonizing domestic law for the regulations on advertising practices to become more comprehensive. Commercial communication is defined as, *'All forms of communication seeking to promote either products, services or the image of the*

[95] VAHRENWALD, Arnold: *The Advertising Law of the EU*, **EIPR**, [1996] 5, p. 290.
[96] GÖLE (1983), p. 25-28; GREER / THOMPSON (1985), p. 25-26; FORD (1993), p. 559-564; VAHRENWALD (1996), p. 282.

company or organization to final consumers and/or distributors', and includes all types such as advertising, sponsorship, direct marketing, sales promotion and public relations. Commercial communication is developing with the rapidly evolving information society service industry and hence the institutions of the EU are trying to catch up with this momentum with the policies and regulations that they create.[97]

3.1 Regulations that Include Provisions Directly Related to Advertising Practices:

The regulations on advertising practices within the European Law have both qualitative and quantitative dimensions. Qualitative regulations cover general principles and obligatory standards on advertising practices (the protection of minors, prohibition of discrimination, prohibition of tobacco advertisements, restrictions on drug and alcohol advertisements). Quantitative regulations cover issues such as how and for how long an advertisement can be placed within a program. We can list the regulations that are made with the purpose of providing provisions directly related to advertising practices as follows:

- Regulations that form the general principles regarding advertising practices
- Regulations regarding the medium that the advertising practices take place
- Regulations regarding certain products placed in the advertising practices.[98]

3.1.1 Regulations that form the general principles regarding advertising practices:

Regulations that form the general principles of advertising practices are comprehensive regulations that are directly about advertising practices. These regulations can be listed as follows:

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[97] COMMISSION OF THE EUROPEAN COMMUNITIES: **Commercial Communications in the Internal Market – Green Paper from the Commission**, COM (96) 192 final, Brussels – 08.05.1996; http://www.ivir.nl/publications/kabel/commercial_communications.pdf (26.11.2014).

[98] European Commission DG EAC: **Study on the Impact of Advertising and Teleshopping on Minors - International and European Regulation and Self-regulation**, March - 2001, p. 2-11; ÇAKIR, Vedat: *Avrupa Birliği'ne Uyum Sürecinde Türkiye'de Televizyon Reklamlarına Yönelik Düzenlemeler*, **Selçuk İletişim**, 5(1), 2007, p. 198–209;
http://www.ivir.nl/publications/kabel/commercial_communications.pdf (26.11.2014);
http://www.europarl.europa.eu/aboutparliament/en/displayFtu.html?ftuId=FTU_4.11.2.html (26.11.2014).

- Directive 84/450/EEC relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising,
- Directive 97/55/EC amending the Directive 84/450/EEC concerning misleading advertising so as to include comparative advertising,
- Directive 2005/29/EC The Unfair Commercial Practices Directive,
- Directive 2006/114/EC Directive on Misleading and Comparative Advertising.[99]

3.1.1.1 Directive 84/450/EEC relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising

The process of the regulations listed above goes back as far as 1960s, and the harmonizing efforts began around that time. Local regulations on misleading advertising practices were differing greatly from each other among the member states. The draft law on this topic proposed in 1978 referred to unfair advertisements and misleading advertising practices, while the first directive issued, 'Directive 84/450/EEC relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising' is only on misleading advertising and its basic principle is to maintain that the advertising does not deceive the consumer. Directive 84/450/EEC that forms the first stage in the harmonizing efforts in the field of misleading advertising practices impose the obligation to member states to harmonize their domestic law, brings minimum standards, and give possibilities to the member states to introduce tougher provisions or retaining the current regulations in their domestic law.[100]

Directive 84/450/EEC is composed of 9 articles. We can list the basic determinations covered in these articles as follows:

[99] European Commission DG EAC (2001), p. 4-5; http://www.ivir.nl/publications/kabel/commercial_communications.pdf (26.11.2014).

[100] BOZBEL, Savaş: **Mukayeseli Hukukta ve Türk Hukukunda Karşılaştırmalı Reklam**, Ankara 2006, sf. 160-163; GÖLE (1983), p. 113-116; VAHRENWALD (1996), p. 282-283; KİRMANİ, Samia M.: *Cross-Border Comparative Advertising in the EU*, **Boston College International and Comparative Law Review**, Vol. 19, Issue 1, 1996, p. 201-215; STUYCK, Jules: *Regulating Comparative Advertising in the European Community*, **European Advances in Consumer Research**, Vol. 1, 1993, p. 565-568.

- The purpose of this Directive is to protect consumers, persons carrying on a trade or business or practising a craft or profession and the interests of the public in general against misleading advertising and the unfair consequences thereof.
- For the purposes of this Directive, 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; and, 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 behavior or which, for those reasons, injures or is likely to injure a competitor.
- In accordance with the relevant provisions of the Directive, in determining whether advertising is misleading, account shall be taken of all its features, and in particular counted as; the characteristics of goods or services, such as their availability, nature, execution, composition, method and date of manufacture or provision, fitness for purpose, uses, quantity, specification, geographical or commercial origin or the results to be expected from their use, or the results and material features of tests or checks carried out on the goods or services; the price or the manner in which the price is calculated, and the conditions on which the goods are supplied or the services provided; the nature, attributes and rights of the advertiser, his qualifications and ownership of industrial, commercial or intellectual property rights or his awards and distinctions.
- Minimum sanctions that need to be at the member states relevant regulations are also specified at the Directive. In accordance with such provision, member states shall ensure that adequate and effective means exist for the control of misleading advertising in the interests of consumers as well as competitors and the general public. Such means shall include legal provisions under which persons or organizations regarded under national law as having a legitimate interest in prohibiting misleading advertising may; take legal action against such advertising; and/or bring such advertising before an administrative authority competent either to decide on complaints or to initiate appropriate legal

proceedings. In addition, in accordance with the Directive member states shall confer upon the courts or administrative authorities powers enabling them to order the cessation of, or to institute appropriate legal proceedings for an order for the cessation of, misleading advertising; or, if misleading advertising has not yet been published but publication is imminent, to order the prohibition of, or to institute appropriate legal proceedings for an order for the prohibition of, such publication, even without proof of actual loss or damage or of intention or negligence on the part of the advertiser.

- Directive introduces an exception to the general rule on proof as burden of proof is on the claimant, through provision as 'where courts require the advertiser to furnish evidence as to the accuracy of factual claims in advertising'.
- Lastly, the Directive referred to the voluntary control of misleading advertising by self-regulatory bodies and specified that such control does not exclude. We will further discuss this provision in the section on this topic further below.[101]

3.1.1.2 Directive 97/55/EC amending Directive 84/450/EEC concerning misleading advertising so as to include comparative advertising

Following the directive of 84/450/EEC which composed the first stage, the comparative advertising practices had to be taken up in the next stage.[102] Since there are great variations in the legislations of the member states in the field of comparative advertising, it took some time to reach a consensus on the related regulation. Furthermore, the delicacy of the situation is also clear from the fact that the Parliament and the Council proceeded with the co-decision procedure. The agreement was reached in 1997. With the 'Directive 97/55/EC, amending Directive 84/450/EEC concerning misleading advertising so as to include comparative advertising' the Directive

[101] TEKİNALP, Gülören / TEKİNALP, Ünal: **Avrupa Birliği Hukuku**, İstanbul – 2000, p. 660-662; GÖLE (1983), p. 116-118;
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31984L0450:EN:HTML (26.11.2014).

[102] About the situation in the period, we can give "Cola Wars" as a striking example on advertising practices. Beginning in mid-1990s, in the campaign mainly led by the brand "Pepsi Cola" against the "Coca Cola" brand with comparative advertising, the brand "Coca Cola" responded with legal action internationally and this became one of the striking examples that demonstrate the ease with which brand pursue comparative advertising in their international campaigns.

84/450/EEC was amended with the main purpose of harmonizing diverse provisions on comparative advertising in member states. The Directive 97/55/EC fundamentally receives advertising practices favorably in relation to competition and consumer policies, but at the same time wants to protect all the parties of competition from its drawbacks. Directive 97/55/EC is composed of 4 articles. These articles are briefly as follows:

- The first article of the directive covers the altered or amended articles of Directive 84/450/EEC. Accordingly, an addition is made to the first article of Directive 84/450/EEC, which is on the objective of the directive, and it is stated that the conditions for the allowed comparative advertising are taken within the scope of this directive.
- The definition of comparative advertising is added to the second article of the Directive 84/450/EEC which is also amended. Accordingly, comparative advertising is defined as any advertising which explicitly or by implication identifies a competitor or goods or services offered by a competitor.
- The addition made to the third article of the Directive 84/450/EEC considers legitimate any comparative advertising if the listed limited number of conditions is met. According to the article, comparative advertising is admitted when the following conditions are met; (a) it is not misleading according to Art.s 2, 3 and 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 create confusion in the market place 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, (e) it does not discredit or denigrate the trade marks, trade names, other distinguishing marks, goods, services, activities, or circumstances of a competitor, (f) for products with designation of origin, it relates in each case to products with the same designation, (g) 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, (h) it does not present goods or services as imitations or replicas of goods or services bearing a protected trade

mark or trade name. Furthermore, in relation to comparisons made in special offers, special conditions such as the date on which the offer ends or, where appropriate, that the special offer is subject to the availability of the goods and services, where the special offer has not yet begun, the date of the start of the period during which the special price or other specific conditions shall apply, shall be indicated in a clear and unequivocal way.

- In the section that alters the art.s 4, 5, and 6 of the Directive 84/450/EEC, combatting with the comparative advertising practices are added to the provisions regarding sanctions, self-regulation and furnishing evidence.
- With the addition made to the art. 7 of the Directive 84/450/EEC, it is decided that member states can retain or adopt provisions with a view to ensuring more extensive protection, with regard to misleading advertising, but these extensive provisions cannot be applied to comparative advertising practices, as far as the comparison is concerned. Furthermore, it is stated that the provisions of this Directive shall apply, without prejudice to Community provisions on advertising for specific products and/or services or to restrictions or prohibitions on advertising, in particular media. Lastly, it is clarified that this directive does not oblige member states to impose advertising bans on certain goods or services, on the other hand, it resolves that the directive shall not prevent member states from introducing bans or limitations on the use of comparisons in the advertising of professional services.[103]

3.1.1.3 Directive 2005/29/EC the Unfair Commercial Practices Directive

We can summarize the basic aim of the Unfair Commercial Practices Directive 2005/29/EC as harmonizing national legislations on unfair commercial practices,

[103] WRIGHT, Linda Berns / MORGAN, Fred W.: *Comparative Advertising in the EU and the United States: Legal and Managerial Issues*, **Journal of Euromarketing**, Vol. 11 (3), 2002, p. 7-30; KAMVOUNIAS, Patty: *Comparative Advertising and the Law: Recent Developments in the EU*, **EABR & ETCL Conference Proceedings**, 2010, p. 620-631; MORASCH, Manuel: **Comparative Advertising: A Comparative Study of Trade-mark Laws and Competition Laws in Canada and the EU**, Thesis for the Degree of the Master of Laws / Faculty of Law of University of Toronto, p. 38-57; BERNITZ, Ulf: *The EC Directive on Comparative Advertising and Its Implementation in the Nordic Countries*, **Stockholm Institute for Scandinavian Law**, 2009, p. 12-29; BOZBEL (2006), p. 160-228; http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31997L0055:EN:HTML (26.11.2014).

increasing legal protection and precision both for consumers and businesses; and thus, creating a high level of consumer protection, abolishing barriers that emerge from disparities of rules on unfair commercial practices, and providing an internal market in this field. We also observe specifications on advertising practices among the fundamental aims and reasons of the regulation. Furthermore, these practices are considered as misleading actions and misleading omissions within the scope of articles that are on the content of unfair commercial practices, which we will examine briefly below, and both articles mention advertising practices. Lastly, a black list was created at the directive, and 31 items of unfair commercial practices were defined which also includes determinations on advertising practices. Below, we analyze the Directive 2005/29/EC in general and from the perspective of its provisions on advertising practices:

- Directive 2005/29/EC, from a general point of view structured as, goals, definitions, and scope at the beginning; and is constituted of a large art. 5 that has a general scope; art.s 6 and 7 that are of special quality; art.s 8 and 9 in which decisions are made on conditions which are already considered as unfair commercial practices; art.s 10, 11, 12, and 13 on legal procedures; lastly, art. 14 on the amendments made to Directive 84/450/EEC.
- We observe that the Directive 2005/29/EC gives place to designations on advertising practices at the portion before art. 14 in a couple of articles. Firstly in the definitions sections, the definition of 'business-to-consumer commercial practices' mentions advertising practices within the scope of commercial communications that are conducted by a trader. Following this, under the art. 5 titled 'Prohibition of unfair commercial practices', it is stated that to the common and legitimate advertising practices that are performed using exaggerated statements or statements which are not meant to be taken literally, the provision of the art. 5, which makes an assessment from the perspective of the average consumer, does not apply. The art. 6 titled 'Misleading Actions' and art. 7 titled 'Misleading Omissions', which are under general title 'Misleading Commercial Practices', indicates that any product marketing method that causes a confusion about a product, brand, trade name or any other distinctive quality of

a competitor is misleading and comparative advertising practices are also included in this provision; other regulations on advertising practices within the EU Law, which are not limited in number, are enumerated and the significance of these provisions are emphasized.

- Directive 2005/29/EC art. 14 makes amendments to the Directive 84/450/EEC art.s 1, 2, 3, 4, and 7:

i. The art. 1 of the Directive 84/450/EEC is amended as, 'in order to protect traders against misleading advertising and the unfair consequences thereof and to lay down the conditions under which comparative advertising is permitted.' Hence, the statements about consumer, and persons who do commercial business or craft that were present before are amended.

ii. The definition of 'person' in art. 2(3) at the Directive 84/450/EEC that expressed any natural or legal person is replaced with 'trader, which means any natural or legal person who is acting for purposes relating to his trade, craft, business or profession and any one acting in the name of or on behalf of a trader.' The following is added as art. 2(4), 'code owner means any entity, including a trader or group of traders, which is responsible for the formulation and revision of a code of conduct and/or for monitoring compliance with the code by those who have undertaken to be bound by it.'

iii. The scope of comparative advertising practices in art. 3a(1)(a) covered in art. 3a, which come into force with the amendments of Directive 97/55/EC amending the Directive 84/450/EEC as stated above, was changed; and, the condition of not being deceptive was inserted as the meaning of the relevant articles of the Directive 2005/29/EC (the articles that are related or to those on business-to-consumer unfair commercial practices in the internal market); furthermore, the 3a(1)(d) is also amended and replaced under 3a(1)(h) as a condition that these practices do 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.'

iv. The art. 4(1) of the Directive 84/450/EEC is amended and consumers, competitors and public as addressee replaced with traders and persons. In the addition made to art. 4(1), it is stated that it is for each member state to decide which of these facilities shall be available and whether to enable the courts or administrative authorities to require prior recourse to other established means of dealing with complaints, including those referred to in Art. 5. Furthermore, under art. 4 (1), 'it is for each member state to decide a) whether these legal facilities may be directed separately or jointly against a number of traders from the same economic sector; and (b) whether these legal facilities may be directed against a code owner where the relevant code promotes non-compliance with legal requirements.' was inserted.

v. While the Directive 84/450/EEC art. 7(1) included consumers, persons carrying on a trade, business, craft or profession, and the general public as addressee; here, it is amended to allow for or continue member states in retaining or adopting provisions with a view to ensuring more extensive protection, with regard to misleading advertising, for traders and competitors.

- We will lastly look at the list of conditions that are qualified as 'commercial practices which are in all circumstances considered unfair' in the

Annex 1 of the Directive 2005/29/EC. There are also some designations on advertising practices within the scope of the list. Those are the following:

i. Making an invitation to purchase products at a specified price without disclosing the existence of any reasonable grounds the trader may have for believing that he will not be able to offer for supply or to procure another trader to supply, those products or equivalent products at that price for a period that is, and in quantities that are, reasonable having regard to the product, the scale of advertising of the product and the price offered (bait advertising).

ii. Making an invitation to purchase products at a specified price and then refusing to show the advertised item to consumers or refusing to take orders for it or deliver it within a reasonable time or demonstrating a defective

sample of it, with the intention of promoting a different product (bait and switch).

iii. Using editorial content in the media to promote a product where a traderhas paid for the promotion without making that clear in the content or by images or sounds clearly identifiable by the consumer (advertorial).

iv. Promoting a product similar to a product made by a particular manufacturer in such a manner as deliberately to mislead the consumer into believing that the product is made by that same manufacturer when it is not.

v. Establishing, operating or promoting a pyramid promotional scheme where a consumer gives consideration for the opportunity to receive compensation that is derived primarily from the introduction of other consumers into the scheme rather than from the sale or consumption of products.

vi. Including in an advertisement a direct exhortation to children to buy advertised products or persuade their parents or other adults to buy advertised products for them.[104]

3.1.1.4 Directive 2006/114/EC concerning Misleading and Comparative Advertising

The most current regulation on advertising practices that establishes the general principles is the Directive 2006/114/EC of 12 December 2006 Concerning Misleading and Comparative Advertising. The insufficiency of the solutions prescribed by the Directive 84/450/EEC, despite the amendments made to it as analyzed above, resulted in abolishing the Directive 84/450/EEC and Directive 97/55/EC and their appendices, as well as the related articles in the Directive 2005/29/EC pursuant to the Directive 2006/114/EC, and in a sense the provisions included in these directives are codified in an

[104] European Parliament Directorate General for Internal Policies: **State of Play of the Implementation of the Provisions on Advertising in the Unfair Commercial Practices Legislation**, July – 2010, p. 6-19; MICKLITZ, Hans-W. / REICH, Norbert / ROTT, Peter: **Understanding EU Consumer Law**, Intersentia - 2009, p. 64-116; PONSIBO, Cristina / INCARDONA, Rosella: *The EU Unfair Commercial Practices Directive: A Faltering First Step*, **London Law Review**, Vol. 1, Issue 2, October - 2005, p. 317-337; http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:149:0022:0039:en:PDF (26.11.2014); http://www.djei.ie/commerce/consumer/conspol_consultation.pdf (26.11.2014); http://www.esktb.org.tr/dergi.pdf (26.11.2014).

orderly way. The reasons for issuing this directive are stated in the introduction part of the directive. Among these reasons, we need to emphasize especially the need for clarity and rationality as a result of amendments made several times; the continuing impact of the diversity of the laws in member states on functioning of the internal market, competition, and advertising that reaches beyond the frontiers; the need for minimum and objective criteria; the need to clarify the conditions and the concept of comparative advertising (including its reflections in the field of intellectual property); the need for regulation on sanctions and self-regulatory mechanisms. The directive is composed of 12 articles, which we analyze as follows in their relation to the prior directives:

- The article on scope is preserved with the amendment made with the Directive 2005/29/EC;
- The article on definitions includes the definition of advertising and misleading advertising as provided Directive 84/450/EEC, and is amended to include the definition of comparative advertising added to the Directive 97/55/EC; and the definitions of trader (by means of amending the definition of person) and of code owner which are added in the Directive 2005/29/EC.
- The article on the investigation of misleading advertising preserves the provision provided in Directive 84/450/EEC;
- The article on the conditions of comparative advertising practices preserves the amendments made by Directive 2005/29/EC;
- About the articles on legal measures, the article on sanctions includes the provision in Directive 84/450/EEC as amended in Directive 2005/29/EC; the article on self-regulation includes the amendment made by Directive 97/55/EC; the article on evidence again includes the amendment made by Directive 97/55/EC;
- The article on more extensive protections to be implemented in member states includes the amended version in the Directive 2005/29/EC of the provision in Directive 97/55/EC.[105]

[105] ÖZSUNAY, Ergun: *Karşılaştırmalı Reklamlar AB Yönergesi Işığında Türk Hukukuna İlişkin Gözlemler*, **Uluslararası Reklam Hukuku Sempozyumu (8-9 Mayıs 2008)**, İstanbul - 2009, p. 135-165;

3.1.2 Regulations regarding the medium that the advertising practices take place:

Regulations regarding the medium that the advertising practices take place are, as can be understood from the concept medium, documents that include regulations on the transmission of advertising practices through audiovisual media, and can be listed as follows:[106]

- Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in member states concerning the provision of audiovisual media services (Audiovisual Media Services Directive),
- Directive 97/36/EC amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities,
- Directive 2007/65/EC Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities,
- Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (codified version).

3.1.2.1 European Convention on Transfrontier Television

Before beginning to analyze the listed regulations above, it will be adequate to examine the European Convention on Transfrontier Television that was signed in 1989, which emerged during the process of specifying and developing the EU media policies and which has an international feature, accepted by the European Parliament and the Council. As stated explicitly in the introduction of the 'Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:376:0021:0027:EN:PDF(26.11.2014).
[106] http://ec.europa.eu/avpolicy/reg/history/index_en.htm (26.11.2014).

Media Services Directive),' which is the first and fundamental documents of the regulations that we will examine below, the provisions of the convention are accepted in this directive; hence, the directive is regulated in parallel to the convention. The relation between the two is seen as, great technological and economic developments in television broadcasting and the emergence of new communication services in Europe plus the need to do a regulation parallel to the amendments made by Directive 89/552/EC, at the beginning of the regulation regarding amendments made to the convention in 1998. The aim of the convention can be summarized as the attempt to establish a standard on issues such as definitions in broadcasting, broadcasting principles, advertising practices, retransmission. The sections on advertising practices of the convention are briefly as follows:

- The convention art. 2 adds the term 'broadcaster' to the text as amended in 1998, and the definition of advertising is put forth as; '... means any public announcement in return for payment or similar consideration or for self-promotional purposes, which is intended to promote the sale, purchase or rental of a product or service, to advance a cause or idea, or to bring about some other effect desired by the advertiser or the broadcaster itself.'
- The section that gathers provisions on advertising is Chapter III. This chapter includes articles 11-16. These articles cover provisions under the titles of the general standards, duration, form and presentation, insertion of advertising and tele-shopping, advertising and tele-shopping of particular products, advertising and tele-shopping directed specifically at a single party.

i. Art. 11, titled General Standards, lists the basic qualities that advertising practices should adhere to. Advertising should be; fair and honest; shall not be misleading and shall not prejudice the interests of consumers; those that address or use children shall avoid anything likely to harm their interests and shall have regard to their special susceptibilities; and, the advertiser shall not exercise any editorial influence over the content of programs. With the amendment made to this article, these conditions were set for tele-shopping as well, and furthermore, it is added that tele-shopping shall not extort minors to contract for the sale or rental of goods and services.

ii. Art. 12 on duration describes the duration restrictions about the proportions of advertising practices to daily transmission time. With the amendments made to this article, tele-shopping was included into the provision and again through amendment, it is resolved that for the purposes of this article, advertising shall not include announcements made by the broadcaster in connection with its own programs and ancillary products directly derived from those programs; announcements in the public interest and charity appeals broadcast free of charge.

iii. The art. 13, titled Form and Presentation, introduces conditions on the ways advertising practices are presented; within this scope, it is stated that advertising practices shall be clearly distinguishable as such and recognizably separate from the other items of the program service, it prohibits the use of subliminal techniques and surreptitious advertising, and that they shall not feature, visually or orally, persons regularly presenting news and current affairs programs. Tele-shopping has been incorporated into the article through amendments.

iv. Art. 14 that is on the insertion of advertising practices designates that advertising shall be inserted between programs, and may also be inserted during programs in such a way that the integrity and value of the program and the rights of the rights holders are not prejudiced; shall only be inserted between the parts or in the intervals in programs consisting of autonomous parts, or in sports programs and similarly structured events and performances comprising intervals; the scheduled duration of transmissions in order to make a insertion and the duration of advertising; shall not be inserted in any broadcast of a religious service; and the duration restrictions for the interruption of news and current affairs programs, documentaries, religious programs, and children's programs are specified as well.

v. Art. 15 on the advertising of particular products, it is stipulated that advertising for tobacco products shall not be allowed; advertising for alcoholic beverages shall comply with specific rules (accordingly, these

advertisements shall not be addressed particularly to minors and no one associated with the consumption of alcoholic beverage in advertising should seem to be a minor; they shall not link the consumption of alcohol to physical performance or driving; they shall not claim that alcohol has therapeutic qualities or that it is a stimulant, a sedative or a means of resolving personal problems; they shall not encourage immoderate consumption of alcohol or present abstinence or moderation in a negative light; they shall not place undue emphasis on the alcoholic content of beverages); advertising for medicines and medical treatment which are only available on medical prescription in the transmitting state shall not be allowed; advertising for all other medicines and medical treatment shall be clearly distinguishable as such, honest, truthful and subject to verification and shall comply with the requirement of protection of the individual from harm.

vi. The last article on advertising practices is Art. 16 which is on advertising directed specifically at a single party (as a state). The article stipulates that in order to avoid distortions in competition and endangering the television system of a state, advertising which is specifically and with some frequency directed to audiences in a single party other than the transmitting party shall not circumvent the television advertising rules in that particular party. The exceptions to this rule is when the rules concerned establish a discrimination between advertising transmitted by a broadcaster within the jurisdiction of that party and advertising transmitted by a broadcaster or any other legal or natural person within the jurisdiction of another party, or, when the parties concerned have concluded bilateral or multilateral agreements in this area. The four articles on advertising that cover form and representation, insertion of advertising, advertising of particular products, and advertising directed specifically at a single party are amended to cover tele-shopping.[107]

[107] WILKINS, L. Kelly: *Television Without Frontiers: An EEC Broadcasting Premier*, **Boston College International and Comparative Law Review**, Vol. 14, Issue 1, 1991, p. 195-211; ÇABUK, Didem:

3.1.2.2 Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), and the Directives 97/36/EC and 2007/65/EC that amended the Directive 89/552/EEC

The first attempt in defining the media policies of the EU, which expressed the development period of the legal documents and provisions abovelisted and the related convention by the Council of Europe abovementioned, which includes the regulations on the broadcasting of advertising practices through audiovisual media, is parallel to the development of TV and radio broadcasting technologies in the beginning of 1980s, especially that of satellite broadcasting. The need to focus on the issue at the level of the EU emerged because broadcasting frequencies recognize no borders and there were diversities in legal regulations among countries; thus, reports[108] were issued in this context.[109]

By taking these developments and the projections presented in these reports into account, 'Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services' which is commonly referred to as the 'Television without Frontiers Directive' was put into effect on October 3, 1989. The directive is composed of 7 main chapters and 27 articles. The main objective of the directive is to establish the

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Avrupa Birliği'ne Katılım Sürecinde Türkiye'de Medya Politikalarının Dönüşümü, **Gümüşhane Üniversitesi İletişim Fakültesi Elektronik Dergisi**, Vol. 2, No.: 1, 2013, p. 26-48;
http://conventions.coe.int/Treaty/en/Treaties/Html/132.htm#FN1(26.11.2014);
http://conventions.coe.int/Treaty/en/Treaties/Html/171.htm (26.11.2014).

[108] Among these reports, the documents that will become the basis of later regulations, are 'Green Paper on the establishment of a Common market in broadcasting' issued in 1984, and 'Green Paper on the development of the Common Market for Telecommunication Services and Equipment' issued in 1987. These reports discussed forming shared standards for lifting up national restrictions, evaluated regulatory steps that are required to establish a competitive open information market, thus implementing the freedoms enshrined in the Treaty of Rome.

[109] ÇABUK (2013), p. 26-48; SAPMAZ, Emel: **Avrupa Birliği'ne Uyum Sürecinde Türkiye'de Görsel İşitsel Medya Mevzuatı ve Karşılaşılan Sorunlar,** Specialization Thesis, Ankara - 2011, p. 18-25; UYANIK, Faik: **Türkiye'nin AB Görsel İşitsel Politikalarına Uyum Çabaları**, Unpublished Master Thesis, İstanbul - 2006, p. 4;
http://ec.europa.eu/avpolicy/reg/history/historytvwf/index_en.htm (26.11.2014).

legal framework of the free circulation of TV broadcasts within the EU and to harmonize the national legislations in the path to create a single audiovisual market in accordance with the policies that are formed through founding treaties. Because this directive quickly fell behind the rapid technological and sectoral developments, and in order to resolve the problems that occurred in the market due to legal gaps as well as to remove diversities in implementation, it was amended by the Directive 97/36/EC. The need for an update, which would include other mass communication tools, arose in the following period since the directive only covered television broadcasting and did not cover broadcasts via the Internet and mobile phones. The reflection of this need for making amendment on advertising practices has been experienced as its failure to regulate new advertising techniques, interactive advertising, virtual advertising, split advertising, advertising on the Internet through search motors and SMS advertising on the mobile telephones. Directive 2007/65/EC came in effect in 2007. An overlook of the provisions of the Directive 89/552/EEC together with the amendments is as follows:[110]

- The first article of the Directive covers definitions, and with regard o advertising practices, includes the definitions of 'television advertising', 'surreptitious audiovisual commercial communication', 'sponsorship' and 'teleshopping';

  i. In accordance with the article, television advertising means any form of announcement broadcast in return for payment or for similar consideration by a public or private undertaking in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immovable property, or rights and obligations, in return for payment.

  ii. Surreptitious advertising means the representation in words or pictures of goods, services, the name, the trade mark or the activities of a producer of

[110] MAGDALENA, Prihoanca Diana: *Legal Framework Setting up Advertising on the Audiovisual Market in Romania and the EU*, **Economic Science Series**, Vol. 17, Issue 4, 2008, p. 1131 – 1132; WOODS, Lorna: *The Consumer and Advertising Regulation in the Television without Frontiers and Audiovisual Media Services Directives*, **Journal of Consumer Policy**, Vol. 31, Issue 1, 2008, p. 63-77; NİZAM, Feridun: **Türk Medya Mevzuatının Avrupa Birliği Medya Mevzuatı ile Uyumlaştırılması ve Karşılaşılan Sorunlar**, Unpublished Master Thesis, Ankara - 2007, p. 48; http://ec.europa.eu/avpolicy/reg/history/historytvwf/index_en.htm (06.02.2014).

goods or a provider of services in programs when such representation is intended by the broadcaster to serve advertising and might mislead the public as to its nature. Such representation is considered to be intentional in particular if it is done in return for payment or for similar consideration.

iii. Sponsorship means any contribution made by a public or private undertaking not engaged in television broadcasting activities or in the production of audiovisual works, to the financing of television programs with a view to promoting its name, its trade mark, its image, its activities or its products.

iv. Lastly, teleshopping means direct offers broadcast to the public with a view to the supply of goods or services, including immovable property, rights and obligations, in return for payment.

v. The amendments made by Directive 2007/65/EC the terms audiovisual commercial communication, surreptitious audiovisual commercial communication and product placement inserted within the scope of audiovisual media services. Audiovisual commercial communication means images with or without sound which are designed to promote, directly or indirectly, the goods, services or image of a natural or legal entity pursuing an economic activity. Such images accompany or are included in a program in return for payment or for similar consideration or for self-promotional purposes. Forms of audiovisual commercial communication include, inter alia, television advertising, sponsorship, teleshopping and product placement. Surreptitious audiovisual commercial communication means the representation in words or pictures of goods, services, the name, the trade mark or the activities of a producer of goods or a provider of services in programs when such representation is intended by the media service provider to serve as advertising and might mislead the public as to its nature. Such representation shall, in particular, be considered as intentional if it is done in return for payment or for similar consideration. And lastly, product placement means any form of audiovisual commercial communication consisting of the inclusion of or

reference to a product, a service or the trade mark thereof so that it is featured within a program, in return for payment or for similar consideration.[111]

- Other provisions that are on advertising practices are covered in art.s 4 and 5 under Chapter III titled 'Promotion of distribution and production of television programs'. Under these articles, the need for dedicating broadcasting time on European works is emphasized, and it is stipulated that the transmission time for these works, excluding the time appointed to news, sports events, games, advertising and teletext services shall be designated.
- The section that is directly related to advertising practices is the provisions in art.s 10-20 under Chapter IV;

i. Art. 10 stipulates that television advertising shall be readily recognizable as such and kept quite separate from other parts of the program service by optical and/or acoustic means; isolated advertising spots shall remain the exception; advertising shall not use subliminal techniques; and, surreptitious advertising shall be prohibited. In the amendments made by Directive 2007/65/EC, the provisions on subliminal techniques and surreptitious advertising were deleted, the new advertising techniques are inserted, and the broadcasting of sport events is considered out of exceptions.
ii. Art. 11 stipulates, in parallel to the European Convention on Transfrontier Television, that advertising practices shall be inserted between programs or may also be inserted during programs in such a way that the integrity and value of the program, and the rights of the rights holders are not prejudiced; shall only be inserted between the parts or in the intervals in programs consisting of autonomous parts, or in sports programs and similarly structured events and performances comprising intervals. The transmission duration of programs before insertion, the allowed duration for advertising,

[111] MAGDALENA (2008), p. 1133-1134; ÇAKIR (2007), p. 199–202; UYANIK (2006), p. 5-16; NİZAM (2007), p. 49-56;
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1989L0552:20071219:EN:PDF (26.11.2014);
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31997L0036:en:NOT (26.11.2014);

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:332:0027:0045:EN:PDF (26.11.2014).

as well as the period between each successive advertising break, and the duration restrictions for news and current affairs programs, documentaries, religious programs, and children's programs are specified. No advertisements shall be inserted in any broadcast of a religious service. According to the amendments done by Directive 2997/65/EC, the provision which stipulates that in programs consisting of autonomous parts, or in sports programs and similarly structured events and performances comprising intervals, that advertisements shall only be inserted between the parts or in the intervals is deleted, and the transmission duration before insertion has been shortened, and the duration restrictions for news and current affairs programs, documentaries, religious programs, and children's programs are retained only for children's programs.

iii. Art. 12 stipulates the conditions for television advertising and teleshopping, accordingly advertising shall not prejudice respect for human dignity; include any discrimination on grounds of race, sex or nationality; be offensive to religious or political beliefs; encourage behavior prejudicial to health or to safety; encourage behavior prejudicial to the protection of the environment. Directive 2007/65/EC deletes this article as well as art. 13, yet, these listed conditions are reproduced under audiovisual media services and programs, and thus the media which the article covers have been extended.

iv. Art. 13 is on tobacco and in the same way as it takes place in the European Convention on Transfrontier Television, any form of television advertising and teleshopping are prohibited.

v. Art. 14 is on medications, and similar to the European Convention on Transfrontier Television, it prohibits the television advertising for medicinal products and medical treatment available only on prescription in the member state within whose jurisdiction the broadcaster falls. Furthermore, teleshopping of medicinal products that are subject to market permission and teleshopping of medical treatments within the scope of the directive are prohibited. With the amendments done by Directive 2997/65/EC, the first section of the Art. 14, which is on advertising of medicinal products and

medical treatments available only on prescription, is deleted and this provision was taken under the conditions on audiovisual media services and programs, and its scope is extended.

vi. Art. 15 stipulates the criteria of advertising of alcoholic beverages and these criteria comply with to the related article in the European Convention on Transfrontier Television.

vii. Art. 16 is on the protection of children. This provision stipulates that television advertising shall not cause moral or physical detriment to minors, and shall therefore comply with the following criteria for their protection; it shall not directly exhort minors to buy a product or a service by exploiting their inexperience or credulity; it shall not directly encourage minors to persuade their parents or others to purchase the goods or services being advertised; it shall not exploit the special trust minors place in parents, teachers or other persons; it shall not unreasonably show minors in dangerous situations. Furthermore, it stipulates that teleshopping shall not encourage children to ensure the rent or sale of services or goods. The amendment made by Directive 2007/65/EC deletes this article, yet, these provisions are retained and reproduced for audiovisual media services and programs covering more forms of media and thus its scope is extended.

viii. Art. 17 is on sponsorship institution (sponsoring programs). The requirements that the sponsored programs shall meet are; the content and scheduling of sponsored programs may in no circumstances be influenced by the sponsor; they must be clearly identified as such by the name and/or logo of the sponsor at the beginning and/or the end of the programs; they must not encourage the purchase or rental of the products or services of the sponsor or a third party, in particular by making special promotional references to those products or services. Furthermore, television programs may not be sponsored by natural or legal persons whose principal activity is the manufacture or sale of products, or the provision of services, the advertising of which is prohibited by Art. 13 or 14 (tobacco products); but can be sponsored by companies whose principal activity is the manufacture or sale of medicinal

products and the name and the logo of the company can be included (but medicinal products and medical treatments that are only available on prescription in the member state within whose jurisdiction the broadcaster falls cannot be broadcasted); and news and current affairs programs may not be sponsored. Directive 2007/65/EC deletes this article and reproduces its conditions under audiovisual media services and programs, extending the scope of the article. Furthermore, the expanded article on sponsorship also includes the provision that member states may choose to prohibit the showing of a sponsorship logo during children's programs, documentaries and religious programs.

ix. Art. 18 specifies the proportion of advertising practices and teleshopping to the daily transmission time. In complete compliance with the European Convention of Transfrontier Television, it stipulates that these restrictions do not apply to announcements made by the broadcaster in connection with its own programs and ancillary products directly derived from those programs, sponsorship announcements and product placements. With the amendments made by Directive 2007/65/EC, the restriction on the total amount of transmission time is cancelled, and product placement is introduced under exceptions in the second clause.

x. Art. 19 specifies the changes that need to be made to the other chapters of the directive for their becoming effective for teleshopping channels. The amendment made by the Directive 2007/65/EC stipulates that advertising channels and channels which make their own promotions are subject to the same provisions.

xi. Art. 20 stipulates that the member states can lay down conditions other than those laid down in the related articles.[112]

[112] MAGDALENA (2008), p. 1133-1134; ÇAKIR (2007), p. 199–202; UYANIK (2006), p. 5-16; NİZAM (2007), p. 49-56;
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1989L0552:20071219:EN:PDF (26.11.2014);
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31997L0036:en:NOT (26.11.2014);
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:332:0027:0045:EN:PDF (26.11.2014).

- The articles that are only added by the Directive 2007/65/EC, which were not present in the Directive 89/552/EEC amended by Directive 97/36/EC, were on audiovisual commercial communication and product placement:

i. At the article on the audiovisual commercial communication, the conditions are listed. The audiovisual commercial communications shall not use subliminal techniques; prejudice respect for human dignity; include or promote any discrimination based on sex, racial or ethnic origin, nationality, religion or belief, disability, age or sexual orientation; encourage behavior prejudicial to health or safety; encourage behavior grossly prejudicial to the protection of the environment. Furthermore, the article stipulates that it should be easily recognizable as such, and surreptitious audiovisual commercial communication is prohibited.

ii. With regard to particular products, the article especially prohibits the audiovisual commercial communication of any cigarettes or other tobacco products, and stipulates that the audiovisual commercial communication of alcoholic beverages shall not be aimed specifically at minors and shall not encourage immoderate consumption of such beverages. The audiovisual commercial communication of medicinal products and medical treatment available only on prescription in the member state within whose jurisdiction the media service provider falls is prohibited.

iii. With respect to restrictions that are related to minors, the Directive stipulates that audiovisual commercial communications shall not cause physical or moral detriment to minors; therefore they shall not directly exhort minors to buy or hire a product or service by exploiting their inexperience or credulity; directly encourage them to persuade their parents or others to purchase the goods or services being advertised; exploit the special trust minors place in parents, teachers or other persons; or unreasonably show minors in dangerous situations.

iv. As a provision that covers both particular products and minors, the article stipulates that member states and the commission shall encourage media service providers to develop codes of conduct regarding inappropriate

audiovisual commercial communication, accompanying or included in children's programs, of foods and beverages containing nutrients and substances with a nutritional or physiological effect, in particular those such as fat, trans-fatty acids, salt/sodium and sugars, excessive intakes of which in the overall diet are not recommended.

v. Another regulation that was added by the Directive 2007/65/EC is the article on product placement, which stipulates that these provisions shall apply only to programs produced after 19 December 2009. In accordance with the article, the product placement shall be prohibited, and the exceptions excluding children's programs are listed as follows; product placement shall be admissible unless a member state decides otherwise in cinematographic works, films and series made for audiovisual media services, sports programs and light entertainment programs, or where there is no payment but only the provision of certain goods or services free of charge, such as production props and prizes, with a view to their inclusion in a program.

vi. Programs that contain product placement shall meet at least all of the following requirements; their content and, in the case of television broadcasting, their scheduling shall in no circumstances be influenced in such a way as to affect the responsibility and editorial independence of the media service provider; they shall not directly encourage the purchase or rental of goods or services, in particular by making special promotional references to those goods or services; they shall not give undue prominence to the product in question; viewers shall be clearly informed of the existence of product placement (programs containing product placement shall be appropriately identified at the start and the end of the program, and when a program resumes after an advertising break, in order to avoid any confusion on the part of the viewer). In relation to informing the viewers of the presence of the product placement, by way of exception, member states are given the right to waive the requirements on informing the viewer provided that the program in question has neither been produced nor commissioned by the media service provider itself or a company affiliated to the media service provider.

vii. In any event, programs shall not contain product placement of tobacco products or cigarettes or product placement from undertakings whose principal activity is the manufacture or sale of cigarettes and other tobacco products; or, specific medicinal products or medical treatments available only on prescription in the member state within whose jurisdiction the media service provider falls.[113]

3.1.2.3 Directive 2010/13/EU Audiovisual Media Services Directive

The Directive 89/552/EEC and the amendments made in 1997 and 2007 are codified by the Directive 2010/13/EU with the commonly referred title 'Audiovisual Media Services Directive'. This codified document first of all changes the title of the directive, which seemed to cover only television broadcasts, into 'Audiovisual Media Services Directive' to widen its scope. Furthermore, the Directive 2010/13/EU has transformed the Directive 89/552/EEC into a clear and explicit document while including all the developments and amendments made to the document which was updated through amendments in the manner of patches. In the Art. 33 of the Directive 2010/13/EU, it is decided that the Commission shall submit to the institutions of the EU a report on the applications of the provisions of this directive. When we analyze the report of 2012, submitted in accordance with this article, after the Directive 2010/13/EU came in effect, we observe that indications are made on the regulations about minors, alcoholic beverages and discrimination within the scope of articles that are on advertising practices. Accordingly, the report makes the observation that the provision on the duration of advertisement spots of 12 minutes for each hour of transmission is exceeded through the use of various types of advertising practices; having a detailed provision on alcoholic beverages is informative and resolves irregularities, plus a lot of member states have put into effect more stringent provisions; and that since the provisions on the protection of children are detailed, they are not violated widely and the member states have partially

[113] MAGDALENA (2008), p. 1133-1134; ÇAKIR (2007), p. 199–202; UYANIK (2006), p. 5-16; NİZAM (2007), p. 49-56;
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1989L0552:20071219:EN:PDF (26.11.2014);
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31997L0036:en:NOT (26.11.2014);
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:332:0027:0045:EN:PDF (26.11.2014).

made these provisions a part of their national legislation; in relation to discrimination, there is no single member state in which stereotypes which are sexually discriminatory are not used; and lastly, it is discussed whether lottery games are covered by this directive or not, and it is concluded that they are not.[114]

3.1.3 Regulations regarding certain products placed in the advertising practices:

The expression of the regulations regarding certain products placed in the advertising practices refers to products that are regulated with an additional document by the EU as a result of conditions. When we examine the regulations on specific products, the reasons for the need to make such a regulation will become evident. It is possible to list these regulations in three main areas:

- Directive 98/43/EC on the approximation of the laws, regulations and administrative provisions of the member states relating to the advertising and sponsorship of tobacco products, and Directive 2003/33/EC which has the same title;
- Directive 92/28/EEC and Directive 2001/83/EC on the advertising of medicinal products for human use;
- Regulation No. 1924/2006/EC on nutrition and health claims made on foods; Directive 79/112/EEC on the approximation of the laws of the member states relating to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer; Directive 89/395/EEC which amends the Directive 79/112/EEC and has the same title; Directive 89/398/EEC on the approximation of the laws of the Member States relating to foodstuffs intended for particular nutritional uses; Directive 90/496/EEC on nutrition labelling for foodstuffs; Directive 96/8/EC on foods intended for use in energy-restricted diets for weight reduction; and, Directive 2000/13/EEC on the approximation of the laws of the member states relating to the labelling, presentation and advertising of foodstuffs.

[114] European Commission: **First Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Application of Directive 2010/13/EU "Audiovisual Media Service Directive"**, 4.5.2012, p. 6-8; http://ec.europa.eu/avpolicy/reg/avms/index_en.htm (26.11.2014); http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:095:0001:0024:EN:PDF (26.11.2014).

3.1.3.1 Directive 98/43/EC on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products, and Directive 2003/33/EC which has the same title

Within the scope of the EU Law, there are two regulations on advertising practices that relate to tobacco products. These are directives 98/43/EC and 98/43/EC which bear the same title; 'Directive on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products'. Directive 98/43/EC has been annulled upon the decision of the Court of Justice. The tobacco lobby won the lawsuit which it filed with the claims that this directive has the objective of approximation with respect to public health and that the founding treaties prohibits that, and that the directive does not ease the free movement of goods and services but to the contrary obstructs it, and as a result, the lobby obtained a short period of release against the EU who would return with a much tougher regulation later. As a result of this process, Directive 2003/33/EC came into effect. As stated at the beginning of the Directive 2003/33/EC, any references made by the council to the Directive 98/43/EC will amount to address directly this directive. We analyze below the provisions of the Directive 2003/33/EC along with the indications in the report that is presented by the commission according to the art. 6 of the Directive, which is on the application of the Directive.[115]

- The Directive, which has the objective of approximation, states as the scope of its application, press and other printed media, radio broadcasts, information society services, sponsorships on tobacco (including the free distribution of tobacco products), tobacco products and promotions. Since television broadcasting was covered by the Directive 85/552/EC, it is not mentioned here.
- In the definitions section of the Directive, tobacco products is defined as all products intended to be smoked, sniffed, sucked or chewed inasmuch as they are

[115] ALEGRE, Melissa: *We've Come a Long Way Baby (Or Have we?): Banning Tobacco Advertising and Sponsorship in the EU*, **Boston College International and Comparative Law Review**, Vol. 26, Issue 1, 2003, p. 157-170;
http://curia.europa.eu/juris/showPdf.jsf;jsessionid=9ea7d0f130d52ac9a27a6fba462cb386d73d78dd5162.e34KaxiLc3eQc40LaxqMbN4OahmTe0?text=&docid=45715&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=4489614 (26.11.2014).

made, even partly, of tobacco. The same article provides definitions of advertising and sponsorship.

- According to the Directive, advertising in the press or other printed publications, information society services, radio broadcasts, sponsorship in a couple of countries and/or any free distribution of tobacco products is prohibited. As an exception to prohibition in press and information society services, publications intended exclusively for professionals in the tobacco trade and to publications which are printed and published in third countries, where those publications are not principally intended for the EU market, are allowed.[116]

The indications made in the report mentioned above state that the application of the directive in press and printed publications are very good. However, advertising in the pamphlets of bar, restaurants and hotels are using the exception that these are directly related to tobacco trade, and the news stories of sponsorship practices that are done in third countries (such as sport events) are broadcasted in news channels are areas which indicate that the directive has not completely accomplished its mission. As to information society services, it is clear that virtual media is the most used area for these types of advertising. It is very difficult to identify the person who is giving the advertising in the virtual media and having an editorial board in a third country are the specific difficulties about virtual media. On sponsorship, even though the report states that the application is again successful, indirect sponsorships such as sponsoring a social responsibility program, or the reflection of sponsorship in the internal media as mentioned above such as in motor sports, are the areas in which the application diverges from the provisions. The legal functioning which comprises sanctions, regulation and application found quite sufficient.[117]

[116] http://eur-lex.europa.eu/LexUriServ/site/en/oj/2003/l_152/l_15220030620en00160019.pdf (26.11.2014); http://eurlex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=31998L0043&model=guichett (26.11.2014).

[117] European Commission Directorate General for Health and Consumers: **Report on the Implementation of the EU Tobacco Advertising Directive**, May - 2008, p. 3-12.

3.1.3.2 Directive 92/28/EEC and Directive 2001/83/EC on the advertising of medicinal products for human use

Another group of products that have provisions for their advertising practices within the related directives are medicinal products for human use. Directive 92/28/EEC and Directive 2001/83/EC have the same title, 'Directive on the advertising of medicinal products for human use'. As stated in the introduction part of the Directive 2001/83/EC, Directive 92/28/EEC is repealed by means of being codified in a single and clear document. Again in the same introduction, the essential purpose of regulations on the advertising practices of medicinal products is provided as to safeguard public health. When we analyze the directive, we observe that in most of the areas that are covered by the provisions, it is generally stipulated in most of them that member states are allowed to regulate with tougher rules; yet, among the decisions of the Court of Justice, it was decided that these tougher rules have to be on specified issues. The reason for this is that, in relation to approximation, the various perspectives of member states also reflects in their bringing these rules into the national legislation. Below, we analyze the provisions of the Directive 2001/83/EC in a way that covers both directives:[118]

- Provisions on advertising practices within the scope of the directive are put under title VIII. This title contains the provisions in art.s 86-100.
- According to the provision, the definition of advertising of medicinal products includes any form of door-to-door information, canvassing activity or inducement designed to promote the prescription, supply, sale or consumption of medicinal products. It shall include in particular, the advertising of medicinal products to the general public; advertising of medicinal products to persons qualified to prescribe or supply them; visits by medical sales representatives to persons qualified to prescribe medicinal products; the supply of samples; the provision of inducements to prescribe or supply medicinal products by the gift, offer or promise of any benefit or bonus, whether in money or in kind, except when their intrinsic value is minimal; sponsorship of promotional meetings

[118] HANCHER, Leigh, FÖLDES, Maria Eva: *Push or Pull? Information to Patients and European Law*, **European Journal of Consumer Law**, Vol. 4, 2011, p. 749-776.

attended by persons qualified to prescribe or supply medicinal products; sponsorship of scientific congresses attended by persons qualified to prescribe or supply medicinal products and in particular payment of their travelling and accommodation expenses in connection. The exceptions are, the labelling and the accompanying package leaflets, which are subject to the provisions in the related article; correspondence, possibly accompanied by material of a non-promotional nature, needed to answer a specific question about a particular medicinal product; and, factual, informative announcements and reference material relating, for example, to pack changes, adverse-reaction warnings as part of general drug precautions, trade catalogues and price lists, provided they include no product claims, therewith.

- In accordance with the related article, only those products that are authorized for marketing can be advertised, and all parts of the advertising of a medicinal product must comply with the particulars listed in the summary of product characteristics. The advertising of the product shall encourage the rational use of the medicinal product, by presenting it objectively and without exaggerating its properties, and shall not be misleading. In the following articles, the medicinal products and applications whose advertising is prohibited are listed one by one.
- Provisions on the requirements about the content of the advertising are divided into advertising to the general public and advertising to persons qualified to prescribe or supply such products. In relation to all advertising to the general public, the advertising shall be set out in such a way that it is clear that the message is an advertisement and that the product is clearly identified as a medicinal product; and furthermore should include the minimum information such as the name of the medicinal product, as well as the common name if the medicinal product contains only one active substance; the information necessary for correct use of the medicinal product; an express, legible invitation to read carefully the instructions on the package leaflet or on the outer packaging. The following article lists in detail, in 13 entries, the issues that advertising should not contain. The conditions that are designated for advertising to persons qualified to prescribe or supply such products are more technical, and there are

also provisions on the condition for promotions to be made to these persons (such as the information on the documentation has to be accurate, up-to-date and verifiable). It is also stipulated that where medicinal products are being promoted to persons qualified to prescribe or supply them, no gifts, pecuniary advantages or benefits in kind may be supplied, offered or promised to such persons unless they are inexpensive and relevant to the practice of medicine or pharmacy, and that hospitality at sales promotion events shall always be strictly limited to their main purpose and must not be extended to persons other than health-care professionals.

- Under the section on advertising, there are also provisions that are related to medical sales representatives, and free samples. The training of the medical sales representatives and the information they need to provide about the products they promote are covered in the article on medical sales representatives. The article on free samples states that these can be provided only to persons qualified to prescribe them, and the conditions for supplying free samples are listed.
- The last provisions are on the legal measures, sanctions and monitoring system. The legal measures are basically in compliance with the regulations that are covered by the general provisions mentioned above. What is specific about this directive is its introduction of a monitoring system. Accordingly, the marketing authorization holder shall establish, within his undertaking, a scientific service in charge of information about the medicinal products which he places on the market. Again the same article prescribes the conditions on the authorization holder, and the ways the scientific service shall monitor.[119]

3.1.3.3 Directives Regarding Food

The last category that we will analyze in relation to legal regulation on advertising of certain products concerns directives on food. As it will be clear from the

[119] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31992L0028:en:NOT (26.11.2014); http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:311:0067:0128:en:PDF (26.11.2014).

section below, where we will briefly look at the provisions on advertising practices by regulation, that there are provisions in a variety of regulations.

- As stated in the introduction of Regulation No. 1924/2006/EC on nutrition and health claims made on foods, the main reason for issuing such a regulation was the increase in the number of foods labelled and advertisements that bear nutrition and health claim. There are references to the Directive 2000/13/EC, which will be examined below, and to Directive 84/450/EEC, which was detailed above, both of which are directives on advertising practices. According to the article which covers the aim and subject matter of the directive, the objective of this directive is to harmonize the provisions laid down by law, regulation or administrative action in member states which relate to nutrition and health claims in order to ensure the effective functioning of the internal market whilst providing a high level of consumer protection. In this context, the nutrition and health claims on the labels, presentation, and advertising of the products supplied to the end consumer can only be used if they comply with the conditions of the regulation. The regulation lists (a) the general principles for all claims, (b) general and specific conditions for the use of nutrition and health claims, (c) scientific substantiation for claims, (d) the stipulation under the nutrition claims that nutrition claims shall only be permitted if they are listed in the Annex and are in conformity with the conditions set out in this regulation, (e) special condition on health claims and restrictions on the use of certain health claims, (f) conditions on reduction of disease risk claims and claims referring to children's development and health, and on health claims other than those, (g) the procedures of an application for authorization.[120]
- Directive 89/398/EEC on the approximation of the laws of the Member States relating to foodstuffs intended for particular nutritional uses, has been amended by Directive 96/84/EC and Directive 1999/41/EC. Eventually, Directive 2009/39/EC legislated away those directives when it came into effect. The directive is about foodstuffs for particular nutritional uses which are, owing to their special composition or manufacturing process, are clearly distinguishable from foodstuffs for normal consumption, and are suitable for their claimed nutritional purposes.

[120] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:012:0003:0018:EN:PDF (26.11.2014).

There are specifications about the advertising practices of these type of products within the scope of the directive. These designation include; the conditions that are prohibited in the advertising of foodstuff for normal consumption (such as the use of 'dietary'); in the annex of the directive, the provision that regulations which provide special rules on foodstuffs intended for particular nutritional uses may also contain provisions on advertising; that the commission may adopt conditions under which reference may be made in labelling, presentation and advertising to a diet or to a category of persons for which such products are intended; and that the labelling and the labelling methods used, the presentation and the advertising of such products shall not attribute properties to such products for the prevention, treatment or cure of human disease or imply such properties.[121]

- Directive 90/496/EEC on nutrition labelling for foodstuffs concerns nutrition labelling of foodstuffs to be delivered as such to the ultimate consumer. In the definitions section of the directive, it is also stipulated that any representation and any advertising message which states, suggests or implies that a foodstuff has particular nutrition properties due to the energy are considered as nutrition claim. Another article of the directive stipulates that where a nutrition claim appears on labelling, in presentation or in advertising, with the exclusion of generic advertising, nutrition labelling shall be compulsory.[122]
- Directive 96/8/EC on foods intended for use in energy-restricted diets for weight reduction and the Directive 2007/29/EC amending it, are specific directives that lay down the content and labelling requirements for foods that are intended to use in energy-restricted diets, regulated according to the related article of the Directive 89/398/EEC examined above. These special products partially or completely stand for the entire daily diet when used as prescribed by the producer. In relation to its article on advertising, the article stipulates that the labelling, advertising and presentation of the products concerned shall not make any reference to the rate or amount of weight loss which may result from their use.[123]

[121] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:124:0021:0029:EN:PDF (26.11.2014).
[122] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31990L0496:en:NOT (26.11.2014).
[123] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1996L0008:20070620:EN:PDF (26.11.2014).

- Directive 79/112/EEC on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer and Directive 89/395/EEC which amends it and has the same title, are consolidated by the Directive 2000/13/EEC on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs. The directive is on the labelling, presentation and advertising of foodstuff for the sale to the ultimate consumer, yet it also covers foodstuff that are supplied to restaurants, and large meal providers. The restrictions and prohibitions on the labelling of the foodstuff (for instance, the ingredients, expiration date, effects, and not being misleading on other issues mentioned) are listed and then further stipulated that this regulation also applies to advertising practices.[124]

3.2 Regulations that Contain Provisions on or References to Advertising Practices:

Along with documents that include regulation directly on advertising practices, which we examined in detail above, there are also regulations which references to direct provisions in related regulation or which includes indirect provisions on this subject matter, in the legislation of the EU Law. We briefly look over these mentioned documents and the regulations they cover below:

- According to the related article in the Directive 94/47/EC on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis, any advertising referring to the immovable property concerned, in addition to a general description of the property or properties, shall provide at least brief and accurate information on the particulars referred to in certain points of the Annex (the identities and domiciles of the parties, including specific information on the vendor's legal status at the time of the conclusion of the contract and the identity and domicile of the owner; the principles on the basis of which the maintenance of and repairs to the immovable

[124] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:109:0029:0042:EN:PDF (26.11.2014).

property and its administration and management will be arranged; the price to be paid by the purchaser to exercise the contractual right; an estimate of the amount to be paid by the purchaser for the use of common facilities and services; the basis for the calculation of the amount of charges relating to occupation of the property, the mandatory statutory charges (for example, taxes and fees) and the administrative overheads (for example, management, maintenance and repairs); information on the right to cancel or withdraw from the contract, specifying also the arrangements under which such letters may be sent; where appropriate, information on the arrangements for the cancellation of the credit agreement linked to the contract in the event of cancellation of the contract or withdrawal from it) and on how further information may be obtained.[125]

- In the area of insurance, the Directive 92/49/EEC on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and Directive 2002/83/EC concerning life assurance, contain the same provision on advertising practices. According to this provision, nothing in these directives shall prevent insurance undertakings with head offices in member states from advertising their services, through all available means of communication, in the member state of the branch or the member state of the provision of services, subject to any rules governing the form and content of such advertising adopted in the interest of the general good.[126]
- Directive 87/102/EEC for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit, as understood from its name, specifies the principles that are going to be applied to consumer credit. In the directive, within the scope of the article on advertising practices, first of all, there is a reference to the Directive 84/450/EEC and to the rules and principles about unfair advertising; and later, without prejudice to these, it is stipulated that any advertisement, or any offer which is displayed at business premises, in which a person offers credit or offers to arrange a credit agreement and in which a rate of interest or any figures relating to the cost of the credit are

[125] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31994L0047:EN:HTML (26.11.2014).
[126] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31992L0049:EN:HTML (26.11.2014); http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:345:0001:0001:EN:PDF (26.11.2014).

indicated, shall also include a statement of the annual percentage rate of charge, by means of a representative example if no other means is practicable.[127]

- Directive 98/6/EC on consumer protection in the indication of the prices of products offered to consumers, set as a rule the indication of the selling price and the price per unit of measurement of products offered by traders to consumers in order to improve consumer information and to facilitate comparison of prices. According to its article on advertising, any advertisement which mentions the selling price of products shall also indicate the unit price.[128]
- The purpose of the Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees is again stated as ensuring a uniform minimum level of consumer protection. In relation to advertising, it is stipulated that any undertaking by a seller or producer to the consumer, given without extra charge, shall reimburse the price paid or replace, repair or handle consumer goods in any way if they do not meet the specifications set out in the guarantee statement or in the relevant advertising. In another article, under the conditions of the conformity of goods with the contract, it is stipulated that any public statements on the specific characteristics of the goods made about them by the seller, the producer or his representative, particularly in advertising or on labelling shall conform with the quality and performance which are normal in goods of the same type. Lastly, in the article on guarantees, it is stipulated that a guarantee shall be legally binding on the offerer under the conditions laid down in the guarantee statement and the associated advertising.[129]
- Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on Electronic Commerce), makes references to the general principles on advertising practices examined above, lists the conditions that service providers in the area of information technology should meet, and stipulates that the service provider should

[127] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31987L0102:EN:HTML (26.11.2014).
[128] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31998L0006:en:NOT (26.11.2014).
[129] http://eurlex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=31999L0044&model=guichett (26.11.2014).

comply with requirements regarding the quality or content of the service including those applicable to advertising as well.[130]

- Directive 1999/45/EC concerning the approximation of the laws, regulations and administrative provisions of the Member States relating to the classification, packaging and labelling of dangerous preparations is on preparations which contain at least one dangerous substance or which are considered dangerous. Under the section on distance selling, it is stated that any advertisement for a preparation within the meaning of this Directive which enables a member of the general public to conclude a contract for purchase without first having sight of the label for that preparation must make mention of the type or types of hazard indicated on the label.[131]
- Within the scope of the Directive 97/7/EC on the protection of consumers in respect of distance contracts, press advertising with order form is also included on the list of the means of distant communication, which takes place at the annex of the directive. Since these means of distant communication are used in distance contracts, which are the subject matter of this directive, the provisions also apply to press advertising with order form. Thus, the articles of this directive are briefly; the information that the distant contract should include (for instance, price of the type of distance communication is also on this list) and how this information should be presented; confirmation as well as required information (for instance, the address of the supplier) that need to be provided to the consumer; designations and conditions on the consumer's right to withdraw; the duration in which the supplier should fulfill its obligation; appropriate measures to conduct in case there is a fraudulent use of the credit card; certain means of distance communication which requires the prior consent of the consumer (such as facsimile machine).[132]
- Within the final version of the Directive 76/768/EEC on the approximation of the laws of the Member States relating to cosmetic products, which has been amended many times, the single article it contains on advertising practices states that member states shall take all measures necessary to ensure that, in the labelling, putting up

[130] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0031:En:HTML (26.11.2014).
[131] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1999:200:0001:0001:EN:PDF (26.11.2014).
[132] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31997L0007:en:NOT (26.11.2014).

for sale and advertising of cosmetic products, text, names, trade marks, pictures and figurative or other signs are not used to imply that these products have characteristics which they do not have.[133]

- The related article in the Directive 2008/95/EC to approximate the laws of the Member States relating to trade marks concerns the rights that a trade mark confer on its proprietor. Accordingly, the signs of which the proprietor shall be entitled to prevent all third parties not having his consent from using in the course of trade are listed. The provision on advertising covered by the same article and stipulates that the proprietor is also entitled to prevent the use of the sign in advertising.[134]

4. Regulations on Advertising Practices in Turkey

As we mentioned when we analyzed the process during which advertising practices became widespread, advertising practices in Turkey have gained a momentum after 1980-1990s as a result of increasing television channels and the reflection of the economic conjuncture in the world to our country.[135] The Turkish Advertising Law legislation, that we will analyze, has been enriched partly as a result of this momentum and partly as a result of the harmonization works Turkey conducted in the process of accession to the EU.

Although we observe that legislations on advertising practices have mainly been regulated as a part of consumer protection policies, the sources of advertising law is dispersed across various documents and hence the legislation displays diversity.[136] In this respect, when analyzing and evaluating the related legislation, it will be adequate to analyze firstly the regulations that cover or/and effect advertising practices even if indirectly, and then regulations particularly on this area, and finally, the provisions that are on advertising practices in regulations of food, cosmetics, medicinal products, alcoholic beverages, health institutions, and individual retirement, as we analyzed at the

[133] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1976L0768:20100301:en:PDF (26.11.2014).
[134] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:299:0025:0033:en:PDF (26.11.2014).
[135] ZİYLAN, Çetin: *Türkiye'de Reklam Düzenlemeleri, Denetimi, Kurumlar ve İşleyiş*, **Uluslararası Reklam Hukuku Sempozyumu (8-9 Mayıs 2008)**, İstanbul - 2009, p. 2-3; ÇAKIR (2007), p. 203.
[136] ZİYLAN (2007), p. 3-4;

EU regulations above. Lastly, we will examine the points where the advertising legislation of the EU, as examined above, and our national legislation intersect.

Before analyzing the legislation, in order to comprehend the basic structure, it will be adequate to look at the related articles in the Constitution of the Republic of Turkey, which is the founding document, in relation to establishing free competition that is the fundamental principle required to embody advertising practices, and to the consumer protection policies that are directly related to advertising legislation. Advertising practices that bridge the connection between the producers and consumers, whose ties are severed in the new world order especially as a result of new communication technologies, have naturally became one of the most important tools of free competition in this context. Even though the Constitution of the Republic of Turkey does not explicitly mention freedom of competition, the statements in art. 48, '*Everyone has the freedom to work and conclude contracts in the field of his/her choice ... The State shall take measures to ensure that private enterprises operate in accordance with national economic requirements and social objectives and in security and stability*' and art. 167, '*The State shall take measures to ensure and promote the sound and orderly functioning of the markets for money, credit, capital, goods and services ...*', indicate that the recognition of the operation of the private enterprises and the state's support to perpetuate implies the presence of the freedom of competition. The provision in the constitution that provides the ground for consumer protection policy is clearly the statement in art. 172: "*The State shall take measures to protect and inform consumers; shall encourage their initiatives to protect themselves.*"[137]

4.1 Indirect Legislation Regarding Advertising Practices

In evaluating the provisions of legislation that are indirectly related to advertising practices, we examine the legal feature of advertising practices, and legal measures that are available for advertising practices that violate the relevant regulations. Although the legal feature of advertising does not bear significance for the regulations

[137] ÖZEL, Çağlar: *Hukuksal Açıdan Tüketicinin Korunması ve Tüketicinin Korunma Gerekliliğine İlişkin Bir Değerlendirme*, **Tüketici Yazıları (I)**, Ankara – 2007, p. 15-27
http://global.tbmm.gov.tr/docs/constitution_en.pdf (26.11.2014);
http://www.anayasa.gen.tr/1982ay.htm (26.11.2014).

that contains provisions directly related to advertising practices, and although there are no explicit articles within the legislation, especially within the provisions of Code of Obligations, that are indirectly related to advertising which we will analyze below, we will make explanations according to the assessments in this field that take place in the doctrine.

4.1.1 Old Code of Obligations No. 818 and New Code of Obligations No. 6098

Within the scope of Code of Obligations, it is possible to analyze advertising practices in relation to the concepts that defines them, the specification of the related agreement type, the relation to the theory of 'culpa in contrahendo' with respect to damages or risk of damages, and the relation with the concept of 'unfair competition'. The concept of 'unfair competition' is going to be be analyzed at the section below comparatively in the context of Commercial Law, and the other issues are goin to be examined in this section.

Since advertising practices do generally have the purpose of inviting the persons who have the potential to constitute the other party to execute an agreement, they can be defined as 'offer' and 'invitation to offer' within the art. 7 of the Old Code of Obligations No. 818, and with 'suggestion' within the art. 8 in the New Code of Obligations No. 6098. Along with these definitions, we also observe that advertising practices acquire a 'promise by announcement' or 'lottery' feature. Hence, since advertising practices should be subject to the provisions of the legal context that it is included, it will be adequate to evaluate every incident on its own. 'Offer', is a declaration of intention which includes one person's offer with the purpose of generating an agreement, and it is executed with the acceptance of the other party. In case the declaration of intention only covers the intention to enter into a negotiation, involves an invitation to a meeting, it is defined as 'invitation to offer'.[138] Hence, if all the essential elements that are required to make an agreement exist and if it will be instituted following the acceptance of the other party, then advertising can be considered as 'offer'. Yet, if it is clearly or implicitly understood from the advertising that the offer is not binding, it is an 'invitation to offer'. If we

[138] OĞUZMAN, Kemal / ÖZ, Turgut: **Borçlar Hukuku Genel Hükümler**, İstanbul – 2006, sf. 45-50.

examine the issues at the advertisements to clarify the subject, we see that mostly advertisements do not mention the price, which is the basic issue of the advertisements; thus, under such circumstances more than 'offer', advertisements show 'invitation to offer' feature. It will be adequate to assess the relationship between announcement and advertising briefly, before explaining the feature of 'promise by announcement'. Even though the term 'announcement' is almost used to imply advertising in some provisions (art. 48 in the old Code of Obligations No. 818, and art. 57 in the new Code of Obligations No. 6098), not every announcement has the feature of advertising; moreover, we can say that the concept of 'announcement' is a superior concept comprising of the concept of 'advertising'. According to art. 8 of the Old Code of Obligations No. 818, and art. 9 of the new Code of Obligations No. 6098, if a person makes an announcement that s/he will give a reward in return for an act to an indefinite number of people, s/he is indebted to fulfill this promise. Announcements made about providing some goods in exchange for coupon can be given as an example of such advertising practices. Lastly, according to conditions listed in art. 506 in the old Code of Obligations No. 818, and in the art. 606 in the new Code of Obligations No. 6098, providing a certain goods to a person whose number was drawn can be given as an example of an advertising practice that has the quality of 'lottery'.[139]

When we analyze advertising practices within the context of legal obligations that may arise, we arrive at the theory of 'culpa in contrahendo' within the context of the Code of Obligations. According to this theory, in the event that one of the parties, during the estalishment of the agreement, retains some of the information s/he has to provide against the principle of honesty, provides inaccurate information, ignores due diligence, enters into and continues negotiation without the intention of agreement and thereby damages the opposite party, damages the other party or the subject of the agreement, conducts contractual action without authority, s/he shall compensate the damages of the other party. In other words, the term 'culpa in contrahendo' means fault at the negotiation phase of the agreement. In advertising practices, on the basis of the requirement of

[139] GÖLE (1983), p. 42-46; BOZBEL (2006), p. 32-34; DİŞBUDAK (2007), p. 17-21; ÖZKAN, Özgül: *Tüketici Hukuku Bakımından Ticari Reklamlar ve Tabi Olduğu Hükümler*, **Ankara Barosu Dergisi**, 1997/4, p. 6-7; OĞUZMAN, Kemal / ÖZ, Turgut, p. 50-57, 158-159, http://www.ankarabarosu.org.tr/Siteler/2012yayin/2011sonrasikitap/6098son.pdf (26.11.2014).

fulfilling the obligations of the contact s/he enters with the buyer/client through advertising, the advertiser has to take preventive measures against damaging the buyer/client, avoid misleading conduct, provide sufficient and necessary information, and warn the buyer/client when necessary; otherwise, s/he will have to compensate the damages incurred on the buyer/client within the framework of the theory of 'culpa in contrahendo'.[140]

Finally, when we examine the contract which may arise during the creation process of the advertising practice, we can count within this scope many types, such as contracts that are made with the media in which the advertising is propagated, contracts that are made in order to create the advertising as a product (contracts made with actors, contracts made with advertising agency, etc.). When specifying the legal feature of the contract, the acts of the parties form the basis; also, it should be mentioned at this point that, what matters is not the expressions of the parties, but their real intentions. There is no explicitly regulated contract type on advertising practices within the Code of Obligations; this subject matter is discussed at the level of doctrine in the manner of features of certain contract types that are already reglated under relevant laws. Accordingly, even though there is an attempt to classify it within the types of exception contract, contract of attorneyship, or contract of performance; it is revealed that contract about the production of advertising cannot be included purely by any of these types of contracts. Under the light of assessments of the doctrine, the cathegory in which we can include contracts about advertising practices are innominate contracts. This type of contract can be fully or partially composed of elements that do not take place in types of contract that are regulated under law (sui generis contracts); can be composed of elements that take place in types of contract that are regulated, but brought together in a way that is not foreseen by the law (combined contracts); and/or can be composed by connecting two or more different contract which are completely independent of each other, without prejudicing their content (composite contracts).[141]

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[140] OĞUZMAN / ÖZ (2006), p. 321-325; DİŞBUDAK (2007), p. 96-97.

[141] OKTAY ÖZDEMİR, Saibe: *Reklam Yapımına ve Yayınına İlişkin Sözleşmelerin Hukuki Nitelikleri*, **Uluslararası Reklam Hukuku Sempozyumu (8-9 Mayıs 2008)**, İstanbul 2009, p. 106-123; ARAL, Fahrettin: **Borçlar Hukuku Özel Borç İlişkileri**, Ankara – 2007, p. 49-57.

4.1.2 The Old Turkish Commercial Code No. 6762 and the New Commercial Code No. 6102:

It is possible that those who provide goods or services can use advertising practices as a tool, with the purpose of promoting their goods or services and increase its consumption against their competitors; and in this respect, the relation between advertising and 'unfair competition' institution emerges. This institution is regulated both under the Commercial Code and Code of Obligations in Turkish Law.[142] This institution which will be analyzed further below in relation to the provisions of the old and new Codes of Obligations and which is one of the most important subjects in the field of Commercial Code is covered by the new regulations brought by Turkish Commercial Code No. 6102. The old Commercial Code No. 6762 is completely renewed by the new Commercial Code that came into effect on July 1, 2012. The provisions on unfair competition are under the art. 56 and the following articles in the old Commercial Code No. 6762, while this institution is covered by art.s 54-63 in the new Commercial Code No. 6102. The source of the new code is 'Federal Law Against Unfair Competition' that came into effect in 1988 in Switzerland.[143]

Unfair competition is defined in the art. 56 of the old Turkish Commercial Law as: *"... various types of misuse of commercial competition that are misleading or incompatible with good faith ..."*. Art. 54 with the title 'Purpose and Principle' within the New Turkish Commercial Law No. 6102 stipulates; *'The purpose of the provision in this section on unfair competition is to ensure a fair and unimpaired competition to the benefit of all participants. Misleading commercial practices and behaviors that effect relationship between the competitors or between the supplier and customers or commercial practices and behaviors incompatible with the principle of honesty in other ways, are unfair and unlawful.'* The system in the new code is different and there are no definitions. Furthermore, the new code introduces a concept of 'fair and unimpaired competition' by moving away from a notion of 'commercial competition'. Thus, it was

[142] GÖLE (1983), p. 52-53; BOZBEL (2006), p. 51-56, 82-85.

[143] PINAR, Hamdi: *Reklam ve Satış Yöntemlerine İlişkin Haksız Rekabet Halleri*, **'6102 sayılı Yeni Ticaret Kanunu'nu Beklerken' (10-11-12 Mayıs 2012 Sempozyum)**, İstanbul - 2013, p. 153-154; YILMAZ, Lerzan: *Avrupa Topluluğunda Karşılaştırmalı Reklamları Düzenleyen 97/55/EG ile Değişik 84/450 Sayılı AT Direktifi ve Türk Ticaret Kanunu Tasarısı*, **İstanbul Barosu Dergisi**, Vol. 81, No: 5, 2006, p. 1963-1964.

accepted that the code aimed the purpose of achieving a general fair and real competition and not just the prevention of abuse of commercial competition through the violation of principle of honesty. The preamble of the law emphasizes that the expression 'all participants' imply the famous trio of competition law; economy, consumer, and public. Consumers being a part of this trio demonstrates that the social aspect of unfair competition is reflected in the code by means of provisions that do not only concern competitors but other parties too. In this context, the doctrine makes indications that with this article, the scope of unfair competition is expanded and that it can be recognized as a reflection of new commercial, economic and social understanding to the provisions on unfair competition. Advertising and sale techniques, and designations on the advertising practices in relation to consumer protection according to this new understanding can be counted as examples of unfair competition in this new approach.[144]

When we analyze art. 55 of the new Commercial Code No. 6102, we observe that it preserves the system of providing examples on cases of competition as the art. 57 of the old Commercial Code No. 6762. Yet, even though both codes are similar in their basic and purposes, we see that the new issues that are included in the analogies and made more comprehensive from aspects of protected persons and interests in Art. 55 of the New Commercial Code No. 6102 has made the code more comprehensive and up-to-date. When we analyze the code with regard to advertising practices, the most significant point is the explicit enunciation of the possibility that unfair competition circumstances can be committed through advertising with the phrase 'advertising and sale methods against the principles of honesty' that is considered as one of the instances of unfair competition in the scope of this article. When we analyze the instances that are counted under the art. 57 of the old Turkish Commercial Code No. 6762, we can see that at the phrase in clause 3; *'Providing false or misleading information on one's personal status,*

[144] KENAROĞLU, Soner: **Haksız Rekabet Hukukunda Karşılaştırmalı Reklamlar**, Yayınlanmamış Yüksek Lisans Tezi, İstanbul - 2008, p. 128-129; YILMAZ, Mehmet: *Türk Ticaret Kanunu ve Türk Ticaret Kanunu Tasarısında Haksız Rekabete İlişkin Genel Hükümlerin Karşılaştırılması ile Kötüleme ve Reklamlara İlişkin Özel Haksız Rekabet Halleri,* **İstanbul Barosu Dergisi**, 2006, Vol. 80, No.: 4, p. 1483-1484, 1493-1497; GÜVEN, Şirin: **Haksız Rekabet Hukukunun Amacı ve Koruduğu Menfaatler**, Unpublished Doctorate Thesis, Ankara - 2011, p. 42-44; POROY, Reha / YASAMAN, Hamdi: **Ticari İşletme Hukuku**, İstanbul – 2007, p. 281-282.

goods, work products, business or business operations; or, to behave in the same way about third parties in order to bring those to an advantageous position against their competitors ...' and indirectly at the phrase in first clause; *'To discredit others or their goods, work products, business or business operations with false, misleading or unnecessarily offending statements ...'* can be associated with instances of advertising practices.[145]

Within the first clause of the art. 55 with the title *'Behaviors and commercial practices against principle of honesty'* in the new Commercial Code No. 6102, the major instances of unfair competition are listed as follows, based on six basic categories:

- advertising and sale methods against the principle of honesty, and other unlawful behaviors,
- directing another to violate or cancel the contract,
- unauthorized benefiting from others' work products,
- unlawful disclosure of manufacturing and business secrets,
- not complying with business terms,
- using terms of operation against the principles of honesty.

Below, we list the analogies that are included in the section '*advertising and sale methods and other unlawful behaviors against the principle of honesty*', which is a category about advertising practices, with explanations by assessing preambles on the subclauses:[146]

1. To discredit others or their goods, work products, business or business operations with false, misleading or unnecessarily offending statetments.

This provision is an amended repetition of the provision at the first subclause of the article in the old code, and the discrediting (defamation, covering, devaluating and

[145] GÖLE (1983), p. 52-53; KENAROĞLU (2008), p. 129; YILMAZ (2006), p. 1487-1489; POROY / YASAMAN (2007), p. 282-284; http://www.tobb.org.tr/YayinMudurlugu/Documents/Kitaplar/turk_tic_kan_kitap_cilt_01.pdf (26.11.2014).

[146] Analyzing the provisions on unfair competition within the Commercial Code is doubtless beyond the scope of this study; hence, they will be mentioned in brief titles only in order not to digress from the subject matter.

undervaluing) which is the basis of the article has been made to include prices through amendment. The discrediting, which serves as the basis, occurs with false, misleading, and unnecessarily offending statement, and the word misleading is explained as causing the target audience or the addressee, to conceive the situation differently than it actually is. The word unnecessarily is defined as exceeding the limit of criticism or as immoderation. Another important point here is that the statement made by the person doing the discrediting have to be unreal; otherwise, the circumstances does not constitute for unfair competition. The product means a subject of trade, something that meets a need; and, manufactured product is defined as patent, design, article, film, staging or performance in the wide sense.[147] The implementation of the provision is not dependent on the condition of fault. The phrase 'discrediting with false statement' has been discussed in relation to this provision. According to indications, it is generally stated that not every false statement can be characterized as unfair competition, and especially what seems as insignificant, humorous or fantastic exaggerations are not included within this scope, since they are easily understood by the target audience to be false.[148]

2. To provide unreal or misleading information on one's personal status, commercial enterprise, signs of the enterprise, goods, work products, operations, prices, stocks, sales campaign styles and work relations; or, in same ways bring third parties to an advantageous position at competition.

The concept that is aimed to be put forward in this provision is to provide oneself or another third person advantage, and it does not need to be in the form of praise or expression of superiority, it is satisfactory in case unreal or misleading statements intend to influence the purchase decisions of consumers. The word unreal is used in the sense of untrue, deviating from reality and inaccurate; while the word misleading accords with the explanations we provided at the above subclause. The target audience and the characteristics of the concrete case have to be taken into account when analyzing these two effective phenomena. The indication within the preamble states that the advantage can also be provided to the third person through media. The provision brings a dimension

[147] DOĞRUSÖZ, Bumin / ONAT, Öznur / TUNÇEL TÖRALP Funda: **Gerekçe, Karşılaştırmalı Maddeler, Komisyon Raporları, Önergeler ve Karşılaştırmalı Tablolar ile Türk Ticaret Kanunu C. I**, Ankara – 2011, p. 164.
[148] PINAR (2013), p. 143-144.

by emphasizing sale campaigns (including end of season sales, all types of campaigns, promotions, and programs related to these) explicitly.[149]

3. Attempting to create the impression about oneself that one owns special talents by pretending to have a distinction, degree or award without actually having it or using untrue profession titles or symbols accordingly.

This provision is a repetition of the fourth subclause of the related article in the old code. According to the preamble, the provision is preserved as is in order to protect the experience attained by doctrine and court decisions.[150] It is designated that the possibilities regulated by this provision could have been included in the subclause two mentioned above, therefore the direct translation of the source code was not appropriate here, and that this situation has been criticized within the Switzerland doctrine as well.[151]

4. Taking measures that leads to confusion with other's goods, work products, activities or operations.

This provision covers the term confusion that takes place in clause five in the related article within the old code. The preamble clarifies that the amendment to the provision does not mean the acknowledgement of inapplicability of the experience gained through doctrine and court decisions; and that, such experience maintains its existence with the meaning and function concept. With this provision, the concept of confusion more widely covers misleading, deceiving, causing misperception and is regulated within the context of external view / enunciation (similarity in sound). The confusion of name, title, brand and sign, which existed in the old code, have been regulated in detail in the related sections of the new code with their special regulations including their conditions, provisions and consequences, and this is why they are not repeated under this provision.[152]

5.To compare oneself, goods, work products, operations, prices with someone else, his/her goods, work products or prices in an unreal, misleading, unnecessarily offending or unnecessarily benefit from his/her recognition ways or to bring third parties to an advantageous position in the same way.

[149] DOĞRUSÖZ / ONAT / TUNÇEL TÖRALP, p. 164.
[150] DOĞRUSÖZ / ONAT / TUNÇEL TÖRALP, p. 165.
[151] PINAR (2013), p. 134.
[152] DOĞRUSÖZ / ONAT / TUNÇEL TÖRALP, p. 165.

A significant development in legal regulation in relation to advertising practices is the inclusion of comparative advertising as a new regulation in this subclause. The clause shows the instances in which comparative advertising is against the principle of honesty, which means that comparative advertising is not considered unlawful as a rule, nor prohibited. However, what is considered unlawful and prohibited is comparative advertising that is objectively unreal and excessively exaggerated (one that makes comparisons by excessively emphasizing). There is no requirement for the name of the competitor to be explicitly mentioned or identified for the conditions to occur; in this respect, a sign that refers to competitors can be recognized as referring to others. The subject matter of comparison can be persons (personalities), goods, work products, operations and prices; and, the cases that are considered as against the principle of honesty is when the statements, explanations, comparison points are not given correct, meaning that they are false or misleading or exploit, misrepresent the reputation or products of the competitor, or conceal his/her superior qualities. The issue whether exaggerated advertising can be considered as false advertising depends on the judgment of the judicial authority based on the facts of the concrete case since the provision is abstract and general. Lastly, prices and product, operations, products tests are also covered as the subject matter of comparative advertising. What is considered unlawful with respect to prices is the case when the conditions are different from what is compared. The criterion in product tests is whether they are scientific or not.[153]

6. Putting on sale certain chosen goods, work products or operations under the supply price more than once, emphasizing these supplies in advertisements, and in such way mislead the consumers about the capacities of oneself or the competitors.

The act that is the subject matter of this provision is called 'misleading by showpiece' or 'trapping by showpiece'. In this example of an act of unfair competition, some products are chosen as showpiece (hence the expression 'certain chosen goods' in the provision), they are put on sale under their supply price for show, and the customer is deceived by being trapped in this way. More concretely, the expressed quality and supply price are allocated to chosen products and even to a certain portion of that particular product; hence, the supplier does not have enough product of the same quality, or if s/he does, s/he

[153] DOĞRUSÖZ / ONAT / TUNÇEL TÖRALP, p. 165-166; PINAR (2013), p. 149-151; BOZBEL (2006), p. 92-95.

is selling (or intend to sell) the products at a higher price. In this case, when the customer goes to where the product is in sale or when the product is sent to her/him, the product can be a different one in terms of quality, class or properties, or is replaced by another product at a different price with the excuse that the product is out of stock. In order for the provision to apply, according to the presumption of being misleading, the price that is promoted has to be below the supply price (the cost price to the supplier) that is applied to the same type of goods (or products or operations) with the similar amount of purchases. Misleading the consumers about the capacities of the competitors means leading the consumers to faulty perception about the capacities of the competitors.[154]

7. Misleading the customer about the real price of the supplies through additional acts.

'Additional acts' refers to advantages such as gifts, bonuses, products that are provided free of charge. By providing or supplying these additional acts that are promised to the customer, the quality, freshness or defects of the products are concealed, the costumer's discretion has been effected, and the customer is deceived. The word 'supplies' within the provision also includes the meaning of offer.[155]

8. Restraining the customer's freedom of making a decision especially with aggressive sale methods.

An important indication in the preamble explicitly states that the provision covers aggressive sale methods and not aggressive advertisements. The reason provided for this is that advertising is a supplementary sale tool, and the idea as the basis for the provision is that the customer is psychologically coerced to buy in an unacceptable way. This condition is expressed especially by the word aggressive and covers cases that are unexpected and withering, such as door step sales and sales done by stopping the customer on his/her way; however, we do not observe such a condition at advertising. The point that has to be taken into account in the provision is the word 'especially'. Not every aggressive sale method is considered as a case of unfair competition in accordance with this code; the important thing is that it has to have an aggressive feature and almost drives the customer into a corner.[156] With regard to such subject, the amendments that are

[154] DOĞRUSÖZ / ONAT / TUNÇEL TÖRALP, p. 166-167; PINAR (2013), p. 134-137.
[155] DOĞRUSÖZ / ONAT / TUNÇEL TÖRALP, p. 167; PINAR (2013), p. 137.
[156] DOĞRUSÖZ / ONAT / TUNÇEL TÖRALP, p. 167.

planned to be made to the legislation on consumer protection are put forward, and it is considered that the regulations made within the scope of this provision will become functionless vis-a-vis new regulation that are going to be made (which are intended to be made within the context of policies of harmonizing with the EU law that includes this area).[157]

9. Concealing the properties, amount, purpose of use, benefits or hazards of goods, work products or operations and misleading the customer in this way.

Among the circumstances of unfair competition, the act of concealing is stated as a special case of misleading or to act contrary to facts. The second subclause analyzed above includes the issue of misleading, but unlike that subclause, the provision that is presented in the subclause nine includes the misleading not only through statements but also made by any kind of tools including visual perceptions such as the shape of the products, package style, presentation on the label. Moreover, while this provision only takes consumers into account, the subclause two also covers other actors such as competitors and intermediary users. We can define the explanations in the subclause two as active, and those in this provision as passive in general sense; yet, the differences between them can only be specified according to concrete cases.[158] The criticisms regarding such provision state that the concept of misleading is not understood well because the concept includes not only conceptual but also visual expressions, and implies unmentioned issues as well as active explanations; hence, that the explanations in the preamble are not pertinent, that it should be stated that the purpose is actually to draw attention to deceiving through concealing.[159]

10. Failure to explicitly state the name, the retail or total sale price, the extra cost that incurs from sale on installments in Turkish Lira and the annual percentage in sale on installment contracts at public announcements about sale on installment contracts and similar legal transactions.

11. Failure to explicitly state the name or the net amount of the loan, the total costs, the effective annual interest rates in public announcements on consumer loans.

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[157] PINAR (2013), p. 140-141.
[158] DOĞRUSÖZ / ONAT / TUNÇEL TÖRALP, p. 168.
[159] PINAR (2013), p. 138.

12. Within the scope of one's business operations, that provides or executes contracts of installment sale or consumer loan, using contract formulae that are providing defective or false information regarding subject matter of a contract, price, terms of payment, term of contract, rights of the customer to retract or terminate the contract or the right to pay the remaining debt before due date.

The provisions that are included within the last three subclauses of the article covers the instances of unfair competition directly in relation to the consumer protection. The purpose is to protect the consumer from ambiguous, deceptive, misleading or fallacious statements used in conditions about consumer loans, sales on installments or similar sales, the related form samples, announcements and advertisements.[160] The criticisms regarding such provision are again related to the amendments that are planned to be made to the legislation of consumer protection. Meaning, it was emphasized that, the current draft regulates the consumer loan and sale on installments, this legislation includes detailed and special featured regulations according to the Commercial Code, the consumer should be defined according to the EU Law. In this context, it is remarked that about these issues that take place in the last three subclauses, the legislation on consumer protection shall be applied.[161]

Lastly, it will be adequate to examine the provisions of Code of Obligations which also covers the unfair competition institution. The provisions on unfair competition take place in art. 48 of the old Code of Obligations No. 818, and in the art. 57 of the new Code of Obligations No. 6098. Art. 48 of the old Code of Obligations No. 818 is as follows: *'Any person who has been subject of the fear of losing customers or whose customers are decreasing as a result of fase statements or various acts that are against the principles of good faith has the right to file lawsuit against the offender to end these acts and demand compensation for the damages incurred from the fault of the offender. The provisions of Commercial Code on unfair competition that are about commercial affairs are reserved.'* This institution has been preserved yet expanded in the art. 57 of the new Code of Obligations No. 6098: *'Any person who is faced with the risk of losing customers or whose customers are decreasing as a result of the spread of untrue news or*

[160] DOĞRUSÖZ / ONAT / TUNÇEL TÖRALP, p. 168.
[161] PINAR (2013), sf. 139-140.

announcements or any other acts that are against the principles of honesty can demand these acts to end and demand the compensation of damages in the event of fault. The provisions of the Turkish Commercial Code on the unfair competition in commercial affairs are reserved.' In parallel to the regulations in Switzerland, which is the legal source, the possibility of legislating away the provision in the Code of Obligations in this area by virtue of the provisions on the instances of unfair competition within the Turkish Commercial Code was brought to agenda. However, they were not abrogated with the idea that provisions on unfair competition within the Commercial Code were introduced for the unfair competition in the field of commerce and these provisions would not have a field of implementation in the other areas of commercial life. In order to solve this problem, the phrase, *'The provisions of the Turkish Commercial Code on the unfair competition in commercial affairs is reserved'* was inserted to the article, and in this way, a distinction between unfair competition that are about commercial affairs and those that are not about commercial affairs was introduced. However this solution has been criticized within the doctrine. The basis of this criticism is that, this solution creates ambiguity about the question to which instances the provision, which is based on a former principle of the protection of commercial identity, will be implemented.[162]

4.1.3 Law on Intellectual and Artistic Works No. 5846:

Various visual/auditory elements such as music, light, graphics, photography, slogan, script is used as well as speech and writing in conveying the message in order to communicate, which is the fundamental purpose of advertising practices. Hence, advertising practices bring together many intellectual works and therefore is connected to Intellectual Property Law basically in terms of the feature of the work, the ownership of the work and copyrights.[163]

However, there is no special regulation on advertising practices within the scope of the Law on Intellectual and Artistic Works No. 5846 and advertising practices are not

[162] POROY / YASAMAN (2007), p. 281; YILMAZ (2006), p. 1484-1485; GÜVEN (2011), p. 17-18, 26-27; GÖLE (1983), p. 52-53; TEOMAN (2007), p. 58-59; ARKAN, Sabih: **Ticari İşletme Hukuku**, İstanbul – 2011, p. 310-313; KARAHAN, Sami: **Ticari İşletme Hukuku**, İstanbul – 2011, p. 194-195; http://www.ankarabarosu.org.tr/Siteler/2012yayin/2011sonrasikitap/6098son.pdf (26.11.2014).
[163] İNAL / BAYSAL (2008) p. 105-108; KOCABAŞ / ELDEN (1997), p. 18-19.

included into any group of works. Therefore, general regulations shall be applied on this issue. More clearly, even though the need to have a clear regulation is indicated within the doctrine, in the event that advertising practices consist of elements that are listed on the art. 1 of this law, then they are considered as works.[164] According to art. 1/B: *'... (a) Work: Any intellectual or artistic product bearing the characteristic of its author, which is deemed a scientific and literary or musical work or work of fine arts or cinematographic work.'* According to this definition, in order for something to be considered as a work, there is a need for a subjective quality such that the person who brings intellectual effort into being has to present his/her characteristics; and there is also a need for an objective quality such that the effort brought into being in this way has to be shaped in a way that reflects one of the four work groups listed in the article. In this context, the length of the advertisement or whether it is a written text, photograph, film, etc. does not matter. The current approach is substantive protection and protection of its components (advertising script, images used, music, film, etc.) regarding 'work' feature (just like science, literature and fine arts).[165]

On the ownership of the work, the principle that the owner of a work is someone who brings it into being is valid without any reservations for advertising practices as well, and the ownership of a work is designated according to the concrete case. Yet, since several people can take part in the preparation and production phases of advertising practices (copywriter, graphic designer, art director, advertising agency, advertiser, etc.), the issue of ownership of the work can cause a discussion among these persons. At this point, the provision that applies is art. 10/4, which is regarding the work and ownership of the work that is brought into being through gathering more than one person and/or one work and has a seperate form or effect; *'... If a work created by the participation of more than one person constitutes an indivisible whole, the rights on the joint work shall be exercised by the natural or legal person who has assembled the authors, provided that nothing to the contrary is stipulated in a contract or in the terms of service or in any law*

[164] İNAL / BAYSAL (2008) p. 112-113; TEKİNALP, Ünal: Fikri Mülkiyet Hukuku, İstanbul – 2005, p. 105; KAYA, Arslan: *Reklamın Fikri Mülkiyet Hukuku İçindeki Yeri*, **Prof. Dr. Ömer Teoman'a 55. Yaş Günü Armağanı – I. Cilt,** İstanbul – 2002, p. 471-472.

[165] TEKİNALP (2005) sf. 106; KAYA, Arslan: *Reklamın Fikir ve Sanat Eserleri Kanunu Kapsamında Korunması Sorunu*, **Uluslararası Reklam Hukuku Sempozyumu (8-9 Mayıs 2008),** İstanbul - 2009, sf. 183-188.

that was in force at the time of creation of the work. Rights regarding cinematographic works are reserved.' Since the work produced by a creative team in advertising practices are generally such works, the person who brings those people together, generally the advertising company (advertising agency or others), will have the property rights over the work. Art. 18 of the law can be applied in relation to those who take part in the creative team; *'... The rights in works created by civil servants, employees and workers during the execution of their duties shall be exercised by the persons who employ or appoint them; provided that the contrary may not be deduced from a special contract between such persons or from the nature of the work. This rule shall also apply to the organs of legal persons.'* Therefore, we can say that in general, in relation to the works that are created by people who work according to a contract of service, the employer has the ownership in terms of financial rights. Lastly, the case of the advertiser depends on whether any contract that transfers the intellectual rights has been done about the advertising practice or not.[166]

4.2 Direct Legislation Regarding Advertising Practices

We observe that legal regulations on advertising practices are gathered in two main sources in our legislation. The first group is the regulations on consumer protection, and the other is the regulations on audiovisual media.[167] In addition to these two sources, there are provisions directly on advertising practices in regulations that are on health, food and agriculture, alcohol, tobacco, education, tourism, sports, chance games, finance, transportation, and occupational organization within the legislation.

4.2.1 Regulations under the Legislation of Consumer Protection:

4.2.1.1 The Old Law on Consumer Protection No. 4077 and the New Law on Consumer Protection No. 6502

The movement of protecting consumers that began in the 1960s in several countries of Europe, in EU (named the European Economic Community then) and

[166] TEKİNALP (2005) p. 106 135-138; KAYA (2002) p. 472-473, 476-477; KAYA (2009) p. 187-189; İNAL / BAYSAL (2008) p. 124-136; RG. 13.12.1951 S. 7981.
[167] İNAL / BAYSAL (2008) p. 10-12; PEKMAN (2001), p. 221-224.

especially in the USA against the adverse developments from the perspective of the consumer that began to take place in the markets of countries whose economy is oriented toward consumption, was reflected in Turkey quite delayed with the Law on Consumer Protection No. 4077[168] toward recognizing and protecting the rights of the consumer. This regulation is one of the adjustment laws in Turkey's accession process to the EU.[169] The Law on Consumer Protection No. 4077 was revoked by the Law on Consumer Protection No. 6502[170]. From the perspective of the consumer, advertising practices have the quality of a guide that let the consumer to choose the most appropriate among the goods that are on the market, helping the consumer to specify from where, how, to what price s/he can attain it. In this respect, advertising is within the scope of 'The Right to be Informed' that expresses being informed before the sale with the aim that the consumer acquires enough information about the goods, services or the seller that the consumer is going to purchase so that the consumer can make a correct and healthy choice; and this is one of the five rights of the consumer.[171]

Art.s 16 and 17 of the old Law on Consumer Protection No. 4077, and the art.s 61 and 63 of the new Law on Consumer Protection No. 6502, constitute the general regulations on advertising practices and take on the function of specifying the principles that take place within the scope of by-law that we will analyze below.

The art. 17 of the old Law on Consumer Protection No. 4077, and the art. 63 of the new Law on Consumer Protection No. 6502, is regarding the Advertisement Board that is established within the body of Ministry of Customs and Trade, and as we are going to examine it below in the section on control mechanisms, just mention it here. The art. 16 of the old Law on Consumer Protection No. 4077, and the art. 61 of the new Law on Consumer Protection No. 6502, which specify the general principles that advertisements need to comply with, are not different in their basic rules. The art. 61 of the new Law on

[168] RG. 08.03.1995, S.22221.
[169] GÖLE (1983) p. 13-14; PEKMAN (2001) p. 223-224.
[170] Become effective on May 28, 2014.
[171] KOCABAŞ / ELDEN (1997) p. 11; GÖLE (1983) p. 14, 17; ATEŞ, Hüseyin: *Türkiye'de Yanıltıcı Reklamlar*, **Dünya'da ve Türkiye'de Reklamcılık - Reklamın Gücü**, Ankara – 1988, p. 405.

Consumer Protection No. 6502 states; *'(1) Commercial advertisements are announcements that have the feature of marketing communication that are performed in any media through written, visual, auditory or similar means by advertisers with the purpose of achieving the sale or rent of a product or service, to inform or convince the target audience, in relation to trade, business, craft or occupation. (2) It is the principle that the commercial advertisements comply with the principles defined by the Advertisement Board, to the public morality, public order, personal rights, and shall be correct and honest. (3) It is prohibited to make advertisements that are misleading the consumer, abuse the lack of knowledge or experience of the consumer, endanger his/her safety of life or property, encourage acts of violence or committing a crime, impair public health, abusive to those who are sick, elderly, children, or disabled. (4) The placement of name, brand, logo or any other distinctive figure or expression that are related to products or services within articles, news, broadcasts or programs without explicitly mentioning that they are advertisements, in order to promote the commercial title or business name, which are presented as promotion, is considered as concealed advertisement. It is forbidden to make auditory, written or visual concealed advertising in any communication medium. (5) Comparative advertising of rival goods or services that meet the same needs or address the same purpose is allowed. (6) The advertisers are liable to prove the accuracy of any claims that exist in their commercial advertisements. (7) The advertisers, advertising agencies, and media organization are liable to comply with the provisions of this article. (8) Restrictions on commercial advertisements and the procedures and principles that the advertisements should comply with are designated by by-laws.'* The difference that takes place in this Art. 61 is that it includes the definition of commercial advertisement in its first clause, and the definition of concealed advertisement in clause four.

While art. 16/1 in the old law, and art. 61/2 in the new law specify the general principles to comply with, art. 16/2 in the old law, and art. 61/3 in the new law list some special cases that are violating these principles as examples. The conditions that advertising should meet according to these provisions are as follows: (i) being lawful, (ii)

compatibility with the public morality, (iii) honesty and accuracy.[172] The condition of being lawful, which is a repetition of a general principle of law, implies compliance with all the mandatory rules of law within the legal system, including mandatory rules such as by-laws, regulations and official statements in this respect. The expression of compatibility with the public morality is again a repetition of a general rule of law. Since the concept and measure of morality changes in time and bound to the society, it is not possible to give a clear description; hence, it is reasonable to assess according to the current conditions. At this point, on the subject of morality in relation to advertising practices, art. 6 of the Regulation on the Application Rules and Principles Concerning Commercial Advertisement and Announcement, which will be analyzed below, will be informative. The rule of accuracy and honesty, whose general principle is regulated in the art. 2 of the Turkish Civil Code No. 4721, determines the limits of advertising from two different directions: Honesty and accuracy before the competitors, and honesty and accuracy before the consumers. Detailed provisions on this aspect in the art. 7 of this regulation, which will be examined below, are informative.[173]

Lastly, it is stipulated with the art. 4 and 4/A in the old law, and with the third section, first and second chapters, within the context of provisions on defective goods and services, it is regulated that the factual, legal or economic deficiencies in the advertisements are covered with these articles as well.

4.2.1.2 Regulation on the Application Rules and Principles Concerning Commercial Advertisement and Announcement

In accordance with the provision, *'It is the principle that the commercial advertisements comply with the principles defined by the Advertisement Board, to the public morality, public order, personal rights, and shall be correct and honest'* which is stipulated in the art. 16 of the Law on Consumer Protection No. 4077, the Regulation on

[172] BOZBEL (2006), p. 57; İNAL / BAYSAL (2008) p. 30; AVŞAR, Zakir / ELDEN, Müge: **Reklam ve Reklam Mevzuatı**, Ankara – 2004, p. 83.
[173] İNAL / BAYSAL (2008) p. 17-23; ASLAN, Yılmaz: **Tüketici Hukuku**, 2006, . 264-269; ÖZGÜL (1997) p. 8.

the Application Rules and Principles Concerning Commercial Advertisement and Announcement[174] which was prepared directly by adapting the International Code of Advertising Practice (the final consolidated version is the ICC Consolidated Code of Advertising and Marketing Communications Practice) issued by the ICC entered into force.[175]

The regulation is shortly named as Regulation on Advertising. Art.s 5, 6, 7, 17, 18, and 19 of it specify in detail the basic principles that apply to commercial advertisements and announcements. These principles can listed as; main principles (such as compatibility with the law, public morality, principle of honest competition, the requirement of being easily comprehended, prohibition of covert advertising, prohibition of discrimination, etc.) in the art. 5, some references indicated (such as the prohibition of sexual exploitation, exploitation through fear and superstition, through lack of experience or knowledge, and the failure to provide sufficient information on the subjects of the article) to incompatibility with public morality, honesty and accuracy in the art.s 6 and 7, regulations on public health and environment in art.s 17 and 19, restrictions on advertisements that are directed to minors (not causing adverse effects on children's development, not including elements of violence that can be imitated, not showing the use of objects that are dangerous for children and their surrounding) in art. 18.[176] At this point, it will be useful to mention some of the criticisms that are made against the provisions we summarized. In relation to prohibition of concealed advertising in Art. 5, it is remarked that there is a need for revisions because the definition of concealed advertising is not provided and the criteria for assessing concealed advertising are not specified; and it is commented that specifying criteria will lead to effective and fair control and monitoring.[177] Within the scope of the criteria of public morality that take place in art. 6, the decisions of the Advertisement Board in this field, which will be evaluated below, are criticized, and it is remarked that criteria that cannot be considered

[174] RG. 14.8.2003, S. 25138.
[175] PEKMAN (2001) p. 224.
[176] YILMAZ (2006) p. 1967-1968; ÇAKIR (2007), p. 204.
[177] GÜRBÜZ, Başak / AKTEKİN Uğur: *Türkiye'deki Örtülü Reklamlar ve Uygulamadaki Durum*, **Ankara Barosu Fikri Mülkiyet ve Rekabet Hukuku Dergisi**, 2009/4, p. 54.

as the criteria of public morality are applied by this board.[178] On the criteria of advertising that is directed at minors in art. 18, it is remarked that in such regulations, there is a need to encourage free and diverse thinking rather than directing to a monolithic type, and the influences that restrict creativity in advertising sector are mentioned.[179]

Art.s 8, 9, 10, 11, and 12 within the regulation cover provisions on different types of advertisements. Advertisements that encourage sale, which we can qualify as advertisements that provoke consumer's instinct to buy, are regulated under art. 8, and the regulated subject matter is about promotional sales. We can include the use of aggressive sale methods that can cause the consumer the obligation to buy within the scope of this article.[180] The type of advertisements in the art. 9 and 10 are advertisements of direct sale and the regulations are generally specifying the conditions for distant sale advertisements. In the doctrine, it is remarked that the legislation is behind the developments and applications in the commercial life and hence the gap about distant contracts need to be filled and accordingly, this situation has to reflect to direct sale advertisements. Art. 10 is a regulation on the sale methods of goods that are sent to consumers without their order, which is not covered in the old Law on Consumer Protection No. 4077, and it is the first regulation not only on its advertising, but also on the topic as well.[181] The conditions that comparative advertisements need to comply with are listed in art. 11. We should firstly mention here that there was no provision that prohibited the comparative advertising within our legislation before this regulation.[182] Unlike regulations in Switzerland and in the EU, the regulation in our legislation allows for advertising that is done only by implication. In other words, it is completely illegal to use the name or signs of the products or services of the competitors in an advertisement. In this respect, there are no distinction between direct and indirect comparison within the old Law on Consumer Protection No. 4077, and this situation is continued in the new law, and within the

[178] İNAL / BAYSAL (2008) p. 21.
[179] ASLAN (2006) p. 275-276.
[180] ASLAN (2006) p. 269-270; İNAL, Emrehan: **Reklam Hukuku ve Aldatıcı Reklam**, İstanbul – 2000, p. 51-53.
[181] ASLAN (2006) p. 270-271; İNAL (2000) p. 57-58.
[182] GÖLE (1983) p. 83; İNAL / BAYSAL (2008) p. 55; ÜREY, Yelda: **Türk Hukuku'nda Karşılaştırmalı Reklam**, Unpublished Master Thesis, 2010, p. 27.

doctrine the criticism is raised that the regulation makes that distinction and prohibits direct comparison. More clearly, it is stated that, contrary to the current regulation, comparison that is correct and honest, that does not include false information, does not constitute unfair competition, and that includes clear and distinct comparison which informs the consumer should be encouraged.[183] Art. 12 covers the condition for advertisements that have attestants, which includes scientists, celebrities, users or consumers views to promote the product or service. An important issue about this topic is that the persons should be real and their permission should have been taken.[184]

Following art. 12/A that specifies the conditions for discounted sale, and art. 13 that introduces the charge of proof for advertisements that are based on a claim or includes examples, art. 14 and 15 brings two important prohibitions on discrediting, and unfair benefitting from commercial reputation that are applicable to all advertising practices. These articles are fundamentally parallel to the provisions in the art. 3a of the Directive 97/55/EC on the comparative advertising, which we analyzed above in the context of the EU regulations, and in this respect, advertisements and announcements are put into a framework that is compatible with the European norms. Lastly, art. 20 refers to the legislation on goods and services whose advertising cannot be made, and art. 21 makes persons related to the advertising practices (advertiser, advertising agencies, media institutions and intermediaries) jointly responsible within the context of regulations.[185]

4.2.2 Regulations regarding Audiovisual Media:

The source of regulations on audiovisual media is firstly art. 121 of the 1961 Constitution of the Republic of Turkey, and art. 133 of the 1982 Constitution of the Republic of Turkey. According to these articles, the administration of the radio and television stations attached to the state monopoly. The first code that was issued within the scope of these articles is the TRT Law No. 359 assigns the right to establish and run these stations to the Turkish Radio and Television Corporation, the following Turkish

[183] İNAL / BAYSAL (2008) sf. 56-57; ASLAN (2006) sf. 272; ÜREY (2010) sf. 27, 105, 108.
[184] GÖLE (1983) sf. 90; İNAL (2000) sf. 74-75.
[185] YILMAZ (2006) sf. 1967-1968; ÇAKIR (2007), sf. 204.

Radio Television Law No. 2954 assigns the complete monitoring of radio and television broadcasts and all other electronic transmissions to the Radio and Television High Council. However, during this period, the council has become an institution that monitor TRT rather than regulating private broadcasting, and did not allow the broadcasting of many advertisements and so because of its inflexibility on the principles of public broadcasting while monitoring the advertising practices through pre-inspection, it had experienced problems with the advertising sector. In the following period, because the Radio Television High Council was not a strongbody, it was replaced with Radio Television Supreme Council with the Law on the Foundation and Broadcasts of Radio and Television No. 3984 that takes the European Convention on Transfrontier Television as a reference, after the amendment made to art. 133 of the 1982 Constitution of the Republic of Turkey. Before these changes, because there was a lawless environment, advertising practices switched to private television channels, however, through regulations that the monopoly of the state lifted up and the private radio and televisions broadcasting could be included within these legal regulations. In the following period, during the EU accession period, Regulation on the Procedures and Principles of Radio and Television Broadcasts[186] came into effect.[187] Among current regulations which also include the regulations on advertising practices, we will briefly analyze in relation to the topic of our study the Law on the Foundation and Broadcast Services of Radio and Television No. 6112, which legislated away the Law on the Foundation and Broadcasts of Radio and Television No. 3984, and the Regulation on the Procedures and Principles of Radio and Television Broadcasts[188], which legislated away the Regulation on the Procedures and Principles of Broadcasting Service.

4.2.2.1 Law on the Foundation and Broadcast Services of Radio and Television No. 6112

One of the regulations that we mentioned while we evaluated the development stage of the audio and visual media, Law on the Foundation and Broadcasts of Radio and

[186] RG. 17.4.2003, S. 25082.
[187] SAPMAZ (2011), p. 64-73; ÇAKIR (2007), p. 203; PEKMAN (2001) p. 225; AZİZ, Aysel: **Türkiye'de Televizyon Yayıncılığının 30 Yılı (1968-1998)**, Ankara - 1999, p. 108-109.
[188] RG. 02.11.2011, S. 28103.

Television No. 3984 could not keep up with the rapid technology even through it was amended before it was legislated away by the Law on the Foundation and Broadcast Services of Radio and Television No. 6112. Furthermore, it became compulsory that this law has to be amended constantly along with expansion made to the Directive 89/552/EEC (Audiovisual Media Services Directive) within years, which is among the directives of the EU on advertising practices, and that it had to comply with the provisions of the Directive 2010/13/EU (Audiovisual Media Services Directive) which is the codified version. As a result of all these developments, the Law No. 6112 came into effect in March 2011.[189]

The more comprehensive new law is in harmony with the directive mentioned above. Unlike the directive, it also covers radio broadcasting and media organizations that are operating on the Internet. One area that is in harmony with the directive is the regulations on advertising practices, and these provisions are regulated under the title 'commercial communication' in a comprehensive way parallel to the directive. Additionally, teleshopping and product placement subjects are also included in the law.[190] It is adequate to briefly analyze the provisions included in art.s 8-13 on the issues of commercial communication, teleshopping, product placement and program sponsorship, which are all introduced with the law, and art. 31. Art. 8 lists the basic principles concerning broadcasting services in clauses (integrity of the country; superiority of the law; not being incompatible with public morality; not encouraging the feelings of animosity and hatred in the society, discrimination, criminality, or terror; prohibition of exploitation in order to protect the minors; making a condition of using protective symbols, etc.) Art. 9 on commercial communication defines the conditions that are directly related to commercial communication by referring to art. 8 (being easily discernable visually and auditorily, not using subliminal techniques, not being hidden, not advertising foods and beverages or foods and beverages which contain ingredients whose excessive consumption is not advised in children's programs, having the same sound

[189] SÖZERİ, Ceren / GÜNEY, Zeynep: **Türkiye'de Medya'nın Ekonomi Politiği: Sektör Analizi,** TESEV – 2011, p. 19-20; COŞAR, Özgür: *Görsel İşitsel Medyanın Gelişimi*, **Elektrik Mühendisleri Odası**, 2011, No. 442, p. 51.
[190] SÖZERİ / GÜNEY (2011) p. 20-21; COŞAR (2011) p. 51.

level with the other broadcasting sections, etc.) Art. 10 provides provisions on the conditions of placing advertisement and teleshopping within programs, the restrictions on their length, and the transmission length that is required before making a placement. Art. 11 stipulates the commercial communication conditions on certain products that can be easily understood from the title. In this scope, alcoholic beverages, tobacco products, medicinal products and medical treatment available only on prescription are prohibited products. Art. 12 specifies conditions on the form of application within programs that are sponsored (the amount of time that can be allocated to the sponsor; the persons who are not allowed to become sponsors; programs that cannot be sponsored, etc.) Art. 13 contains provisions on product placement (allowed programs, conditions, programs and products that cannot be subject to placement). Lastly, art. 31 is on political advertisements, it specifies the length of transmission, and it refers to the procedures and principles that are going to be determined by the Supreme Election Board.[191]

Some of the criticism on the new law that are related to advertising practices includes the criticism that, while the source directive only brings restrictions in preventing hate speech and in protecting children with respect to the content of broadcasts, the provisions in the art. 9 of the law are too detailed, and the principles of broadcasting services that are defined ambiguously are limiting the freedom of thought. Furthermore, even though there is no regulation in this direction within the source directive, art. 10 brings prohibition of placement in religious ritual broadcasts but it does not bring a similar type of restriction to children's programs (even with limitations), which is another point of criticism. Another subject that is discussed in art. 10, is the need to expand the provision on exploitation of women to include LGBTT, and the need to bring a clarity to the word 'exploitation' (for instance, issues such as the constant use of women in detergent advertisements were discussed). Lastly, there has been criticisms that the proportion of advertising practices to program transmission time in the art. 10 is too high even though it is in parallel to the source directive, since the new techniques that find a place of application in the member states of the EU are not implemented in the

[191] http://www.mevzuat.gov.tr/MevzuatMetin/1.5.6112.pdf (26.11.2014); http://www.ratem.org/web/Nurullah_Ozturk.pdf (26.11.2014).

same way in our country as the socioeconomic level of the advertisement audience is low in our country.[192]

4.2.2.2 Regulation on the Procedures and Principles of Broadcasting Service

One of the most important secondary regulations that were issued on the basis of the Law on the Foundation and Broadcast Services of Radio and Television No. 6112 is the Regulation on the Procedures and Principles of Broadcasting Service. Provisions on advertising practices within the regulation attempts to clarify issues that are not clear within the law, and we will briefly look at these issues that were stipulated for clarification through examples within the scope of articles.

Provisions provided within art.s 8 to 15 are regulations on advertising practices. Art. 8 provides in detail the media services principles within the scope of provisions, and introduces such issues like: (i) media services shall not be contrary to human dignity and the principle of respect to privacy; shall not include disgracing, degrading or defamatory expressions against persons or organizations beyond the limits of criticism; the sceneries of individuals' moments of suffering, dying, being wounded and similar cases shall not be displayed in a way that leads to emotional exploitation; information, documents and records related to the private life shall not be broadcast without the permission of individuals and inviolability of residence shall not be infringed; (ii) media services shall not encourage or inure violence; shall not cause the acquisition of aggressive behaviors and attitudes, the desensitization against and the normalization of violence; the sounds and sceneries that contain elements of violence shall not be broadcast in news bulletins or news programs beyond its newsworthiness by extending their duration superfluously, presenting them tautologically or spoiling their originality and quality; the comments and expressions which justify violence shall not be broadcast; (iii) In radio and television broadcast services, any programs which could impair the physical, mental or moral development of children and young people shall not be broadcast during the watershed

[192] SÖZERİ / GÜNEY (2011) p. 20; ADAKLI, Gülseren / SÜMER, Burcu: *6112 Sayılı Radyo ve Televizyonların Kuruluş ve Yayın Hizmetleri Hakkındaki Kanuna İlişkin Değerlendirme Raporu*, **İletişim Araştırmaları Dergisi**, No. 5/2, 2011, p. 141-158.

hours even though smart signs are used; the program contents including the elements of violence, sexuality and as such which might harm the physical, mental or moral development of children and young people shall not be broadcast in program promotions during watershed hours. Art. 9 of the law that has the title of commercial communication in broadcasting services has been introduced again in art. 9 within the regulation under the title of 'General Principles'. As examples to the elucidatory provisions of the article, the foods which the law describes as those whose excessive consumption are not recommended, this article clarifies them as 'foods and beverages containing nutrients and substances such as fats, trans-fatty acids, salt/sodium and sugars whose excessive consumption are not recommended in general nutrition diets', and the article also clarifies that 'sound level of broadcasts of commercial communications shall be same as the other parts of the broadcast. Viewers or listeners shall not be disturbed by increasing or decreasing the sound level at the beginning of the commercial communications.' Art.s 10 and 11 of the regulation are on the period, proportion, form and presentation of advertising practices and aims at completing the missing points within the provisions of the art. 10 of the law. As well as the duration of advertisements, it also cover issues such as the size of the script within the advertisement, their duration on screen, the number of times advertisement can be inserted within a program, the use of music advertising. On advertisements of particular products that are covered by art. 11 within the law, art. 12 of the regulation makes some additions such as any kind of weapons (firearm or not) or of the entities engaged in producing or selling weapons, fortune-tellers, mediums, astrologists etc., and dating and matrimonial services to those products or services whose advertising is prohibited. Art. 13 has the same title of sponsorship as the same article within the law and in addition to the designations in the law, it also includes issues such as how and for how long the references to the program sponsor can take place. The last article of the regulation that has the same title as in the law is on product placement. The regulation article includes additional issues to the provision that take place within the law such as the number of products that take place in a product placement, the properties of the expression explaining the product placement, the duration, and prohibited issues in relation to the product in a placement. Finally, art. 15 within the regulation exempts

broadcasts that are exclusively devoted direct advertising practices from the art.s 10 and 11.[193]

4.2.3 Other Special Regulations

In addition to the two main sources we analyzed above, the legislation has articles that have the feature of being special provision on advertising practices in many regulation, even though in a scattered way (on a variety of issues that can be summarized as regulations in a wide range from restrictions to prohibitions of advertising practices on products and services) from health to education, from capital market to occupational organizations.[194] Instead of dealing with the whole legislation, it will be adequate to study regulations that have common provisions through classifying examples.

4.2.3.1 Occupational Organizations

The first classification we can make is on restrictions brought to certain occupational groups. Our first example relates to the attorneyship, and the Attorneyship Law No. 1136 prohibits attorney of any act or venture that can be considered as advertisement, and of using any other title than their own or academic titles.[195] The principles about these prohibitions are designated within the by-law issued by the Union of Bar Associations of Turkey.[196] Another occupation group we can list under this category is the profession of a doctor, and according to the Law on the Practice of Medicine and its Branches No. 1219, doctors are prohibited from having/making notices or advertisements and similar promotions conveying anything other than the place of their practice, the times during which they provide medical examination, and their specialization. In a similar way, another provision within this law, dentists are also included within the scope of advertising prohibition. Among the responsibilities of the Board of Directors at the Turkish Medical Association is included the prevention of any

[193] http://www.rtuk.org.tr/sayfalar/IcerikGoster.aspx?icerik_id=edb25ef4-abc7-4234-bcc3-89ece37201b3 (26.11.2014).
[194] ZİYLAN (2009), p. 3-4; İNAL / BAYSAL (2008) p. 12.
[195] TATAR, Muhammet / AKPOYRAZ, Duygu: **Türk Reklam Mevzuatı**, Ankara – 2006, p. 420-421; İNAL / BAYSAL (2008) p. 15.
[196] RG. 21.11.2003, S. 25296.

type of advertising, according to the Law on Turkish Medical Association No. 6023.[197] The last occupational group that I would like to include in this classification is the profession of independent accountancy and certified public accountancy. According to the By-law on the Work Procedures and Principles of Independent Accountants, Certified Public Accountants, and Sworn-In Certified Public Accountants, which was issued based on the Law on Certified Public Accountancy and Sworn-in Certified Public Accountancy No. 3568[198], the members of the profession cannot or cannot have someone advertise themselves openly or covertly, directly or indirectly in order to acquire jobs.

4.2.3.2 Advertising Practices Prohibited Products and Services

It is possible to make another category of those products and services whose advertising is prohibited within our classification. Particular products whose advertising practices are prohibited through special provisions are alcohol, tobacco products and medicinal products. The Law on Tobacco Control and Prevention of Hazards Caused by Tobacco Products, No. 5727, and the Law on The Monopoly of Alcohol and Alcoholic Beverages No. 4250 includes detailed prohibitions on advertising practices that are in parallel to the general regulations that were explained above with respect to alcoholic beverages and tobacco products. Furthermore, secondary legislation which settle various topic about these products such as the By-Law on the Procedures and Principles of the Sales and Presentations of Tobacco Products and Alcoholic Beverages[199], and the Regulation on the Matters That Must be Complied with in the Issuance of Presentation Conformity Certificates to a Location/Locations that Belong to Businesses where Hookah Tobacco Materials are Smoked and the Operation of these Places[200], have articles that repeat those in the other regulations. The other group of products that we are going to examine under this category is medicinal products, and again in conformity with our explanations at the general regulations, there is a distinction made between products that are only available on medical prescription and those that are not, and the advertising of those that are only available on medical prescriptions is prohibited (expect in medical

[197] TATAR / AKPOYRAZ (2006), p. 415.
[198] RG. 3.1.1990, S. 20391.
[199] RG. 7.1.2001, S. 27808.
[200] RG. 19.2.2013, S. 28564.

publications). Law on Pharmaceutical and Medicinal Preparations No. 1262, and the By-Law on the Promotional Activities for Medicinal Products for Human Use[201] issued on the basis of that law, regulates provisions under the title of the promotion of medicinal products in relation to advertising practices. It is observed that with respect to medicinal products that are only available on medical prescription the legislation is in harmony, yet, there is a conflicting structure with respect to those medicinal products that do not require prescription. More clearly, even though the regulations are prepared as compatible with the acquis of the EU (allowing promotion on the radio and television), the law restricts the advertisement of medicinal products that do not require prescription in newspapers and instruction books. Furthermore, the related decision of the Council of State[202], Division 10 annulled the articles of the by-law that are compatible with the acquis. This decision was criticized with the argument that the main purpose should not be preventing medicinal products that do not require prescription to reach the public, and that the concerned law is behind meeting the needs of the time, and hence that the priority should be placed on adapting to these needs.[203] An example to services whose advertising is prohibited with special provisions is the related legislation on the harvesting/donation of organs and tissues, and on the medicinal methods that assist reproduction. The related legislation on the harvesting/donation of organs and tissues is the Law about Organ and Tissue Procurement, Preservation, Grafting and Transplantation No. 2238, and according to its related article, any procurement, preservation, grafting and transplantation of any type of organ or tissue that are part of the human organism, and their particles for cure, diagnosis or scientific purposes (except autograft, procurement of hair and skin, their graftage or transplant, and blood transfusion) are subject to the provisions of this law. About the services provided within this scope, any type of advertising on the procurement and donation of organ or tissue is prohibited, with the exception of dissemination of information in the form of scientific statistics or news story.[204] Assisted reproductive treatments are regulated by the By-law on Assisted Reproductive Treatment Applications

[201] RG. 23.10.2003, S. 25268.
[202] Council of State 10. Division 13.12.2005 dated 2005/7622 numbered decision; http://www.kararevi.com/karars/249058_danistay-10-daire-e-2003-5945-k-2005-7622 (26.11.2014).
[203] AYGÜN, Ezgi: **Sağlık Sektöründe Reklam**, Unpublished Master Thesis, Ankara - 2007, p. 77, 90; ÇAKIR (2007), p. 198–209; ALTINSOY, Elif: *Türkiye'de İlaç Reklamları*, **Uluslararası Reklam Hukuku Sempozyumu (8-9 Mayıs 2008)**, İstanbul - 2009, p. 244-248.
[204] TATAR / AKPOYRAZ (2006), p. 71.

and Assisted Reproductive Treatment Centers[205], and the advertising of this service through press and communication tools, even with the purposes informing the audience, is prohibited.[206]

4.2.3.3 Advertising Practices Restricted Goods and Services

We can make the last classification through the restrictions that are brought to the content of the advertising practices of certain goods and services.[207] We will analyze special regulations on the advertising practices of foodstuffs, cosmetics, and detergents, in terms of goods, and the services provided by private educational institutions, by travel agencies, services of personal retirement insurance, and aviation services in terms of services.

Provisions on advertising practices of foodstuff can take place in regulations that are directly related to the general title of foodstuff, and they can also take place in documents that regulate issues in relation to certain products such as natural mineral water, foods intended for use in energy-restricted diets for weight reduction, and foods intended for special diets.

Firstly, we will analyze the provisions on advertising practices regarding foods as general title within the Law on Adoption of the Amended Decree By-Law on the Production, Consumption and Control of Food No. 5179, the Regulation about Private Characteristic of Goods and Supplies Concerning General Health and Foodstuffs[208], Regulation on Production, Consumption and Control of Foods[209], and Communiqué on Rules for General Labelling and Nutritional Labelling of Foods[210]. Within the scope of the law mentioned above, advertisement is defined as the forms of promotion that are done in order to increase the sale of foodstuff; it was specified that the advertising and

[205] RG. 6.3.2010, S. 27513.
[206] TATAR / AKPOYRAZ (2006), p. 84.
[207] İNAL / BAYSAL (2008) p. 15.
[208] RG. 18.10.1952, S. 8236.
[209] RG. 9.6.1998, S. 23367.
[210] RG. 25.8.2002, S. 24857.

promotion of foodstuff and the substances that are in touch with them cannot be misleading or fake, in parallel to the general regulations; the issues that are not allowed to be included in the content of the advertisement are listed (such as giving a false impression about the properties of the food, referring to properties that the food does not have); and it makes references to legislation on the topic of procedures and principles. The regulation, on the other hand, stipulates that the foodstuffs are going to be named according to the substances that are used in its production, and that these should be explicitly indicated both on the package label as well as on the notices and advertisements. In addition to this article, the regulation also includes provisions that are directly on certain food groups such as foods intended for use in energy-restricted diets for weight reduction, infant formulas, and dehydrated soup mixes. There are details within these provisions such that the allowed measure of inscription on the foods intended for use in energy-restricted diets that are also valid for advertisements, that the advertisements that exaggerate the benefit of substances that are added to the infant formulas are prohibited, as well as advertisements that bear expressions on dehydrated soup mixes equating them with beef broth are prohibited. The regulation contains a detailed provision on the publication principles of advertising that is defined as the forms of promotion that are done in order to increase the sale of services or goods, through whatever means, in return for a certain amount of fee, including the packaging and labeling of foodstuffs, and the materials that are used in point of sale. The principles again repeats the fundamental principles in parallel to general regulations, such as that the advertisement should be lawful, moral, honest and accurate; that it should not discredit, be incompatible with public morality, or misleading. Then, some special designations are provided, for instance the advertisement shall not distort the citations made from technical or scientific publications, or research results; present statistics as if they are more valid than they actually are; present any witness or expression of approval that is not based on the experience of the person whose testimony is used, or of the person who is not real; imitate the general composition, script, slogan, visual composition, music or sound effects of other advertisements in a way that may mislead or confuse the consumer. And lastly, when we examine the provisions of the communiqué, we observe that the issues that are detailed within the scope of the related article, which are also covered by the law, such as giving a false impression about the properties of the food, referring to

properties that the food does not have, and declaring superiority over similar foods are prohibited in promotions and advertisements. Furthermore, among the provisions that are on advertising practices, it is stipulated that any expression that declares or implies that any foodstuff has the quality of preventing illnesses, curing or treating illnesses cannot take place in promotions or advertisements.

We will now examine the provisions on advertising practices that take place in documents that regulate issues about certain foodstuffs, such as the Regulation on Natural Mineral Waters[211], Turkish Food Codex – Communiqué on Foods Intended for Use in Energy-Restricted Diets for Weight Reduction[212], and the Turkish Food Codex – The Communiqué on the Foodstuffs Intended for Particular Nutritional Uses[213]. In the regulation on mineral waters, the article on advertising prohibits the use of information that refers to the qualities of the natural mineral water that are related to prevention or treatment of illnesses in advertisements; it repeats the designation made in regulations that are directly related to foodstuffs as a general title mentioned above; yet it brings an exception about special expressions about the information on the natural mineral water that are about the favorableness of the water for the nourishment of children, and for helping the digestion, by leaving these expressions to the permission of the ministry. Furthermore, the regulation specifies the mineral amounts that are required to exist for warnings and qualifications on these mineral waters within advertisements. The communiqué on foods intended for use in energy-restricted diets for weight reduction introduces a restriction an expression about weight loss or the speed of weight loss, or alleviation of the feeling of hunger, or the increase of the feeling of being full cannot take place in advertisements of goods that are covered by the communiqué. When we look at the related articles of the communiqué that regulates foodstuffs intended for particular nutritional uses, which is our last example for regulations on particular foods, we observe that the provision that prohibits statements that express or imply that the food has the quality of preventing, curing or treating illnesses within the general regulation is repeated here.

[211] RG. 1.12.2004, S. 25657.
[212] RG. 24.12.2001, S. 24620.
[213] RG. 22.04.2002, S. 24734.

The provision within the Regulation on Cosmetics[214], which is a special regulation on cosmetics that is one example of other product groups, stipulates that the script, title, commercial brand, photograph, figurative motives or other patterns cannot be used to suggest that the product has qualities which it actually does not. This provision is detailed in parallel to the condition of being accurate and honest that takes place in general provisions. The special regulation on advertising practices of detergents, which is our last example of regulations on special products, is the Communiqué concerning the Characteristics, Packaging and Labelling of Detergents[215]. The related article in this communiqué states that the claims that take place in advertisements need to be proved with documents of scientific studies, and this statement is parallel to the criterion of being scientific in testings that take place in general provisions.[216]

Types of services for which there are restrictions in their advertising practices, we will give the examples of services that are provided by travel agencies, personal retirement insurance services and civil aviation services. The special regulation that consists of provisions on the advertising practices and promotion concerning travel agencies is the Law Concerning Travel Agencies and the Association of Travel Agencies. In the article 19 of this law on the topic of advertising and promotion, again the advertisements and promotions that are inaccurate or misleading are prohibited, repeating the general provisions.[217] The Code on Individual Pension Savings and Investment Systems No. 4632, which regulates the personal retirement insurance services, includes an article (art. 7) that is peculiar to the services provided making it mandatory to state the deduction and the entrance fee openly expressed in the advertisements, and an article (art. 10) that states the condition that any statement that are inaccurate, misleading or deceiving should not take place in advertisements, in parallel to the general provisions.[218] Lastly, the provision on advertising that takes place within the Law on Turkish Civil Aviation No. 2920 prohibits any advertising during the flights. However at this point, even though the advertisements on TVs are being stopped during the flight, such

[214] RG. 23.05.2005, S. 25823.
[215] RG. 12.09.2005, S. 25934.
[216] TATAR / AKPOYRAZ (2006), p. 140-143.
[217] TATAR / AKPOYRAZ (2006), p. 253.
[218] İNAL / BAYSAL (2008) p. 15.

prohibition can be overpassed through advertisements at magazines in the plane or advertisements on the seats. In addition, another disputable issue here is 'during the flight' statement in which we cannot specify the beginning of the prohibition.

CHAPTER IV

CONTROL MECHANISMS WITHIN THE SCOPE OF REGULATIONS ON ADVERTISING PRACTICES

1. The Concept of Control in General

In most of the legal systems, there are four basic methods in controlling and combatting advertising practices that are in conflict with legal regulations:

- civil lawsuits,
- administrative control,
- criminal proceeding,
- self-regulation.[219]

When we analyze the concept of control in its relation to advertising practices, we also need to touch upon the control mechanisms that are in place before the publication of the advertisement. This type of control can be explained as the control conducted by the related institution before the advertising practice is transmitted. In this context, the concerned institution control whether the advertisement in question complies with the principles and conditions that are settled. A further step to this type of control is the condition to get permission for the advertising practice that applied. If the system functions properly, this seems like a very effective mechanism.[220] However, it has the characteristics of affecting the development of advertising adversely by creating a bureaucracy for advertising practices within the conditions of our times.

It is also possible to consider advertising practices from the concept of mass communication since advertising practices are also a part of commercial communication.

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[219] İNAL (2000) p. 93; AVŞAR / ELDEN (2004), p. 85; PETTY (1997), p. 3.
[220] GÖLE (1983) sf. 142-144; GÖLE, Celal: *Türk Hukukunda Reklamların Ön Denetimi Sorunu*, **Ankara Üniversitesi Siyasal Bilgiler Fakültesi Dergisi**, Vol. XL, No.: 1-4, 1985, p. 255-268.

In this respect, the control mechanisms are divided into formal and informal control mechanisms within the doctrine on the theories of mass communication. Formal control is defined as procedural control or as legal regulations and includes judicial control with civil cases and criminal proceedings, administrative control, guardianship control, and political control. On the other hand, informal control is considered as based on the society's sense of responsibility, and includes self-regulation, control by public opinion, and by the non-governmental organizations.[221]

1.1 Civil Lawsuits

The most typical control and combatting method in relation to advertising practices that are in conflict with legal regulations are lawsuits and especially those on unfair competition. As we mentioned above[222] when we analyzed legal regulations on advertising practices at the level of countries and the EU, the starting point for making regulations has been the issue of preventing unfair competition and the need for consumer protection emerged only later, and this is also valid in the case of Turkey.[223]

1.2. Criminal Proceeding

Criminal proceeding is very rarely used as a method of preventing advertising practices that are in conflict with legal regulations. France's regulations on advertising practices among the member states of the EU can be given as example.[224] Regulations that are related to this type of control have a punitive character and, even the disputes that are appealed to legal authorities, are resolved in criminal court. Even though the subject is associated with penalty stipulated for the intentional act of unfair competition that takes

[221] DURMUŞ, Seda: **Türkiye'de ve Bazı Avrupa Ülkelerinde Ortak Denetim ve Öz Denetim Uygulamaları,** Specialization Thesis, Ankara - 2011, p. 34-35, 39-40; IŞIK, Metin: **Kitle İletişim Sistemleri,** Konya – 2012, p. 61-75; VURAL, Sacide: **Kitle İletişiminde Denetim Stratejileri,** Ankara - 1994, p. 143, 154.
[222] Please see p. 21, 27, 37.
[223] İNAL (2000) . 96-98; AVŞAR / ELDEN (2004), p. 94-95.
[224] GÖLE (1983) p. 113, 115.

place in art. 62 within the new Turkish Commercial Code No. 6102, we cannot claim that the combat with these types of advertisements have a punitive character.[225]

1.3 Administrative Control

Judicial remedy is generally avoided as a means for various reasons. From the perspective of the competitors, the reasons are running a business in the same field, the difficulty of proving damages, the length of cases, and the ease of doing an aggressive advertisement in response rather than filing a case. From the perspective of consumers, the fear of losing time, money and energy, shying away from the legal process, that the demanded amount is very little, and other such issues can be reasons for not appealing to judicial remedy. In the case of self-regulation, the prejudices that will explain in detail below are the reasons why there is abstaining from appealing to this course of action. All these reasons lead one to appeal to administrative control.

We can describe this type of control as one done directly by the concerned administrative organs through which they control the compatibility to the settled principles and procedures[226], and the most developed and manifest example of this type of control is done by the Federal Trade Commission (FTC) in the USA, which we mentioned above.[227] The administrative control bodies in Turkey are the Advertisement Board, and the Radio Television Supreme Council, whose operations will be examined in detail below.[228] The Board of Advertisement is an administrative control body that is operating under the Ministry of Customs and Trade - Directorate General of Consumer Protection and Market Surveillance, while the Radio Television Supreme Council is an autonomous administrative control body operating within a different structure which has an independent administrative authority feature.[229] We will briefly touch upon independent administrative authorities that also called regulatory authorities, or supreme boards in relation to their particular place within the administrative structure. The most fundamental features of these institutions are their independence, impartiality, regulation,

[225] İNAL (2000) p. 101-102; AVŞAR / ELDEN (2004), p. 104.
[226] AYGÜN (2007), p. 33.
[227] Please see p. 21.
[228] İNAL (2000) p. 99-101; AVŞAR / ELDEN (2004), p. 95-96; BOZBEL (2006), p. 133; PEKMAN (2001) p. 222.
[229] PEKMAN (2001) p. 222-223.

monitoring, controlling, and their ability to place sanctions. We can summarize these features as no typical administrative control on such authorities, being aloof from political expectations and interests, regulating rules on their operations and ensuring the observance of these rules (monitoring, control and sanctions). Former positive aspect of these institutions that is most mentioned is their ability to act much more rapidly and effectively due to their technical capacities, especially in sensitive sectors that require technical specialization, while the most criticized aspects of these institutions are focused on no typical guardianship and hierarchical control authorities on such institutions.[230]

1.4 Self-Regulation

The difficulties in controlling the developing and changing communication technologies and their related communication organs through either legal or administrative rules have created the methods of self-regulation, and common control (also called hybrid control) and of ombudsman institution that we will analyze insofar as it is connected with self-regulation.[231] In short, self-regulation is defined as a system that provides the self-control on one's own (it is also called with terms such as auto-discipline[232] or auto-control).[233] Self-regulation is defined as the controlling of the establishment on their own, or the control that takes place as a result of the organization of similar establishments under the same body; in other words, as the self monitoring of individuals, establishments, organizations or societies through some particular rules.[234] The main objective of media self-regulation, which concerns us in this study, is to render the interference of authority unnecessary, by creating a media structure that is free yet aware of its social responsibilities, and which has very strong internal control

[230] GÖZÜBÜYÜK, Şeref: **Türkiye'nin Yönetim Yapısı**, Ankara – 2001, sf. 272-286; ULUSOY, Ali: *Regülasyon Kurumları Hakkında Genel Bir Değerlendirme*, **Ankara Barosu Dergisi**, 2000 - 2, sf. 45-59; TAN, Turgut: *Bağımsız İdari Otoriteler veya Düzenleyici Kurullar*, **Amme İdaresi Dergisi**, C. 35, S. 2, Haziran – 2002, sf. 11-37; ALTUNDİŞ, Mehmet: *Bağımsız İdari Otoritelerin Türk Hukuku'nda Ortaya Çıkardığı Sorunlar ve Türk Hukuku'na Etkileri*, **Danıştay Dergisi**, S. 113, sf. 17.
[231] AVŞAR, Zakir / DEMİR, Vedat: **Düzenleme ve Uygulamalarla Medyada Denetim**, Ankara - 2005, sf. 341-343.
[232] MATTELART (1994), sf. 91-92.
[233] DURMUŞ (2011), sf. 42.
[234] AVŞAR / DEMİR (2005), sf. 32.

mechanisms.[235] There is no single formula of self-regulation that is accepted around the world. The experience in this developing field, which also includes self-regulation in advertising, is learned from systems that are established in other countries and functioning well, such as Britain.[236]

The most effective operations among the self-regulatory systems are observed in advertising industry, as their aim in implementation is highly visible and they are specifiable since the name of companies and brands are used. The European Advertising Standards Alliance (EASA), a competent body which we will analyze in detail below, defines the self-regulatory system within the scope of advertising practices as a system in which the advertising industry is actively keeping itself under control. The EASA defines the three pillars of this industry as the advertisers who pay the expenses of advertisements, the advertising agencies who are responsible for the form and content of the advertisement and the media that disseminate these advertisements. Within the scope of the self-regulatory system, these three pillars reach a common understanding on advertising standards, and create a system which ensures that any type of advertisement that are incompatible with these conditions are corrected rapidly or removed.[237] In this respect, those who defend the system within the doctrine remark that, even though difficult decisions have to be taken, it is much more preferable for the mentioned industry to be a part of decisions which shape their future rather than waiting for the conclusions outside the doorsand to implement solutions which will be imposed on them in which they did not take part.[238]

It is stated in doctrine that the fulfillment of six duties that are listed below by the advertising industry itself, which were prepared in accordance with the fundamental principles of the International Code of Advertising Practice[239], (the final consolidated version is the ICC Consolidated Code of Advertising and Marketing Communications

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[235] KARADAĞ, Volkan: **Görsel – İşitse Medyada Denetim Biçimleri,** Specialization Thesis, Ankara - 2012, p. 46-47.
[236] KARADAĞ (2012), p. 47; HARKER / CASSIM (2002), p. 1.
[237] European Advertising Standards Alliance: **Advertising Self-Regulation the Essentials,** 2003, p. 5.
[238] BROWN (2006), p. 33; BODDEWYN, Jean J.: *Advertising Self-Regulation: True Purpose and Limits*, **Journal of Advertising,** 1989, Vol. 18, No: 2, p. 22.
[239] Please see p. 15 and the following pages.

Practice) issued by the ICC and in order to establish the understanding of legal advertising that is good and of high quality, is enough to institute self-regulation:[240]

- Specifying and improving advertising norms and standards,
- Ensuring that these standards are known and accepted by the whole industry,
- Providing guidance and advice to advertisers and advertising agencies,
- Monitoring whether the rules are followed or not,
- Punishing bad behavior, and the violations of rules,
- Resolving complaints of consumers, competitors, or other concerned.

1.4.1 Features of Self-Regulatory Systems and the General Principles for Establishment:

The literature lists and explains some principles for self-regulatory systems that provide an effective and applicable model. These principles are;[241]

a. *Forming a universal system:* First of all, the system has to be applicable to anyone without discrimination especially to advertisers, agencies and the media. In order to achieve this, there has to emerge a consensus on the need for this system, and there has to be the full support of all the actors of the industry. Additionally, the self-regulatory body has to get the moral support of the majority of the industry, and maintain the reliability of its decisions and its transparency, and secure the capacity of the applicability of the system even to those advertisers who do not cooperate.

b. *Financing:* Effective financing is seen as the precondition of a self-regulatory system. In other words, financial support should not remain symbolic,

[240] İNAL (2000), p. 93; AVŞAR / ELDEN (2004), p. 85; AVŞAR / DEMİR (2005), p. 212.
[241] HARKER, Debra: *Improving the Effectiveness of Advertising Self-Regulatory Schemes*, **Journal of Marketing Management**, 20, 2004, p. 627-628; Moscow Media Law and Policy Center: **Co-/Self-Regulation Bodies in the Mass Media**, 2005, p. 20-22; BROWN (2006), p. 32-33; HARKER / CASSIM (2002), p. 9.

it has to be convenient and effective. More clearly, self-regulation should not be seen as a method of lower the prices, it should be conceived as something that functions as long as it is financially supported as much as it is required. For the sustainability of the system, this support should be committed by all the actors that take place within the field of commercial communication. A system that is based on tax over a small percentage of advertising expenses is considered sufficient to ensure these criteria.

c. *Establishing written rules:* Some ethical principles, especially in areas that are specified by the consumer, should be determined. The representatives of the market, the public and legal experts should be consulted on this issue. The rules should be specified clearly, they should be accessible, and the advertisers, agencies and the media should have a good comprehension of the content. Furthermore, these rules should be revised periodically in order for them to be up-to-date and practical on the topic (for instance according to the developments in the market, the changing areas of interests of the society, changing sensitive issues for the consumers, new forms of advertising). These rules, which are the key aspect of a self-regulatory system, should be based on the International Code of Advertising Practice, (the final consolidated version is the ICC Consolidated Code of Advertising and Marketing Communications Practice) issued by the ICC; they should be expanded and improved in accordance with the local needs. Lastly, it is crucial that these rules are implemented on all types of advertisement.

d. *Providing advice and information:* An important role of self-regulation is to be able to prevent problems before they even emerge through providing advices to those concerned within the advertising sector. This advice can either be nonbinding, for instance on a certain campaign; or it can be a general one, on the interpretation of rules, for instance. The general types of advices are also helpful for problematic issues, in showing the best implementation in addition to the rules, and for guidance notes that are to be distributed to the public. But it is

also crucial that these guidance notes should be updated as well, just like the rules.

e. *Receiving complaints and the administration of the system:* The extent to which the society comprehends the self-regulatory system depends on how effective the complaints are dealt with. A systematic monitoring system that is oriented toward specific product sectors or to problematic areas, covering the whole media, should be established. This monitoring system, allows the self-regulatory body to act ex officio, and to follow the level of compliance with the rules. All complaints that arrive from all sources should be taken up by an independent administrator and all should taken under investigation for the sake of encouragement. Furthermore, since the self-regulatory system is much faster when compared with the legal procedure, which is one of its main advantages, should also be reflected in the process of receiving complaints. When we look at the administrative substructure of the system, there should be a secretariat independent of the market, and the institution should gain the trust of the public through an administration that works according to specified service standards, with low expenses and in parallel to the principles of commercial life.

f. *Execution of the rules:* The self-regulatory system should demonstrate that it can resolve and decide on the disputes it receives in an effective, professional, and above all, in an impartial way. When a complaint cannot be resolved informally, there should be a hearing in front of a committee whose members are composed of public and market representatives (advertisers, advertising agents, and media) in equal numbers and where especially the chairman and all the members are independent. The processes of handling of the complaint, the evaluation of the committee and arriving at a decision should be conducted in a way that is independent from any formation, either from administrative bodies, non-governmental organizations or any other group. It is among the main principles of the self-regulatory system that, especially in relation to claims about deceptive information, it is the advertiser who has to prove in an

appropriate way the invalidity of the claims. In cases where the violation proved, the stipulated penalty should be implemented. Furthermore, there has to be an appeal procedure to the higher authority. This appeal office should be different than the committee which receives and deals with complaints. It is not necessary for this office to have as many members as the complaints committee.

g. *Effective sanctions:* Even though self-regulatory systems operate on the principle of voluntary compliance to the decisions, reliability depends on not having any limitations on the implementation of the decisions. The regular publication of decisions, with the whole details of complaints and with the name of the advertiser and the brand, is a very strong deterrent. In situations where the principle of voluntary implementation of the decisions does not yield results, making such a publication can be reinforcement. Yet, the most effective sanction method in resolving disputes in relation to incompatible advertisements is the refusal of the media. In other words, all types of media channels should make a commitment to implement the decisions of the self-regulatory body, and should include this to all types of advertising contract that it is a party of, showing that such decisions are binding for both parties of the contract through a responsibility provision, and thus become a police of the media system.

h. *Control of the self-regulatory system:* A periodical auditing of the self-regulatory system should be performed. This control should be executed by a group that is composed of public representatives, which ensures its reliability, and the resulting report should be widely distributed and announced.

i. *Education:* The actors of the market should be trained and informed on standards, recent researches, and latest decisions. The society should be informed, through the public exposure of disciplinary sanctions in the media, by taking into account the complaints of the concern during dealing with the cases, and by providing full information to those concerned during these operations and declaring the decisions in full and in writing.

j. *Raising awareness in the society:* Both the rules and the complaint procedure should be widely announced to the members of the market, administrative bodies, and to the public. The consumers should become aware of where and how they can appeal, and the market actors should know about the rules and procedures. For instance, member organizations should support by distributing pamphlets on the rules and details about the self-regulatory system.

In order to comprehend the features of the self-regulatory system, it will be useful to analyze its advantages and disadvantages as a list of items, including comparisons with the administrative control system. The following is a self-regulatory system that is established correctly, provided as a general template;[242]

- It is much more rapid, efficient and cost-effective in comparison to ponderous and slow judicial and administrative procedures, because it has more information about the advertising sector and profile, and because it is financially supported by the advertising industry.
- Since it has closer relationship with the market, it has the flexibility of making faster revisions on its rules and regulations than judicial and administrative procedures.
- Without requiring damages being incurred on the consumer or competitor, it imposes the burden of proof on the advertiser who is the subject of the claim, contrary to the judicial or administrative procedures. The reasoning behind this is that the accuracy and honesty of the advertising is to the benefit of the public, and perhaps much more to the benefit of the advertising industry.
- It provides a safety and defense against the possibility of making excessive legal regulations that restrict the freedom of expression and communication.

[242] World Trade Organization (1998), p. 6; European Advertising Standards Alliance (2003), p. 6; İNAL (2000) p. 93-94; European Advertising Standards Alliance: **International Guide to Developing a Self-Regulatory Organisation**, 2009, p. 4-5; GRAHAM, Christopher: *Does Self-Regulation Live Up to the Claim?*, **Consumer Policy Review**, 2008, Vol. 18, No: 1, p. 13; HARKER / CASSIM (2002), p. 3.

- It is not an alternative system which nullifies administrative and judicial regulations, but a complementary system. Self-regulatory system can only work efficiently within the general framework of legal regulations. It is possible to describe the relation between legal regulations and self-regulatory system with the beautiful analogy of the relationship between the frame of a tennis racket and its strings.
- Since it is established voluntarily by the sector, its mechanism and conformity to the rules are at the highest level. Since those who take part within the system also comprises of market actors, the decisions taken by the institutions of this system are much more easily accepted.
- In settling disputes, the methods of bringing parties together, convincing or suggestions are mostly used; whereas in judicial and administrative procedures, the disputes can intensify, and may have the aim of punishing the wrongful party.
- The media too plays a participatory and instrumental role within the self-regulatory system with its own ethic rules which it has formed one its own. In this respect, it supports by implementing the decisions of self-regulatory institutions, and performs a very serious sanction by not emitting the advertisements that were the subjects of complaints.
- The adaption of the market to the system is increasingly followed closely. Even though judicial and administrative regulatory procedures also inspect the compliance of the market, but this is much more difficult because of the limited resources.
- Public announcements about practices and practitioners of incompatible advertisements are at the high level. However, with the control through judicial and administrative means, only those issues that reflected to media are reflected to the public.

Along with all these advantageous aspects of self-regulatory system, there are also the following disadvantages.[243]

- Most of the times, self-regulatory system does not have the capacities of investigation and reasoning that are available to judicial and administrative control systems. It can remain incapable of implementing sanctions of fines, compensation or advertising correction.
- As well known, not knowing the law is not an excuse; hence, the public is assumed to know all the rules of law. However, regulations within a self-regulatory system may not be known.
- While there is a general conviction that there would be a fair and unimpaired proceeding within the judicial and administrative control procedures, since the market representatives or consumer organizations and governmental representatives within the self-regulatory system are chosen by the self-regulatory body, there may cause the view in the public that this compromises its impartiality.
- The number of complaints received through the judicial and administrative procedures can be more than those received through self-regulatory mechanisms.
- While the judicial and administrative control procedures can be used to impose on those who avoid implementing their decisions, the self-regulatory mechanism most of the time cannot make such impositions as it is based on voluntariness; it remains ineffective against the mischievous children of the industry who repeatedly violate the rules.
- When the self-regulatory system introduces restrictions for the benefit of unions and associations within the sector, this can lead to circumstances that weaken competition and innovation.
- It is claimed that self-regulation is bringing low standards in order to increase participation across the sector and prevent segmentation, yet it creates an

[243] World Trade Organization (1998), p. 6; European Advertising Standards Alliance (2003), p. 6; İNAL (2000) p. 94.

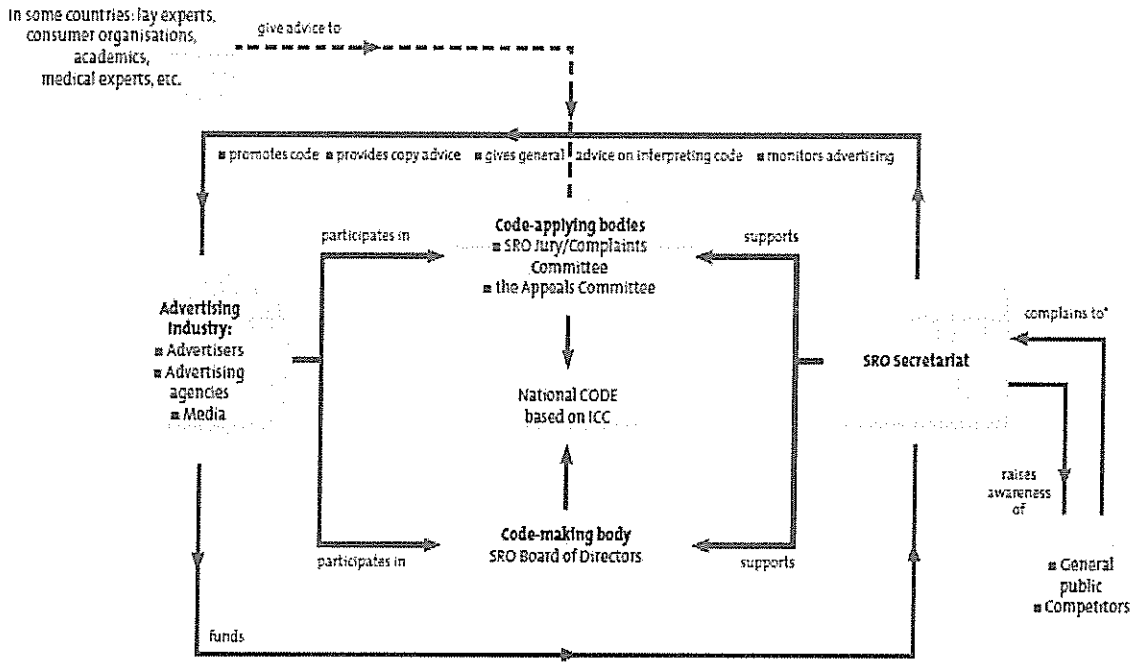
impression that it fulfills its own functions even though the standards are low, and an impression that there is no need for judicial or administrative control.

Lastly, it will be helpful to take up a correctly established self-regulatory system and its functional diagram. It is remarked that the self-regulatory system, which is provided as the best implemented example, has three main pillars.[244] These are:

- *Constituting a regulatory body:* This body is responsible for creating the rules and amending them according to the current developments. This regulatory body constitutes the building block of advertising industry. That is to say, all the market actors are going to be bound with these rules in accordance to the principle of voluntariness.
- *Constituting an executive body:* This organ generally takes the title of Complaints Committee/Jury, and makes decisions on the interpretation of the rules, adapting the rules to the concrete case and taking the proper action. Most of the time, the chairman and most of the members are independent from the market (they are either academicians, professionals from the medical field, or members of consumer organizations). The process of appeals that we mentioned above has to be formed within this pillar.
- *Constituting the secretariat:* For the functioning of the self-regulatory institution, a professional team has to be formed to conduct the daily administrative tasks (such as organizing meetings, preparing draft documents, taking the minutes, conducting preliminary examination of received complaints, conveying decisions to those concerned, announcing committee decisions to the public, and other administrative tasks that are not limited to these, including monitoring advertisements). The secretariat is generally managed by an administrator who is generally serving as the general secretary of the regulatory and executive bodies.

[244] European Advertising Standards Alliance (2003), p. 8; European Advertising Standards Alliance (2009), p. 8-11.

The diagram below shows the functioning of a self-regulatory system that is formed according to the template above:[245]



1.4.2 Common Control and Ombudsmanship as the Models of Self-regulatory Systems:

It will be helpful to mention common control and the ombudsman institution, and their functioning, in their connection with the self-regulatory system and with respect to their common points.

1.4.2.1 Common Control

Common control is defined as a system in which the regulations of traditional public bodies take place along side with self-regulatory elements. It is a model in which self-regulation is merged with judicial and administrative control, and the coordination of their operations and the implementation of the stipulated provisions are controlled by an

[245] European Advertising Standards Alliance (2009), p. 10.

independent board. This concept emerged toward the end of 1990s and it implies a system in which public regulatory and self-regulatory institutions take part together in order to reach the targets determined by the public authority, most fundamentally for the public good. The period when it emerged, in terms of conjuncture, shows parallelism with the concept of 'governance' (cooperation in governing among those who govern and those who are governed, more particularly between the government and the non-governmental organizations, interest groups, public, and individuals), brought by globalization to public administration. This mode of cooperation that allows the joining of forces of judicial and administrative control and self-regulatory forces also provides the chances of avoiding unfavorable aspects that can be caused by these systems. While the purpose of regulation, monitoring and sanctions are performed by judicial and administrative regulatory bodies, the self-regulatory institutions contribute at the stage of specifying principles. Public bodies' regulations provide the basis for the common control regulations that aim at realizing public objectives, within this framework, the targets are monitored by the state as much as necessary. Common control is a much debated issue and not clearly distinguishable from the self-regulatory system, and it is most distinctly applied in the fields that are based on technology, fields which are rapidly evolving and require expertise. In this respect, advertising practices are considered as an area where common control is applicable in the field of media. That this model is open to the contribution of all its parties, being with the broad participation and reconciliatory, and hence implementable more flexibly and rapidly are considered as its favorable aspects; while the possibility that the classical legal control will lose its force in time and control become more closer to ethical principles and thereby the procedures and principles will be replaced by dense ethical principles is stated as an unfavorable aspect. Another disadvantage that is expressed is that there will not be a sanction that can be implemented directly or at least indirectly by the public authorities when the rules are not complied with in the case of common control, the market actors will not be completely free in their decision to participate to the system, and when the public authorities increase their interference, the principle of voluntariness will be less visible. At this point, the discussions on the solution to the problem bring about the question of how common

control practices can be distanced from the effect of public authorities, and to what extent they can maintain a level of autonomy.[246]

1.4.2.2 Ombudsmanship

Ombudsman is used in Swedish in the sense of 'a representative who protects the rights of the citizens' and is widely adopted in other languages as the 'mediator' who investigates complaints of citizens. The ombudsmanship mechanism carries the function of auditing in the various areas of administration. Ombudsmanship in the field of media is represented with the audience and reader representative mechanism in our country. Audience and reader representatives have the task of assessing complaints they received on publications or broadcasts, and convey these to those concerned. These assessments are made within the framework of media ethics and the opinions that emerge as a result, serve the function of control for the media organization as the warnings have a of a directing feature. Ombudsmanship is considered as an important practice with respect to preserving press freedom within the field of media. More clearly, through the policies that are designated in line with the demands and complaints of audiences and readers, the media organization can lessen the pressure of control over itself and since unfavorable issues are prevented there is less need for a higher control mechanism. Ombudsman practice first emerged in Sweden, it spread to the Scandinavian countries and later began to be used in USA. In this context, ombudsmanship mechanism has two types of practices that are called Swedish Model and the American Model. Within the Swedish Model, the independently chosen ombudsman performs control over the media organizations within the country through a secretariat that is subsidiary to him/her. Within the American Model, however, there is a control over particular media organization that is performed by a person that is chosen from that organization, based on the trusted experience, opinions and impartiality of that person. Yet, the fact that the representative still works under the roof of the media organization, social relations within that organization are the factors that make impartiality of control more difficult. On the other hand, some other disadvantageous aspects of ombudsmanship is that it is more costly system for the

[246] AVŞAR / DEMİR (2005), p. 90-91; KARADAĞ (2012), p. 54-57; DURMUŞ (2011), p. 48-53; http://www.oecd.org/gov/regulatory-policy/42245468.pdf (26.11.2014).

ombudsmen to be impartial, that the system brings about more bureaucracy, and it creates yet another obstacle for the audience or readers to reach those concerned.[247]

2. Control of Advertising Practices in the European Union

In this section, we will examine provisions that relate to control, which take place in the regulations we analyzed above[248] in detail in relation to advertising practices in the EU, the institutions that function at the level of the union, their works, and the form and level of including these provisions and works in the local legislations by those member states that are remarkable.

2.1 Control under Regulations on Advertising Practices within the European Union

It will be adequate to begin this section by examining the legislation, which we have analyzed by classifying into regulations that are on general principles, media and products in relation to advertising practices, on provisions of control.

When we analyze the regulations that settle the main principles on advertising practices, namely the Council Directive 84/450/EEC Relating to the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Misleading Advertising, we observe that it introduces the right to make complaints to entities such as consumers and consumer organizations, and it brings the obligation to member states of regulating the judicial and administrative control structuring. On the structuring of judicial and administrative control, it stipulates that the authority of the concerned bodies to prohibit or suspend should be recognized, any decision that is taken in accordance with this authority should not be contingent upon the fault of the advertiser or whether a damage incurred as a result, and authorization should be made that allows

[247] KARADAĞ (2012), p. 50-52; MAURUS, Veronique: *Ombudsman*, **Medya Öz Denetimi Rehber Kitabı**, 2008, p. 68-80;
http://www.tgc.org.tr/ybs/25-18.htm (26.11.2014).
[248] Please see, p. 38 and the following pages.

the courts to demand corrective announcement in order to undone the deceptive impression created or demand the dissemination of the decision. It also stipulates the issues such as the impartiality of the administrative control body that is going to be structured, making decisions on received complaints, being compelling on monitoring and implementation of the decision and that the decisions that would be taken under normal circumstances should be reasoned (also the requirement that in cases in which this administrative control institution is exclusively authorized, it should always provide reasoned decision). Lastly, it also covers the voluntary controls that will be done by self-regulatory institutions. It is stated that these institutions should not be exempted, and those persons who are allowed to appeal to the administrative and judicial control bodies within the scope of other provisions, are able to make appeal in addition to those made to administrative and judicial regulatory bodiess.[249]

On the control that will take place within the regulations on comparative advertising in the member states, the Directive 97/55/EC amending the Directive 84/450/EEC concerning misleading advertising so as to include comparative advertising states that the mentioned provisions of the amended Directive 84/450/EEC will be valid. The introduction part of this new directive expresses issues such as the encouragement of controls that will be done voluntarily by self-regulatory bodies, the maintaining of coordination between local self-regulatory bodies through forming unions or organizations, and in this way the capability to intervene cross border complaints beside the local ones. Furthermore, it decrees in accordance with the provision that takes place in the directive that a study should be conducted assessing the means to handle effectively these types of cross border complaints, and a report should be prepared and presented to the authorized body of the union.[250]

The main purpose of the Directive 2005/29/EC The Unfair Commercial Practices Directive is to harmonize national regulations on unfair commercial practices;

[249] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31984L0450:EN:HTML (26.11.2014).
[250] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31997L0055:EN:HTML (26.11.2014).

yet, there are references to advertising practices in the section on main purposes and in the articles. We observe that this directive is also introduces the obligation of member states to regulate the structuring of proper judicial and administrative control, in the same way as the articles we analyzed above of the Directive 84/450/EEC.[251]

The Directive 2006/114/EC Concerning Misleading and Comparative Advertising is a codified document bringing together all the previous regulations issued on the topic. In this respect, either the articles on control, judicial and administrative regulatory mechanisms, or self-regulatory mechanism within the articles follow the provisions that were included in the Directive 97/55/EC amending the Directive 84/450/EEC.[252]

The regulations on the media in which the advertising practices will be published, which we will analyze now, is the regulation on the audiovisual services that cross borders through certain technologies; the Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in member states concerning the provision of audiovisual media services (Audiovisual Media Services Directive), and the Directives 97/36/EC and 2007/65/EC which amend this one. The directive decrees that member states shall ensure all audiovisual media services that are disseminated through media service providers within their judicial district are complying with the applicable principles of the legal system of that country. A provision that is remarkable on the control mechanism is the one which emphasizes the need for the member states to support common and self-regulatory mechanisms in the areas that are covered by this directive, as much as the local legislation of the member state allows.[253] The Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of

[251] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:149:0022:0039:en:PDF (26.11.2014).
[252] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:376:0021:0027:EN:PDF (26.11.2014).
[253] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1989L0552:20071219:EN:PDF (26.11.2014).

audiovisual media services codifies the Directive 89/552/EEC and all the amendments to it, and it has the same provisions on the topic of control. In addition to this, the explanation in the introduction section states that the common and self-regulatory mechanisms which members states apply according to their different legal traditions play an important role in maintaining a high level of consumer protection, and remarks that the measures that aim at reaching the targets of public interest in this sector will become more effective if the active support of the service providers are attained. Furthermore, it states that even through effective self-regulatory systems are complementary to the judicial and administrative control mechanisms that are in force, they do not constitute a substitute to the obligations of the national legislator; that common control creates a minimum legal bond between self-regulation and national legislator. It is also remarked that the use of self-regulatory and common control are encouraged, without aiming at making these types of systems obligatory, or at harming the current attempts.[254]

The regulations on particular products that take place in advertisement practices which have a provision on control are the Directive 92/28/EEC and Directive 2001/83/EC on the advertising of medicinal products for human use and the Directive 97/7/EC on the protection of consumers in respect of distance contracts. The Directive 92/28/EEC and Directive 2001/83/EC on the advertising of medicinal products for human use includes parallel articles with the regulations that are within the scope of general provisions both on judicial and administrative control and on the self-regulatory mechanism. What is peculiar to this regulation is monitoring system that it introduces. According to this system, the owner of the marketing permit is under the obligation of establishing a scientific service which is responsible for information on products that are included in his/her enterprise. Furthermore, the regulation stipulates that member states should create a proper and effective method of monitoring or tracking medicinal products; this method can be subject to preinspection, and it is stipulated that the right to file a complaint or

[254] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:095:0001:0024:EN:PDF (26.11.2014).

lawsuit against persons or organizations that benefit from the prohibition of a product in accordance with the local legislation.[255]

2.2 Control on Advertising Practices within the Scope of the European Union Institutions

As we have observed in relation to the provisions on control, after making some determinations on judicial and administrative control mechanisms, almost all the regulations emphasize voluntary regulation and have supportive provisions on self-regulatory systems. In this respect, it will be adequate to examine the developments of self-regulatory mechanisms across the institutions of the EU and the organizations at the level of the union.

2.2.1 General:

When we analyze the evolution of the EU legislation on the topic, we observe that the approach to self-regulation began to change in the mid 1980s. During this period, the stagnation within the internal market, local restrictive tendencies and criticism made to the structure of the EU legislation both in its qualitative and quantitative aspects caused the EU to reassess its task of making regulations. This situation has allowed the EU to make less but more effective regulations through 1990s, and to yield towards more diversified governance mechanisms. The reflection of this situation to the EU legislation, to new regulations has been the responsibility it imposed on local authorities and been channeling toward lifting restrictions and toward self-regulation at the level of the EU.[256]

Self-regulation within the EU has improved out the legal frame that has been accepted for a long time. Since self-regulation and common control is in dispute and as it has not been settled with rules within the EU legislation created an uncertain 'grey' area;

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[255] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:311:0067:0128:en:PDF (26.11.2014).

[256] SENDEN, Linda: *Soft Law, Self-Regulation and Co-Regulation in European Law: Where Do They Meet?*, **Electronic Journal of Comparative Law**, Vol. 9.1, 2005, p. 4-5.

it failed to develop at the level of the union. Maastricht Treaty signed in 1992 has taken the first step in fixing this situation by putting forward the frame and impact of the European social dialogue among the parties in accordance with their contractual liabilities. About ten years after this move, the Commission of the European Communities issued a White Paper on the European Governance[257] in 2001, which was followed by many documents and advices, began to put forth the general principles for advancing these fields. In this particular White Paper, the situation is described as; '... legislation is often only part of a broader solution combining formal rules with other non-binding tools such as recommendations, guidelines, or even self-regulation within a commonly agreed framework.'[258]

The key point of these developments has been the Interinstitutional Agreement on Better Law-Making[259] that was made by European Parliament, Council of the EU, and the European Commission in 2003. With this agreement, the framework of self-regulation and common control is established for the first time in a single market, and the institutions of the EU has become included in the establishment of a self-regulatory system, in assessing the problem of adapting it to the legal framework of the union. The basic points of the agreement is interinstitutional coordination and transparency, common definitions, increasing the use of the impact assessment of the decision making mechanisms of the EU, getting guarantees on the time limitation of adapting the directives within the internal law. On the topic of self-regulation and common control, a further step was taken after the White Paper of 2001, and alongside making a common definition, the outlines of a legal framework that can be used were determined as well. Self-regulation has been defined as a possibility for economic enterprises, social partners, non-governmental organizations to accept common guiding provisions (especially implementation principles or sectoral agreements) at the level of EU, directly for themselves and among themselves. Common control is defined as the mechanism

[257] http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52001DC0428&rid=2 (26.11.2014).
[258] European Economic and Social Committee: **The Current State of Co-Regulation and Self-Regulation in the Single Market**, 2005, p. 10; SENDEN (2005), p. 3; KONZENDORF, Götz / WORDELMANN, Peter / BÖLCK, Susanne / VEIT, Sylvia: **Milestones on the Way to Better Regulation at the EU Level**, 2005, p. 19-77.
[259] http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32003Q1231(01) (26.11.2014).

provided by the legal regulation of the union for the commercial parties (economic enterprises, social partners, non-governmental organizations and institutions) to reach the targets that are defined to them by the legislator.[260]

After examining in general the place of self-regulatory mechanism within the legislation, when we take into account the self-regulatory mechanisms on advertising practices in the EU, we realize that the principles were began to be shaped almost a century ago. A striking issue on this topic is that, even though the local legislations have differences, even though the structure and procedures vary, there is a similarity in the basic principles, and the main purpose of the system which is to protect the consumer at a high standard on the basis of having legal, accurate and honest advertising. The main reason why Europe does not have a self-regulation legislation is that since advertising regulations reflect the local cultural, commercial and legal differences, and responds to local trends and sensitivities, they are functioning better at the local level. However in addition to this, it is also stated that all local self-regulatory norms are based on the provisions of the ICC, and the differences among them are much less serious than the differences between local codes that effect advertising practices.[261]

2.2.2 European Advertising Standards Alliance:

The first step in forming a body in the field of self-regulation on advertising practices at the level of the EU was taken after the statements of Leon Brittan, the Commissioner for competition policy at the European Commission in 1991. Brittan made statements that encouraged a market in which the problems are resolved through the means of self-regulation, which was already established and functions well in some of the member states, avoiding the need for detailed legislation which was firmly opposed by

[260] European Economic and Social Committee (2005), p. 12, 16; SENDEN (2005), p. 11; KONZENDORF / WORDELMANN / BÖLCK / VEIT, Sylvia (2005), p. 19-77; COMMISSION OF THE EUROPEAN COMMUNITIES: **Communication from the Commission to the Council and the European Parliament – Better Regulation for Growth and Jobs in the EU**, COM(2005), p. 15.

[261] Moscow Media Law and Policy Center (2005), p. 19; European Economic and Social Committee (2003), p. 16.

the advertising market. Following this, the members of the advertising market in Europe agreed on establishing an official and independent body which would be constituted of local self-regulatory bodies of the member states, which were already convening unofficially. They founded the European Advertising Standards Alliance (EASA) in 1992. The main purposes of the alliance is to become the single competent voice of advertising self-regulation, to improve responsible advertising through the best practice of self-regulation within the common market both for the benefit of the consumer and of the trader and to prove the effectiveness of making regulations on advertising practices without settling detailed rules within a legal framework. The first action of the alliance, which was established as a settlement body for cross border complaints, was to build a system in order to resolve these complaints. Cross border complaint takes place when a consumer place a complaint about an advertising practice in a country, but the source of the media of the advertisement that is the subject of complaint is another country. In this case, the self-regulatory body within country of the complainant has no right to control the media that is in the other country. The alliance steps in at this point, and the complaint is passing on the self-regulatory body where the media is located, and this body deals with the issue in accordance with its own codes. The system functions on the basis of source country, but those members whose local legislations make it favorable, they apply the principle of 'common recognition'. According to this principle, the members recognize the advertising practices that are complying with the self-regulatory norms of the other country (even though these norms are not exactly the same as their own) under suitable conditions. The alliance associates these norms with the advertising industry through the network it provides to the self-regulatory bodies. In other words, the self-regulatory systems of the countries become a part of a much wider framework. Moreover, the alliance also encourages the forming of common principles, supporting the best practice principle, monitoring the developments in the local systems, monitoring the compliances and not just waiting for receiving complaints. The view of the EU institutions on these works of the alliance can be observed in the words of David Byrne, the Commissioner of the EU: '... it is a good example to what extent self-regulation can be effective when we have the aim of finding a solution ...' and in the words of Leon

Brittain: 'the works of EASA has diminished the need for the interference of the legislator'.[262]

It will be useful to complete this section by looking at the latests works of the EASA. In 2002, the alliance was restructured as a partnership between local self-regulatory bodies, the advertisers which are the representatives of the European advertising industry, advertising agencies and the media, in order to include the whole advertising industry. After this, the alliance and its members began to draft the best implementation advices on many issues in a wide range, from establishing rules, to the issues on referencing in financing system. In 2004, Self-Regulatory Charter[263] was signed in the presence of representatives of the European Commission at the Self-Regulatory Summit, with the participation of all the sectors of the advertising industry. In 2009, ten additional commitments were accepted. The charter was building on the base, EASA Statement of Common Principles and Operating Standards of Best Practice, and EASA's Best Practice Self-Regulatory Model.[264] The main points are to increase the ethical and financial support of self-regulatory systems in Europe, focusing on solid provisions that will reflect the developments in the market and society, and to prioritize the best practice advices which are questioned by self-regulatory authorities. An important point that we need to mention here is that the purpose is not to create a type of self-regulation that will meet all the conditions, but to create a common reference point for all the systems that have different social and legal substructure. In the following period, the alliance created the 'Get-Fit Programme' and allocated its resources in order to improve the current self-regulatory systems within member and candidate states, and to establish new systems, through promoting the best practice. In this respect, in parallel to the principles explained in detail above[265], the criteria of an effective and reliable advertising self-regulatory system in the EU are; to include all market actors (advertiser, agency, and media); to be

[262] Moscow Media Law and Policy Center (2005), p. 19-20; European Advertising Standards Alliance: **Advertising Standards in Europe**, 2005, p. 1; GRAHAM, Christopher: Advertising Self-Regulation, Brand Strategy, December/January 2004; European Advertising Standards Alliance (2003), p. 17; http://www.easa-alliance.org/About-EASA/History/page.aspx/117 (26.11.2014); http://europa.eu/rapid/press-release_SPEECH-91-76_en.htm (26.11.2014).
[263] http://www.easa-alliance.org/page.aspx/237 (26.11.2014).
[264] http://www.easa-alliance.org/page.aspx/237 (26.11.2014).
[265] Please see p. 105 and following.

implemented in all member states and across borders; to be in touch with the representatives of the public authorities and consumers when specifying market rules; to assure rapid adjustment to changes; to work together with concerned institutions within the scope of legal framework; to ensure recognition by consumers and competitors; to win the public trust at a reasonable level; to be financially supported, at a reasonable level, by the market in order to accomplish its objectives.[266]

2.3 Control on Advertising Practices in the Member States of the European Union

On this topic, we have analyzed above Germany and Britain as two striking examples, and the case of Denmark as a regional example.[267] In this section, we will group assessments on the other member states and examine these comprehensively, and will analyze remarkable practices, if there are any, as examples.

As we explained above, self-regulatory systems emerged in various models according to local legal traditions and cultures, and were shaped as a result of the need to reflect these to the local legislation. In this respect, advertising self-regulation has resulted in different types and approaches in the EU. The relationship between self-regulation and national legal regulations show great national diversities among the member states of the EU. In controlling advertising, the current situation is divided into two:[268]

i. The national legislation has direct influence on the self-regulatory system. The local legislation determines the operation rules of self-regulatory bodies in all member states. Yet, in countries like Denmark, Finland and Sweden, the ombudsman institution is dominant; and in countries like Germany and Austria, the legal legislation is so comprehensive that the field of self-regulation is very

[266] SENDEN (2005), p. 2; European Advertising Standards Alliance (2005), p. 1-2; European Advertising Standards Alliance (2003), p. 16-17;
http://www.easa-alliance.org/About-EASA/History/page.aspx/117 (26.11.2014);
http://www.easa-alliance.org/page.aspx/237 (26.11.2014).
[267] Please see, p. 20, and the following
[268] Health and Consumer Protection Directorate General: **Self-Regulation in the EU Advertising Sector (a report on some discussion among interested parties)**, 2006, p. 15; PETTY (1997), p. 3; MATTELART (1994), p. 92-94.

limited. On the other hand, France, Ireland, Spain, Italy, Belgium, Netherland and Britain are the countries where self-regulation plays a more significant role. For instance, in Italy, the courts approach with suspicion towards consumers' claims of misleading advertisement, the self-regulation generally resolves about 4/5 of the complaints, and the rest are reaching judicial bodies.

ii. The form and intensity of using legal instruments vary among the countries. Some countries are more competent in using such instruments that are related to systems such as self-regulation and hence can more easily integrate the use of self-regulation with typical legal regulations. The need to reflect cultural norms emerges especially in relation to the content of advertising practices. Historically, all these differences are adapted at the local level and due to such reason, self-regulatory systems developed at the local level rather than at the level of the EU.

With respect to their relation to the local legal systems, it is stated that there are three basic advertising self-regulatory systems that function in Europe:[269]

i. *Self-regulation that has a strong legal framework:* We can list two groups under this model. The first one is seen in Ireland, Netherland, Spain, Italy and Britain, and it is a model where legislation allows for self-regulation in a wide scope. Self-regulation in these countries is at a high level, and comprises a wide area of responsibility.[270] In order to portray the situation in Britain through a court decision indicating that the decisions of the Advertising Standards Authority (ASA) can only be reviewed through legal means, since the services it provides have the function of public law. In the case of Netherland the subject matter is regulated through a clear and detailed association between legal system and advertising self-regulatory system. This results in clearly defined responsibilities and development of detailed self-regulation rules. In this system, even though participation to the self-regulatory system is based on the principle of voluntariness, the related legal regulations make it a requirement to participate in

[269] Health and Consumer Protection Directorate General (2006), p. 15-17; PETTY (1997), p. 3.
[270] For a detailed analysis of the case of Britain, please see p. 24 and following.

this system, both for the public and private broadcasters, in case they would like to advertize. Furthermore, in Netherland, just like in Britain, the decisions of the self-regulatory body can be cancelled through legal ways. In the opposite example of Spain, the significant overlaps and conflict between the roles of national legislation, regional regulations, national and regional legal authorities, judicial bodies, and self-regulatory bodies bring about ambiguity, and conflicts between judicial bodies and self-regulatory systems from time to time. The second subgroup is the effective system in which advertising practices are subject to comprehensive legal regulations, and yet the self-regulatory regulation is playing a complementary role. The French system, which is one of the oldest one in Europe, is the best example of this type. It is also remarked that Belgium, France and Luxembourg are making regulations that are close to attaining a balance between appeals to self-regulation and administrative regulations and in filing a lawsuit.

ii. *Self-regulation that is restricted with legal regulations:* In this second type of self-regulation model, national legislation only allows self-regulation to be practices in a restricted area. There are two subgroups in this model. The first one is the model in countries such as Germany and Austria, in which advertising practices are covered under Unfair Competition Code and their content, are under tight and detailed legal regulation and control. The generally followed method is to file a lawsuit in authorized judicial bodies on advertising practices by competitors or consumer organizations. The second one is the model that takes place in Scandinavian countries such as Denmark, Finland and Sweden, in which Market Court, Consumer Ombudsman or other legal bodies are authorized in relation to the responsibility of regulating the market and protecting consumers.

iii. *Developing self-regulatory systems:* The last model is found in the group of countries that recently joined the EU from east and middle of Europe. The self-regulatory systems in Poland, the Czech Republic, Hungary, Slovakia and Slovenia are still in the process of forming and specifying the type and level of the relationship with consumers, as much as with legal authorities, and they need continuing support and guidance.

Lastly, it will be helpful to share the basic aspects reached by the self-regulatory systems in the member states of the EU by 2011, which is the last updated report, within the framework of best practice model that the EASA formed with the regulation in 2004:[271]

Develeopment of the Self-Regulatory Systems of the EU Member States

	2005	2011	Katılım
Countries with advertising codes	21	25	4
SROs* in existence	20	23	3
SROs providing copy advice	16	22	6
SROs engaged in own-initiative monitoring	6	12	6
SROs handling consumer complaints free of charge	20	23	3
SROs with an online complaints facility	10	21	11
SROs that publish jury adjudications	16	21	5
SROs that have an appeals procedure in place	13	19	6
SROs that consult external stakeholders when drafting / updating a code	9	19	10
SROs with an independent element in their jury	11	21	10
SROs that promote their services	7	19	12
SROs with a website	19	23	4

* SRO: Self-Regulatory Organization

3. Regulations regarding Control of the Advertising Practices in Turkey

We have listed four basic methods in controlling and combatting advertising practices that are incompatible with legal regulations. Three of these are used in Turkish law:

- civil lawsuits,
- administrative control,

[271] European Advertising Standards Alliance: **EASA Charter Validation Progress Report 2005-2011**, 2011, p. 15-16.

- self-regulation.

3.1 Civil Lawsuits

3.1.1 General:

According to our law, in relation to advertising practices, a lawsuit can be filed within the scopes of Law on Consumer Protection, Code of Obligations and Commercial Code. Within the scopes of the Law on Consumer Protection and Code of Obligations, cancellation of the agreement, return of the product, change of the product and similar demands can be claimed. Within the scope of Turkish Commercial Code, a lawsuit can be filed basing on unfair competition. Furthermore, during the production of the advertisement, many issues can emerge, as we discussed above[272], such as on the presence of the work, ownership of the work or the rights about the work, and natural or legal persons can be hold liable within the scope of the Law on Intellectual and Artistic Works. Intellectual Property Law is described as a more efficient type of protection, and the reason for this is stated to be the presence of punitive outcomes.[273]

Within this scope, we will analyze regulations on incompliance with debt with reference to culpa in contrahendo, deception and warranty against defects and unfair competition, among the legal reasons of civil cases and the cases matter within the scope of the Law on Intellectual and Artistic Works are going to be briefly mentioned in terms of their subject.

3.1.2 Deception:

Deception is covered in the art. 28 of the old Code of Obligations No. 818 as one of the causes that failure of will, and the art. 36 of the new Code of Obligations No. 6098, was retitled as 'Deceit' and amended as follows: 'If either of the parties has placed a

[272] Please see, p. 82-83.
[273] DİŞBUDAK (2007), p. 89-90; ÜREY (2010), p. 86-88; İNAL (2000), p. 130; İNAL / BAYSAL (2008), p. 149-150.

contract as a result of the deception of the other, even if the deception is not essential, s/he shall not be bound by the contract. The party who has done a contract as a result of the deception of a third person, in case the other party was aware or was in a position to be aware of the deception while the contract was made, then s/he shall not be bound by the contract.'

When we evaluate advertising practices in accordance with the article, whose content remained the same even though it is linguistically simplified, the first clause of the mentioned article states that if one of the parties has led the other to the contract by intentionally deceiving him/her, then the contract is not binding for the deceived party, even when the deception is not essential. In this respect, a consumer who buys a product or service by being mistaken with the effect of a deceptive advertisement shall have the right to file a lawsuit within the scope of this article.[274] The act of deceiving can demonstrate itself through various forms such as claiming inaccurate qualities or concealing certain aspects.[275] At this point, the conditions that should have been met are: (i) one party should be made to fall into error by the other party, (ii) the act should be done intentionally, (iii) deception (deceit) should result in the making of the contract, (iv) the act should be done by the other party, or by the person who benefits from the making of the contract. Since the condition of intention that is required for an act of deception (deceit) to take place is very hard to prove, it is described as the greatest obstacle for the consumer to benefit from these provisions. Another point worth mentioning is that in advertising practices, exaggeration is not considered as deception, but any expression that is inaccurate, deceptive, or exceeds the limits of exaggeration on objective topics that might affect the consumer to buy the product are considered as such.[276]

The second clause of the same article covers the cases when deception is done by a third person, and it states as a rule that deception by a third person does not impact on the outcome of the contract. However, if the seller (other party) is aware or is

[274] OĞUZMAN / ÖZ (2006), p. 93; ÜREY (2010), p. 88; GÖLE (1983), p. 150.
[275] REİSOĞLU, Safa: **Borçlar Hukuku Genel Hükümler**, İstanbul - 2010, p. 119-120.
[276] OĞUZMAN / ÖZ (2006), p. 94-96; İNAL (2000), p. 138-139; ÜREY (2010), p. 91; DİŞBUDAK (2007), p. 92; GÖLE (1983), p. 150-151.

supposed to be aware of the deception that is done by the third person during the execution of the contract, the deceived party can apply to with these provisions. If this condition does not take place, then the validity of the contract is unaffected; yet, the deceived party can claim for compensation. When we evaluate this situation from the perspective of advertising practices, if the deceptive advertisement is done by someone other than the seller (producer or distributer), being able to bring up the issue of deception against the seller requires that the seller was aware of the deception. However, we should mention that the consumer reserves the rights that arise from unfair competition, defect or culpa in contrahendo, against the third person. If the advertiser and the seller is the same person, the advertising agency, the media organization are in the position of an auxiliary person, and their act of deception counts as the act of the seller.[277]

Deception (deceit) is one of the instances of failure of will, and it gives the deceived person the right to terminate the contract. In case of contracts signed due to deceptive advertising, the consumer has to use the right in one year after s/he has learned or understood that the statement used in the advertisement is not accurate. The deception (deceit) that has been effective in forming the contract and caused failure of will also has the feature of wrongful act. At this point, the consumer who was deceived as a result of a deceptive advertisement has the right to claim compensation for the damages that s/he incurred as a result of the contract signed. Within this scope, the consumer who had suffered damages as a result of deceptive statements can demand this mentioned damages from the advertiser within the framework of compensation demands that are related to wrongful acts. The consumer who had been subjected to deceit, even if s/he had not terminate the contract within one year, if s/he had not fulfilled his/her own act, s/he can

[277] ÜREY (2010), p. 90; İNAL (2000), p. 139-140.

avoid fulfillment by using the right of plea[278] against the demand of the seller for fulfillment.[279]

3.1.3 Culpa in Contrahendo:

As we provided detailed explanation in the related section above[280], the term 'culpa in contrahendo' means fault during the negotiations of a contract. In advertising practices, the advertiser who gets in touch with the consumer through the advertisement, is under the liability of keeping the other party away from damages, independent of the liability of the principal act, in other words, has the duty of care, in accordance with the rule of honesty (Turkish Civil Code Art. 2). More clearly, the advertiser, through the advertisement, is creating a special kind of trust in the consumer that s/he will not impair the interest that relates to the consumer's property or personal existence; s/he will behave truthfully and honestly to the consumer; and s/he will show special care to avoid him/her to get harm. Thus, if the advertiser does not fulfill the requirements of his/her duty of care in accordance with this trust, s/he acts contrary to this duty (art. 96 in the old Code of Obligations No. 818, art. 112 in the new Code of Obligations No. 6098). If one party causes damages to the other party by acting negligent in fulfilling these obligations, failing to explain what needs to be explained, giving inaccurate information, failing to show the required care, entering into a negotiation without the intention of forming a contract or by continuing the negotiation, that party will have to compensate the damages of the other party.[281] It is adequate to examine the base of the liability that emanates from such circumstance in accordance with the point of view accepted by the Supreme Court[282]. The Supreme Court opined that liability provisions due to breach of contract

[278] In accordance with the article 60 in the old Code of Obligations No. 818, and the article 72 in the new Code of Obligations No. 6098: 'Claim for damages is barred by time limit two years after the date when the injured learned about the injury and the obligant, and ten years after the act is committed in any case. Yet, if the compensation was incurred as a result of an punitive act that is stipulated for a longer time limit by the criminal law, than that is applied. If the injured has incurred debt as a result of wrongful act, even if the claim for damages for the wrongful act is barred by time limit, s/he can always avoid fulfilling this debt.'
[279] ÜREY (2010), p. 92-93; İNAL (2000), p. 140-141; DİŞBUDAK (2007), p. 93-94; GÖLE (1983), p. 150-151.
[280] Please see, p. 72.
[281] ÖZDEMİR, Hayrunnisa: *Aldatıcı Reklamlara Karşı Tüketicilerin Korunması*, **Ankara Üniversitesi Hukuk Fakültesi Dergisi**, 2004, p. 69.
[282] HGK, 01.12.2010, 13-593/623 (İBD 2011, C. LXXXV, S. 3, s.146).

shall be applied, mutatis mutandis, to such situation. The Supreme Court, with detailed assessment declared that contract provisions should be applied, mutatis mutandis, instead of provisions regarding torts and supported its opinion with the doctrine and foreign judgments, with regard to the liability that emanates from contract negotiations that it is different from the classical debt sources which are contracts, torts and unjust enrichment and comes out with the purpose to provide solution to certain situations that are not covered by those. The Supreme Court reached to a conclusion that 'culpa in contrehendo' liability is in question due to breach of duty of care and trust that arises from contract negotiations. In connection with such situation, the responsibility is subject to a time limit of ten years which is different from the time limit of torts. The liability of 'culpa in contrahendo' can arise whether or not a contract is executed between the consumer and the advertiser; because there is always a duty of care. It should also be mentioned that the burden of proof for the intention in deception we described above can be surpassed with 'culpa in contrahendo', and in the case of defect, which we will examine below, the consumer who misses the time limits can hold on to the responsibility of 'culpa in contrahendo'.[283]

3.1.4 Defect:

3.1.4.1 Code of Obligations

The provisions stipulated by the art. 194 in the old Code of Obligations No. 818 take place in the art. 219 of the new Code of Obligations No. 6098: 'The seller is liable for the goods' properties declared in any way to the purchaser, furthermore, liable for the material, legal or economic defects which is against quality or quantity effecting the quantity, which diminish or eliminate their value of usability and benefits that purchaser expect; even if the seller is not aware of the defects.'[284]

Warranty against defect is the seller's liability for the goods not having the qualities promised at the time of transference of loss, or not having the expected

[283] İNAL (2000), p. 142-143.
[284] http://www.ankarabarosu.org.tr/Siteler/2012yayin/2011sonrasikitap/6098son.pdf (26.11.2014).

characteristics in accordance with the principle of honesty.[285] When we make an assessment in relation to advertising practices, we observe that when the consumer incurs losses by buying a product as a result of believing in the related advertisement, s/he can benefit from the provisions of warranty against defect. In this context, the conditions for applying the liability of the seller are as follows: (i) The advertisement contains a notice about the quality of what is sold; the advertiser makes the claim that the goods or services that is the topic of the advertisement is distinctive in certain aspect with respect to other goods or services, and influences the value judgement of the consumer in this way. (ii) The advertisement is done by the seller; in cases in which the advertisement is done by the producer of the distributer, that is, by someone other than the seller from whom the consumer directly buys, the consumer, who incurs a loss by buying the advertised goods or services, cannot benefit from the provisions of warranty against defect. However, in cases where it is possible to consider the sale network of the producer as a whole, and as a result, the possibility of the consumer to file a lawsuit based on the provisions of warranty against defect within the scope of the contract signed with the sellers authorized by the advertiser in selling the goods, is acknowledged. (iii) Notice of quality should be effective in executing the contract; this is the condition that the advertisement is effective in the act of buying the concerned goods or services. (iv) The consumer has fulfilled the obligations that are imposed on him/her by law; according to the provisions on the subject (Art. 198 in the old Code of Obligations No. 818, and the Art. 223 in the new Code of Obligations No. 6098), these obligations are the examination of what has been sold, and noticing the seller about the presence of the claimed defects.[286]

When the above listed conditions are met, one of the optional rights that are recognized within the framework of the concerned articles (Art. 202 in the old Code of Obligations No. 818, and the Art. 227 in the new Code of Obligations No. 6098) can be used: (i) Terminate the contract by notifying that one is ready to return back what is sold. (ii) Keep what is sold while demanding a discount, proportional to the defect, on the sale price. (iii) If it is not excessively costly, demand the repair of what is sold free of charge,

[285] ARAL (2007), p. 110.
[286] DİŞBUDAK (2007), p. 97-100; GÖLE (1983), p. 151-152.

with the cost belonging to the seller. (iv) If there is a possibility, demand what is sold to be replaced with another one without defect. Also, according to the general provisions, the right to demand compensation is reserved. Yet, we need to add that, since the use of these rights depend on the above listed conditions; these provisions are not considered as effective provisions in protection against advertisements.[287]

3.1.4.2 Consumer Law

The subject matter is covered in the scope of Consumer Law by making a distinction as 'defective good' and 'defective service' in the art. 4 and 4/A in the old Law on Consumer Protection No. 4077, and the provision between art.s 8 and 16 in the new Law on Consumer Protection No. 6502.

Art. 8 of the new Law on Consumer Protection No. 6502 defines 'Defective Good' as; 'a good that is not in accordance with the contract due to incompliance with the sample or model that the parties agreed on, or non-possession of the characteristics that the good must objectively possess. Goods, (i) which do not have one or more of the characteristics showed on its packaging, its tag, its presentation or instruction book, its internet portal or in its commercials and publicities, (ii) which are not appropriate to the qualifications stated by its seller and to its technical organization, (iii) which contain material, legal or economic deficiencies and thus do not meet the intended purpose expected from an equivalent good, reduce the normal benefits expected by the consumer or destroy them, are also deemed to be defective.' Art. 13 defines 'Defective Services' as; 'the provision of a service that is not in accordance with the contract due to incompliance with the inception of the service, or non-possession of the characteristics the parties agreed that the service must objectively possess. Services which do not possess the characteristics described on their internet portal, or in its commercials and advertisements provided by the service supplier or services which contain material, legal or economic deficiencies reducing or destroying its value or the reasonable benefits expected by the consumer with respect to the purpose of utilization are also deemed to be defective.' As

[287] DİŞBUDAK (2007), p. 100-101; GÖLE (1983), p. 151.

clearly seen, both provisions deem goods/services which do not contain the properties advertised as defective.

A novelty introduced with the new law, which related to our topic, with respect to the rights of the consumer against defective goods/services is that defects which appear within 6 months of the date of delivery are deemed to have existed on the date of delivery. Furthermore, according to the new law, the consumer is able to use his/her rights without reporting the defect to the seller.[288] The optional rights of the consumer against defective goods/services are; (i) terminating the contract, (ii) requesting a discount on the sale price proportional to the defect and keep the defective good, (iii) requesting the sold good to be repaired at the seller's expense by bringing all repair costs to the seller if such costs are not excessive, (iv) if possible, requesting the purchased good to be exchanged for a non-defective good the re-performance of the service. Furthermore, the right of the consumer to claim compensation in accordance with the general provisions, in addition to one of these optional rights, is reserved.

3.1.5 Unfair Competition:

As we analyzed in detail above[289], the art. 55 and the following articles of the new Commercial Code No. 6102, and art. 57 and the following articles of the new Code of Obligations No. 6098, stipulates advertising against the law as one of the instances of unfair competition.

Pursuant to the preamble of the new law, the provisions in the art. 58 of the old Commercial Code No. 6762 on this topic are preserved with some amendment that do not touch on the essence in the provisions of the art. 56 of the new Commercial Code No. 6102.[290] Pursuant to the article, in case of unlawful advertisement which is an instance of

[288] www.gtb.gov.tr/ (26.11.2014).
[289] Please see, p. 37 and the following pages.
[290] http://www.tobb.org.tr/YayinMudurlugu/Documents/Kitaplar/turk_tic_kan_kitap_cilt_01.pdf (26.11.2014).

unfair competition, (i) detection of whether the act is unfair or not, (ii) prohibition of unfair competition, (iii) elimination of the situation occurred as a result of unfair competition, correction of the statements if the unfair competition has been arisen due to false or misleading statements, and destruction of the instruments and goods that have been effective for realizing the act of unfair competition, if it is inevitable for the prevention of violation, (iv) compensation of the losses and damages if there is fault, could be applied. Furthermore, it is possible to file a compensatory action for non-pecuniary damages against unfair competition acts. This action could be filed as per art. 58 of the new Code of Obligations No. 6098.

At this point, it will be useful to mention those who can file a lawsuit in case of unfair competition: (i) persons whose costumers, loans, professional reputation, commercial activities or other economic interests have suffered or is in danger of suffering as a result of unfair competition, (ii) customers whose economic interests have suffered or in danger of suffering can take legal action, except for demanding the destruction of the tools or goods, (iii) chambers of commerce and trade, chamber of artisans, stock exchange, other occupational or economic union which are authorized to protect the economic benefit of their members in accordance with their by-laws, non-governmental organizations that protect the economic benefits of consumers in accordance with their by-laws, and public agencies can take legal action of those described in art. 58/1 (a), (b), and (c).

Lastly, it will be adequate to identify the persons against whom legal action in unfair competition cases can be taken. Unfair competition lawsuits can be filed against: (i) The perpetrator who performed the unfair competition act; this can be the competitor, a third person, an advertising agency or media organization. (ii) If the unfair competition act is performed by one of the employees or personnel while they are fulfilling their own work, then the employer of the employee or personnel can be filed a lawsuit of those described in art. 56/1 (a), (b), and (c). At lawsuit for damages, provisions of the art. 66 of the new Code of Obligations No. 6098 are implemented. (iii) Pursuant to the art. 58 in

cases when the unfair competition act is performed through media, the lawsuits that are described in art. 56/1 (a), (b), and (c), can be filed against the owner of the writing or to those who made the announcement. Yet, it is also possible to file a lawsuit against persons that are specified in the other provisions of the article.

It is adequate to finalize this section by mentioning some samples from practice. The Supreme Court decided at one of its resolution that an advertisement's unjustly provision of advantage to an advertiser in the eye of consumer shall cause unfair competition[291]; at another decision, by indicating that advertiser's comparative and detracting advertisement regarding a registered product shall be relevant to prevention of unfair competition through deceptive – comparative advertising, the court decided that the dispute should be resolved against Commercial Court instead of Intellectual and Industrial Property Rights first instance courts[292]; at its another decision that approves the court of first instance, the court decided correction of statements in such a manner that it should not constitute unfair competition[293]; at another decision of approval, mentioning

[291] Under the 2013/5467 basis and 2014/12258 decision numbered file, the plaintiff alleged that, at the 'Atlas of locations where solely Turkcell have signal' named booklet which the defendant distributed with the magazines and publicized at advertisements on TV, s/he claimed that the competitive operators do not have signal at such locations; however, the plaintiff have signal at such locations, so accordingly the plaintiff shall become in a disadvantegeous and the defendant in an advantegous position in the eye of the consumers. The defendant claimed that s/he is only reflecting the real situation and there is no detraction against the plaintiff. The court of first instance decided that it is a deceptive advertisement causing unfair competition, an impression against other firms was given before the consumers and partially accepted the case; as the booklets were distributed with the magazines and there is no ongoing unfair competition, the court rejected the demands regarding prevention. The Supreme Court decided reversal of the resolution in favor of the plaintiff. http://www.sinerjimevzuat.com.tr/ (26.11.2014)

[292] Under the 2009/10459 basis and 2011/2949 decision numbered file, the plaintiff alleged that, the defendant used the image of 'Chicken that ovulates tariffs', which was registered by the plaintiff, among the crushed routines in accordance with the 'Crush the limits, choose the free world of Vodafone' slogan at the advertisements of the defendant; and the plaintiff requested detain of such advertisements that causes unfair competition and compensation in favor of itself. The defendant claimed that the chicken figure was not look alike the registered chicken character of the plaintiff and such figure is being used at several trademarks advertisements. The court of first instance decided that the dispute arose from usage of the trademark and so intellectual and industrial rights court of first instance should see the case. The Supreme Court disapproved the decision of nonjurisdiction basing on that the dispute is about the prevention of the unfair competition through deceptive – comparative advertising and has taken a decision of reversal in favor of the plaintiff. http://www.sinerjimevzuat.com.tr/ (26.11.2014)

[293] Under the 2005/11256 basis and 2007/2983 decision numbered file, the plaintiff has requested detection of usage of the components, used at its 'big white ball' advertisement of its Ariel product, at advertisements of the defendant's OMO product which were prepared on a later date, if such advertisements' cause confusion on consumers' choices, if the statements of the defendant are wrong, deceptive and offending with regard to the other producers' products and if cause unfair competition due to such reasons. The

25 years experience even the activities started on 1993 shall be wrong and deceptive advertising and cause unfair competition[294]; indirect comparison which is not deceptive shall not cause unfair competition[295]; moreover, at the decisions regarding unfair competition which were taken by the courts of first instance, as the presented products are the products which were submitted by different sectors, it can be seen from its decisions that the court precisely deliberates that the technical and academical accuracy of the statements used at the advertisement should be determined[296]. Under such resolutions the court also decided that slogans used by the newspapers, in case they are wrong and deceptive, could cause unfair competition[297]. Another remarkable point at the Supreme

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defendant claimed the accuracy of the content of the advertisement and that there is no unfair competition and requested the decision of reversal. The court of first instance decided correction of the statements at the advertisements in favor of the plaintiff which do not constitute any unfair competition. The Supreme Court approved the decision. http://www.sinerjimevzuat.com.tr/ (26.11.2014)

[294] Under the 2005/2643 basis and 2006/5139 decision numbered file, the plaintiff cargo company claimed that, even the defendant at the same sector is active till 12.07.1993, by mentioning its 25 years experience at its advertisements, the defendant tried to provide unfair advantage by wrong and deceptive information and the plaintiff requested prevention of the unfair competition and correction of the advertisements. The defendant alleged that the statements that it used at its advertisement campaign is the period that passed from the establishment date of the first company of the holding and it's not misleading the consumer. The court of first instance decided acceptance of the case with the reasons that the statements has wrong and deceptive advertisement feature and cause unfair competition. The Supreme Court evaluated finalization of the advertisement campaign shortly after filing of the lawsuit as adoption of the defendant's claim and approved the decision.
http://www.sinerjimevzuat.com.tr/ (26.11.2014)

[295] Under the 2008/1262 basis and 2009/11173 decision numbered file, it was decided that the statement 'The Most Beatiful Paint' is not a comparative advertisement that constitutes an unfair competition; however, an indirect comparison can be mentioned and the advertisement does not have a deceptive or misleading feature and due to such reason it has no feature that may effect consumers on an unfair competition level. PINAR (2013), sf. 133-134.

[296] Under the 2001/10574 basis and 2002/2316 decision numbered file, the plaintiff alleged that, even the defendant bought, distributed and sold the products from the same refineries, the advertisements 'The fuel is perfect at BP, because the additive is perfect' and 'Super Radiator Fuel' are misleading the consumer and denigrating the products of the competitor. The defendant claimed that it added additives in such products and announcement of this situation to consumers through advertisements cannot be unfair competition. The court of first instance decided that, even the additive addition has been accepted, it was not added to every type of fuel; furthermore, additive is not providing a difference and superiority which cannot be compared, accordingly it can mislead average consumer and so cause unfair competition. The Supreme Court disapproved the decision in favor of the plaintiff, declaring that it is not adequate to decide upon missing research, expert report which is not sufficient and satisfying.
http://www.sinerjimevzuat.com.tr/ (26.11.2014)

[297] Under the 1999/3173 basis and 1999/7795 decision numbered file, the plaintiff alleged that the defendant did advertising by using the slogan 'Sole Newspapr of Eagean' and as it is not the only newspaper of such region, using this slogan is unreal, deceptive and against goodwill, depending on such reasons the plaintiff requested finalization of the unfair competition. The court of first instance decided to accept the case as because the slogan is deceptive and misleading the consumer and exploits consumers' lack of information and experience, determination of such newspaper's position and termination of the unfair competition and use of such slogan. The Supreme Court approved the decision. http://www.sinerjimevzuat.com.tr/ (26.11.2014)

Court resolutions is that, in the event that the statements at the advertisement are wrong the court accepted unfair competition most of the time[298]; however, it also decided that exaggerations which are inherent in the advertising, could be permissible[299].

At a significant decision of reversal of the Supreme Court, the court did an assessment within the scope of the legislation relevant to the sector of the advertisement and emphasized that statements which are wrong and deceptive in accordance with the sectoral legislation shall cause unfair competition[300].

Under the 1997/9233 basis and 1998/1026 decision numbered file, the plaintiff claimed that the statement on the defendant's newspaper heading as 'Turkey's most selling newspaper' and the logo which implies (1) did not reflect the actuality and thus bring itself to a dominant position against defendant competitive newspaper by wrong and misleading information and cause unfair competition. The court of first instance decided to dismiss the case depending on the reasons that the defendant's attitude did not effect the sales of the newspaper and praising and presenting itself was not did with a purpose to detract and derogate. The Supreme Court disapproved the decision based on that the logo is not reflecting the reality, thus by using the wrong and misleading information provided itself an advantegous situation and cause unfair competition. http://www.sinerjimevzuat.com.tr/ (26.11.2014)

[298] Under the 2009/8143 basis and 2009/11342 decision numbered file, even the relevant institution of the defendant established after the plaintiff and serving in the same field, 'Only dialysis center in Zonguldak that has agreement with insurance' advertisement is wrong and thus decided as unfair competition. PINAR (2013), sf. 133-134.

[299] Under the 2009/14485 basis and 2011/6865 decision numbered file, it was decided that an enterprise named 'Aqua Fantasy' that used 'Turkey's Number One Water Park' statement at its trademark with small font size had the purpose to call attention to qualified service, so it was an exaggerated but can be tolerated advertisement and the consumer cannot be misled with such statement.

Under the 2011/10057 basis and 2011/14215 decision numbered file, it was decided that 'Efe Rakı the Original Turkish Rakı' statement which was used as a slogan was an exaggerated but can be tolerated advertisement and it was not detracting another person's product or showing its product as the best. PINAR (2013), sf. 133-134.

[300] Under the 2005/2636 basis and 2006/5025 decision numbered file, the plaintiff alleged that at the advertisements of the defendants, 'Odourless Gas, Odorous Gas is Unqualified; Do Not Shorten the Life of Your Automobile which is a National Wealth with Odorous and Unqualified Gas', did comparative advertisement by relating to the products of the competitors; thus, had a purpose to detract these products and effect the consumers and caused unfair competition. The defendants claimed that such announcements were done to raise the awareness of the consumer and for advertising, including the plaintiff's products no product was compared at the advertisements, also claimed that there is no factor at the advertisements that may cause unfair competition. The court of first instance decided to dismiss the case depending on the reasons that the defendant's defence as it's purpose is to announce that the products which some sellers' add additives may harm the vehicles and there is no statements that refers to the plaintiff at such announcements. The Supreme Court disapproved the decision in favor of the plaintiff, declaring that giving odour to all autogases is compulsory, but it was understood from the advertisement that the defendants'product has no odour, as the statements at the advertisement causing unfair competition, instead of evaluation according to the plaintiff's requests, dismissing the case depending on the decision on an irrelevant case is not right. http://www.sinerjimevzuat.com.tr/ (26.11.2014)

3.1.6 Intellectual Property Law:

In order to take one of the legal or criminal actions covered within the scope of the Law on Intellectual and Artistic Works No. 5846, there has to be a violation or the threat of violation against pecuniary or non-pecuniary rights. Civil cases are; determination of the owner of the work (Art. 15); the revocation of violation (Art.s 66, 67, 68); prohibition of violation (Art. 69); lawsuits for damages (Art. 70). With respect to criminal cases, the Law on Intellectual and Artistic Works No. 5846 art. 71 regulates crimes about non-pecuniary rights; art. 72 regulates crimes and penalties about violations of pecuniary rights; and art. 73 regulates other crimes.[301]

3.2 Administrative Control

In our legal system, advertisement control is mainly performed by the administrative regulatory bodies. The administrative regulatory bodies are Advertisement Board and the Radio Television Supreme Council, whose forming, functioning and operations we are going to be analyzed in detail below. These two institutions are determining the principles which the advertisements need to comply with, and conduct actions according to these principles, as administrative regulatory bodies. Before examining these institutions in detail, we need to mention that the Radio Television Supreme Council performs regulations and sanctions only intended for television and radio broadcasters, while Advertisement Board can also perform sanctions to advertisers and advertising agencies that advertise in audiovisual and print media.[302]

3.2.1 Radio Television Supreme Council:

As we have mentioned in the section[303] where we described the evolution process of regulations on audiovisual media, the Radio Television Supreme Council was authorized after the amendment made to art. 133 of the 1982 Constitution of the Republic

[301] İNAL / BAYSAL (2008) p. 150-160; TEKİNALP (2005), p. 292-325.
[302] İNAL / BAYSAL (2008) p. 79; İNAL (2000) p. 99-101; AVŞAR / ELDEN (2004), p. 95-96; BOZBEL (2006), p. 133; PEKMAN (2001) p. 222; ÖZDEMİR (2004), p. 82-83; ÇAKIR (2007), p. 204.
[303] Please see p. 89.

of Turkey, with the Law on the Foundation and Broadcasts of Radio and Television No. 3984. Following the amendment made to the art. 133 of the Constitution, the Radio Television Supreme Council acquired the status of a constitutional institution. Yet, from this provision of the Constitution, it is not possible to arrive at a clear conviction on the autonomy and independence of the institution, which are the qualities of independent executive administrations. In order to investigate this issue, it will be adequate to refer to the Law on the Foundation and Broadcast Service of Radio and Television No. 6112, which legislated away the Law on the Foundation and Broadcasts of Radio and Television No. 3984. We can observe from the statements in the art. 34 in the new law; 'The Radio and Television Supreme Council is established as an administratively and financially autonomous and impartial public legal person ...' and 'The Supreme Council shall independently fulfil and exercise its duties and powers, under its own responsibility, given by this law and the legislation' that alongside independence and autonomy, the principle of impartiality is specified as well.[304]

The main provision on the regulatory and controlling functions of the Radio and Television Supreme Council takes place in art. 133 of the Constitution; 'The Radio and Television Supreme Council, established for the purpose of regulation and supervision of radio and television activities, is composed of nine members.' The authority of the institution is described in art. 34/1 of the Law on the Foundation and Broadcast Services of Radio and Television No. 6112; 'The Radio and Television Supreme Council is established for the regulation and supervision of radio, television and on demand media services sector.' The scope of regulatory authority with respect to advertising practices is part of the regulation of media services which also includes commercial communication. Art. 37/i of the Law on the Foundation and Broadcast Services of Radio and Television No. 6112 defines the tasks and authorities of the institution; 'To determine the procedures and principles for the execution and the supervision of the viewing or listening rating measurements of the media services; to determine the sanctions to be applied to the companies and the institutions not in compliance with these procedures and principles.'

[304] YALÇIN, Nilgün: **Radyo ve Televizyon Alanının Düzenlenmesi ve Denetlenmesinden Sorumlu Kuralların Özerkliği ve Bağımsızlığı**, Spealization Thesis, Ankara – 2011, p. 90-92.

The provision in the Art. 10, which has the title of advertising and teleshopping in television and radio broadcasting services stipulates that other issues in relation to the application of this article shall be regulated by the by-law adopted by the Council. Accordingly, the Council published the Regulation on the Procedures and Principles of Broadcasting Service, which legislated away the Regulation on the Procedures and Principles of Radio and Television Broadcasts, and determined the procedures and principles on advertising practices within that new regulation.[305]

Pursuant to the provisions of art. 37/e-f, the Radio and Television Supreme Council is monitoring and supervising the broadcasts of media service providers in accordance with the provisions of this Law (hence including the provisions of the regulation that is based on this law), the international treaties and cooperates with the competent bodies and institutions of other states when required. The three pillars of the control operations that are conducted by the Council are listed as: (i) direct control, (ii) control by the audience, (iii) self-regulation. Direct control is the type of monitoring, that is conduction without having an application or complaint, whereby the broadcasts are followed by the experts of the Council with respect to their compliance to the regulations that include the law, by-law, etc. In this respect, the national broadcasts are monitored simultaneously via Digital Recording, Archiving and Analyzing System. Control by audience is done through the experts of the Council assessing the audience complaints that the Council receives through its communication centre, website, electronic mail channels. In other words, the audience can file a complaint on the advertisement s/he considers to be adverse by filing a complaint form on the website of the Council. The applicants receive a response letter informing them whether the complaint has been accepted or not, or whether an investigation has been launched on the concerned broadcast as a result of the application for complaints. Lastly, self-regulation is defined as the type of control that is conducted by the media organizations themselves through practices such as media ethics principles or the institution of audience representative.[306]

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[305] RG. 20.4.1994, S. 21911.
[306] KARADAĞ (2012), p. 112; DURMUŞ (2011), p. 94; http://www.rtuk.org.tr/sayfalar/IcerikGoster.aspx?icerik_id=80775e05-caec-4a48-bac5-39fd6375da3b (26.11.2014).

Chapter ten of the Law on the Foundation and Broadcast Services of Radio and Television No. 6112 on the sanctions cover 'Administrative Sanctions' (Art. 32) and 'Judicial Sanctions' (Art. 33). Administrative sanctions cover issues that relate to the content of the broadcasts and include penalties such as administrative fine, administrative measure, warning, suspension of the program, revoking the broadcasting licence. Judicial sanction cover issues such as broadcasting technique, broadcasting permission and unauthorized broadcasting. It foresees penalties such as imprisonment, judicial fine, sealing and shutting down the equipments and facilities. The provisions that are introduced in the art. 32 cancels the gradual penalty system and made it possible to give pecuniary fine and/or penalty of suspending the program directly at the first step for the media service providers without making a warning notice.[307]

It is expressed within the doctrine that the Radio and Television Supreme Council has failed to fulfill its tasks about advertising since it was established. More clearly, following the law which set the vision of the council was issued in 1994, the council's first regulation was 'By-Law on the Procedures and Principles of Broadcasting Advertisements by Radio and Television Organizations and on the Payments of Supreme Council Cuts of Advertising Revenues'. As clearly observed from the title of the by-law, the priority is expressed to be the supreme council's cuts that constitute one of its revenue items. As a result of the insufficiencies in its organization, that the council has not fulfilled its task of regulation of broadcastings except advertisements and that it only began to concern itself with advertising in 1998, have been associated with the issue of revenue cuts.[308]

The main criticism about the decisions of the Radio and Television Supreme Council is the total confidentiality at these decisions. More clearly, it is not possible to have an opinion about the contents and features of the decisions or whether these decisions are pertinent or not. The criticisms also remark that this situation is not acceptable for a democratic society. Naturally, decisions taken behind close doors and not

[307] KARADAĞ (2012), p. 122-123; DURMUŞ (2011), p. 98-100.
[308] AZİZ (1999), p. 122-123; PEKMAN (2001) p. 226; ÇAKIR (2007), p. 205.

announced to the public are clearly incompatible with democratic transparency. Furthermore, the criticisms also make the point that the dominant understanding of the Law on the Foundation and Broadcast Services of Radio and Television No. 6112 for the council is not 'regulatory' but 'controlling', which has the nature of censorship, and that this regulation, which tries to remedy the problems that are continuing since the forming of the council, is moving away from transparency and accountability.[309] The double-headed structure of administrative control is considered as one of the most important problems on the regulation and control of the advertisements, and is especially criticized by the media organizations. These organizations state that television broadcasting has its own particular forms and practices of advertising, and claim that the penalties imposed by the Advertisement Board are very high.[310] Another point that is criticized is that the Radio and Television Supreme Council's regulation on advertising practices only covers radio and television organizations and that it is not possible to regulate the advertisers and advertising agencies; hence, the scope of control in the event of unlawful advertising is limited.[311]

3.2.2 Advertisement Board:

3.2.2.1 General

Art. 17 of the old Law on Consumer Protection No. 4077 and art. 63 of the new Law on Consumer Protection No. 6502[312] constitute the main provisions on the establishment and functioning of the Advertisement Board, which is established under the Ministry of Customs and Trade. The Regulation on the Application Rules and Principles Concerning Commercial Advertisement and Announcement[313], as stated in its first article, specifies the principles on advertising, defined by the Advertisement Board, that the advertisers, advertising agencies, media organizations, and all persons, institutions or organizations should comply with, and the procedures of monitoring that will be

[309] İNAL / BAYSAL (2008) p. 100; AYGÜN (2007), p. 54; ÜREY (2010) p. 80; İÇÖZ, Derya: **Aldatıcı Reklamlara Karşı Tüketicinin Korunması**, Unpublished Master Thesis, İstanbul – 2008, p. 170; ADAKLI / SÜMER (2011), p. 144-145.
[310] ÇAKIR (2007), p. 207.
[311] DİŞBUDAK (2007), p. 119-120.
[312] RG. 28.11.2013, S.28835.
[313] RG. 14.8.2003, S. 25138.

performed within the framework of these principles. Since we mentioned the principles of this regulation above[314], we will not evaluate those provisions. Detailed provisions on the forming, tasks, procedures and principles of work of the Advertisement Board and its specialized commissions take place in the By-law on Board of Advertisement[315]. Yet, pursuant to the new regulations in the new Law on Consumer Protection No. 6502, the by-law was changed. The new By-law on Board of Advertisement[316], which consists of amendments entered into force on July 3, 2014. Under the light of this information, we will take the new legislation as our primary document in analyzing the main points of the provisions of the by-law, and we will make comparisons with the previous version when necessary.

Before beginning to evaluate the regulations, it should be mentioned that at the current state today, the authorities of the board are very much extended in time considering the fact the when the Advertisement Board was established, it could only make suggestions to the ministry as a result of its investigations and then sanctions could be taken on these suggestions.[317] In this context, the criticism and assessments on the Advertisement Board, which is the most active regulatory mechanism on advertising practices in our country, will be dealt under the 'Conclusion and Assessment' section. We will explain the legal structure and functioning of the board in this section.

3.2.2.2 Advertisement Board under the Old Law on Consumer Protection No. 4077 and the New Law on Consumer Protection No. 6502

Pursuant to the art. 63/1 of the new Law on Consumer Protection No. 6502: 'An Advertisement Board shall be established that will be in charge of determining the principles that should be complied with in commercial advertisements and making regulations on consumer protection against unfair commercial practices; of monitoring and investigating within the framework of these principles; of applying sanctions as

[314] Please see p. 86 and following pages.
[315] RG. 03.07.2014, S. 29049.
[316] http://www.resmigazete.gov.tr/eskiler/2014/07/20140703-4.htm (26.11.2014).
[317] ÖZDEMİR (2004), p. 83-84.

suspension, demanding correction, imposing administrative fine or a short-term suspension fine up to three months in cases where considered necessary as a result of this monitoring and investigation. The board can delegate the authority to decide on short-term suspension to the chairman of the board. The decisions of the board are executed by the chairmanship.' When we compare this first subclause with the Art. 17/1 and 17/2 of the old law, we observe that along with commercial advertisements, tasks that relate to unfair commercial practices are also added to the provision that regulates the tasks and authorities of the board. The term 'unfair commercial practices' did not take place in the old law, it is a concept introduced by the new law. This concept is introduced and defined in art. 62 of the new Law on Consumer Protection No. 6502; 'A commercial practice is considered as unfair in cases when the requirements of occupational care are not met, or when it significantly disrupts, or has the potential of significantly disrupting, the economic behavior of the average consumer it reaches, or the average member of the group that it intends to, with respect to a good or service.' Furthermore, in the same article, misleading or aggressive practices, and other practices that are listed in the annex of the by-law, are accepted as unfair commercial practices, and unfair commercial practices that are directed at the consumers are prohibited. According to the preamble of the art. 62, the purpose behind prohibiting unfair commercial practices that are directed at consumers is to ensure that the consumers are able to use their free will completely in their legal transactions, and that they are able to decide without being under influence. Moreover, it is pointed out that examples of unfair commercial practices that are included in related regulations of the EU, as well as details on practices that are considered misleading and aggressive will take place in this by-law.[318]

Another novelty that is introduced in the art. 63/1 of the new Law on Consumer Protection No. 6502 is that the authority of giving a short-term suspension penalty can be delegated to the chairman by the board. On this delegation, the preamble of the article gives the reasoning that, it has the purpose of taking a decision in a rapid way without waiting a month for the next standard meeting of the Advertisement Board when deemed necessary. The preamble explains that in some cases, an advertisement that puts the life or

[318] http://www.tbmm.gov.tr/sirasayi/donem24/yil01/ss490.pdf (26.11.2014).

safety of the consumer in danger can be disseminated right after the board meeting, and in the best case the next meeting is waited in order to make a decision on that particular advertisement, and that this period can be about thirty days. Hence, when the decision is taken a month after the advertisement is disseminated, during when it impresses on the consumers, that decision comes late from the perspective of the consumers. It is indicated that the board aims at preventing these problems by delegating the authority.[319] In this respect, it should be mentioned that in delegating the authority, the purpose is to prevent the suffering of the consumers that may result from a delay in taking a decision, yet, since there are no provision that prevent the competitors from taking advantage of this article, it should not be ignored that such a misuse of this article can create problems. Another point that is worth mentioning on this topic is that, even though the consolidation of authority may help maintaining the demanded speed, it clearly does not bear the quality of a democratic practice. Lastly, the provision in the art. 17/2 of the old law, which states that, 'Advertisement Board takes into account the conditions of the country as well as the definitions and rules that are universally accepted in the field of advertising in specifying principles with which commercial advertisements and notices should comply.' was removed from the document, yet, there are provision in the article on the tasks of the board under the old by-law, and also under the new by-law that we will analyze below.

Art. 63/2 of the new Law on Consumer Protection No. 6502 is on the number of members of the Advertisement Board and by whom they will be appointed. The board consisted of 25 members pursuant to the old law, and it consists of 19 members pursuant to the new law. In accordance to the new law, those who cannot be a member of the board are the members that are assigned by journalists associations, the Union of Agricultural Chambers, the Directorate of Religious Affairs, Union of Chambers of Turkish Architects and Engineers, the confederations of workers and public workers unions, the Union of Chambers of Certified Public Accountants and Sworn-In Certified Public Accountants of Turkey. Those members that will be assigned to the board in accordance to the new law are the following: the Ministry will assign one member among its vice general directors;

[319] http://www.tbmm.gov.tr/sirasayi/donem24/yil01/ss490.pdf (26.11.2014).

the Ministry of Justice will assign one member among judges or prosecutors that are in administrative duty; the Ministry of Food, Agriculture and Livestock will assign one member; the Ministry of Health will assign one member; the Ministry of Culture and Tourism will assign one member; the Radio and Television Supreme Council will assign one member; Turkish Standards Institution will assign one member; Metropolitan Municipalities of Ankara, Istanbul and Izmir will choose one member among themselves; Council of Higher Education will assign a member among the faculty members who is specialized in advertising, communications or commercial law; Turkish Union of Chambers and Exchange Commodities will assign a member among the members of the Turkish Media and Communication Assembly; the Confederation of Turkish Tradesmen and Craftsmen will assign one member; the Consumer Council will assign one member among the representatives of consumer organizations that participate in the council; one member that will be chosen by the advertisers' associations or their higher organizations; one member that will be chosen by the advertising agencies' associations or their higher organizations; Turkish Pharmacists' Association will assign one pharmacist member; Turkish Dental Association will assign one dentist member; Turkish Medical Association Central Council will assign one doctor member; Union of Turkish Bar Associations will assign one attorney member. It should be mentioned that the members that will be assigned by the Ministry of Culture and Tourism and by the advertisers' associations are introduced with the new law; were not in place in the old law.

The articles of the old and new law on the term of duty that is three years, the replacement of the empty seat and board meeting at least once a month upon the call of the chairman remains similar. The quorum is reduced from 14 to 11. The justification given for both this reduction and the reduction in the number of board members is that through these reductions, it is aimed that the board will work more dynamically and effectively, will take decisions faster. In accordance to the new provision added to the article, in the event of having equal votes, the side which the chairman voted for will attain majority. While the old law stipulated that specialized commissions could be launched when deemed necessary, the new law stipulates that the specialized commissions are going to be formed according to the sectors permanently. The preamble

of the article states that the aim is to ensure taking more judicious decisions.[320] Beside this, specialized commissions are important in steering toward issues that require in-depth expertise, in providing the contribution of experts during the stage of taking decisions, and supporting the decision process. Another important issue is the right to be informed, which is one of the universal consumer right, and as a typical example of this right is the issue of announcing the board decisions to the public. The provision of the old law, which stipulates that the decisions of the board shall be announced with the purpose of informing and enlightening the consumers, and protecting their economic interests, is kept as is in the new law. As new provisions, the new law adds that the board will make its investigations on the files which have the related documents, and can consult the view of real persons or private legal entities, specialized universities on issues that require expertise when it finds necessary.

The other articles that we will examine regarding the board are about provision on penalties at the old Law on Consumer Protection No. 4077 and the new Law on Consumer Protection No. 6502. Art.s 25 and 26 of the old law, and art.s 77 and 78 of the new law cover these provisions. The amendments made to these provisions are the most striking ones. Art. 77/12 stipulates that the advertisers, advertising agencies and media organizations which act contrary to the obligations specified in art. 61 titled 'Commercial Advertisement' which we analyzed above[321], shall be imposed with the penalty of suspension, correction or administrative fine and in case of necessity, short-term suspension up to three months. In accordance to this article, board can impose these penalties separately or jointly according to the nature of the violation. Furthermore, the article provides a much more detailed sanction policy, unlike the old law, by indicating each medium separately. Accordingly, the penalties on the basis of the medium are as follows, (a) if the violation takes place on a local television channel, 10,000 Turkish lira; (b) if the violation takes place on a national television channel, 200,000 Turkish lira; (c) if the violation takes place through periodicals, then half of the amounts that were specified in (a) and (b); (ç) if the violation takes place on a national radio channel, 5,000 Turkish

[320] http://www.tbmm.gov.tr/sirasayi/donem24/yil01/ss490.pdf (26.11.2014).
[321] Please see p. 85.

lira; (d) if the violation takes place on a national radio channel, 50,000 Turkish lira; (e) if the violation takes place on the Internet, 50,000 Turkish lira; (f) if the violation takes place through SMS, 25,000 Turkish lira; (g) if the violation takes place through other media, 5,000 Turkish lira of administrative fine can be given. Another very significant provision that is different from the old law is that the board can sanction ten times of the mentioned administrative fines in case the violation, which was subject to administrative action, is repeated in a year. There are no designations about repetition in the old law. In the old law, the media in which the advertisement was disseminated made no difference, and in the art. 25 titled 'Punitive Articles' was stipulated that against those who act contrary to the provisions in the article on commercial advertisement, board can impose separately or jointly short-term suspension up to three months, suspension, correction, or 6,000 Turkish lira administrative fine, according to the nature of the violation. The punitive provision on unfair commercial practices, which we examined above, takes place in the art. 77/13 within the new law. Pursuant to this provision, the sanctions of short-term suspension of the practice up to three months or suspension or administrative fine of 5,000 Turkish liras can be imposed. The board can impose these penalties separately or jointly, depending on the nature of the violation. If the incompatible practice is conducted nation-wide, the administrative fine becomes 50,000 Turkish liras. If the incompatible practice is performed through advertisement, then the provisions in the art. 77/12 of the new law are implemented. The last issue that we will examine has the nature of being a new provision on our topic is the regulation that is covered in art. 77/19. Pursuant to the provision, in case when the total administrative fine imposed in one calender year, by the date the incompatibility is detected, exceeds 25,000 Turkish lira; the total administrative fine cannot exceed 5% of the gross annual revenue that incurred by the end of the former fiscal year before the incompatibility is detected, to the natural person or legal entity that is subject of the penalty. Yet, since the clauses 12 and 13 on advertising practices are exempted from this provision, it is not possible for those people to benefit from it. It should be mentioned at this point that the penalties being specified according to the media is a favorable amendment. However, considering the fact that the pecuniary penalties are set at a high level and with the principle of imposing up to ten times the penalties, and the exemption of the provision on limiting the fine to 5% of the annual gross revenue, it is clear that the market actors, who are already complaining about the

high amounts of fines[322], are going to withdraw from advertising practices, and this case will have a negative impact on the consumers' interests and economic balances.

Finally, when we look at the art. 78 of the new law, which is on the issue of imposing the sanctions, the sanctions that are decided on by the board are imposed by the ministry. One can appeal to administrative justice procedures against these decisions pursuant to the provisions of the Procedure of Administrative Justice Act No. 2577[323]. Yet, the lawsuit should be filed at the administrative court in thirty days after the action is notified. Having filed an annulment action at the administrative court does not stop the execution of the decision.

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[322] ÇAKIR (2007), p. 207.

[323] In case we mention some samples from practice;

- Under the 2004/9839 basis and 2005/1182 decision numbered file, the court of first instance decision regarding cancellation of the administrative fine given by the Ministry of Industry and Commerce against the plaintiff Anemon Tur. Ve Tic. A.Ş. (Akçura İnşaat ve Tic. A.Ş.) was disapproved by the Council of State. Namely, with regard to presentation of the plaintiff's hotel as 4 star hotel even it is a 3 star hotel, the cancellation decision of the court was disapproved depending on the reason that there is no violation of the relevant legislation to give administrative fine arising from the same legislation.
- Under the 2005/5991 basis and 2008/3378 decision numbered file, the court of first instance cancellation decision with regard to the administrative fine depending on the violation by advertisement against the legislation regarding Private Health Institutions against the plaintiff, due to columns 'Certain Solution to Fats from Belleplast', 'Grida: A Window to Your Beauty', 'End the Unwanted Hair at İstanbul Plastik Cerrahi'and 'Prof. Dr. Erol Kışlaoğlu is Renewing You' at the plaintiff's Form Sante magazine of January 2001, is disapproved by the Council of State.
- Under the 2006/3169 basis and 2009/2343 decision numbered file, the court of first instance cancellation decision with regard to the administrative fine given by the Ministry of Industry and Commerce due to implicit advertisement of a laptop at the TV Show of plaintiff's TV channel, is disapproved by the Council of State. Namely, it was understood that the logo (trademark), which is at reasonable size, on the laptop in front of the announcer was located at a proper angle to the camera and thus the trademark is located which could be directly seen/realized, such use means concealed/implicit advertising and so the administrative fine is not against the relevant legislation.
- Under the 2008/11743 basis and 2010/40 decision numbered file, the court of first instance cancellation decision with regard to the Ministry of Industry and Commerce decision of detain of the advertisements and the doubled administrative fine about the hair products of the plaintiff, is disapproved partially. Namely, as the hair products' advertisements of the plaintiff are misleading and so violating the relevant legislation and as it is apparent that the action was repeated in the same year, it was decided that the detain penalty and administrative fine is not unlawful.
- Under the 2011/870 basis and 2011/254 decision numbered file, the court of first instance cancellation decision, with regard to 'zero sugar' statement at the advertisement about the product of the plaintiff which is named as 'kola' at the relevant legislation, as there is no sugar at the product in accordance with the inspection and analysis report and as the defendant administration did not submit the relevant documents about the sugar content of the product; furthermore, as the 'zero sugar' statement has the same meaning with the statement 'sugar free' in accordance with the relevant nutrient labelling legislation, is approved.

3.2.2.3 By-law on Board of Advertisement

The old By-law on Board of Advertisement[324] is constituted in parallel to the provisions of the old Law on Consumer Protection No. 4077, and the new By-law on Board of Advertisement[325] is constituted in parallel to the provisions of new Law on Consumer Protection No. 6502 that are on advertising practices and on Advertisement Board.

The provisions of the new By-law on Board of Advertisement on formation of the board and the term of duty are the same with those in the art. 63 of the new Law on Consumer Protection No. 6502. Pursuant to the article of the draft by-law on the tasks of the board is, (i) to determine the principles with which commercial advertisements should comply in accordance to the principles specified in the art.s 61 and 63 of the new law, regulate consumer protection against unfair commercial practices and to announce these through the ministry; (ii) to monitor commercial advertisements and unfair commercial practices within the framework of these principles and to sanction when necessary; (iii) as a result of these monitoring and controlling, to impose administrative sanctions that are specified in the art. 77/12-13 of the new law to those who act contrary to the obligations stipulated in the art.s 61 and 62 of the new law. The old by-law is parallel to the old law with respect to the formation of the board. Its article on its duties, does not include the new issues that are introduced in the new law, such as unfair commercial practices, and the authority of the chairman to decide on a short-term suspension.

According to the new by-law, applications to the board are done in writing or electronically. Those applications that do not include the real name, TR identity number and address of the applicant in case the applicant is a natural person; and the title and address of applicant when the applicant is a legal entity, are not accepted. The

[324] RG. 01.08.2003, S. 25186.

[325] http://www.google.com.tr/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=0CC4QFjAB&url=http%3A%2F%2Fwww.gtb.gov.tr%2Fdata%2F52f4e496487c8ef7b0e6d782%2FReklam%2520Kurulu%2520Y%25C3%25B6netmeli%25C4%259Fi%2520%2520taslak.doc&ei=Nz9iU-LJGoOS4ASKy4CoBg&usg=AFQjCNHxDoLCpqU1FDI3BQ2O10DZxEIhgA&bvm=bv.65636070,d.bGE (26.11.2014).

applications on commercial advertisement ask some indicative details such as the medium, date of the advertisement, and the topic of complaint; and the applications on unfair commercial practices ask information and document about the complaint. The originals of the written or printed advertisements should be attached to the application. The photographs that do not have the quality to be attached have to be provided by the applicant. The board convenes at least once a month, or on the call of the chairman, whenever there is a need; the board convenes when at least 11 people are present, including the chairman; takes decisions on simple majority; when the votes are even, the side which the chairman votes for takes majority. Furthermore, the chairman or the members cannot participate in the discussions that concern the interest of their relatives, which is specified in the article, or participate in the voting on this issue. The old by-law in effect does not include issues such as applying electronically, the particulars that are asked on applications, and applications in relation to unfair commercial practices.

The new by-law, pursuant to its article on the investigations of the board, makes it possible for the board to ask information or opinion in writing from persons, institutions or organizations when the board deems necessary. The concerned shall provide the requested documents in 15 days at most. The new by-law also introduces the possibility of the board consulting the view of specialized universities or legal entities, or natural persons in relation to topics that require expertise, when it deems necessary.

The new by-law introduces the authority of the chairman to decide on short-term suspension to commercial advertisement and unfair commercial practices in the article on the duties of the chairman, which does not take place in the old by-law that is in effect. In addition to that, again a new provision in the new by-law stipulates that the chairman can launch ex officio investigation or action about commercial advertisement and unfair commercial practices when deemed necessary.

In the new by-law, under Chapter 4 titled 'The Procedures and Principles Concerning the Formation, Duties and Functioning of Specialized Commissions', very

important new provisions are introduced. The current by-law stipulates formation commissions permanently, which has temporary feature in accordance to the old law. The commissions are formed at sectoral areas, by the ministry, with the purpose of helping the board in taking decisions. The commissions are formed by at least three at most five people including the chairman and the members are chosen by the board and has to meet the conditions that are specified for the board members. The task of the commissions is to make an investigation on topics it finds necessary and on the files that are handed over to it by the Ministry of Customs and Trade - Directorate General of Consumer Protection and Market Surveillance, and to submit its views as a report to this directorate. The commissions convene at least once a month or on the call of the chairman, whenever deemed necessary, and the decisions are taken with the majority vote; in case the votes are even, the side which the chairman voted for takes the majority vote.

3.3 Self-Regulation

3.3.1 General:

When we look at the evolution of the self-regulatory mechanism in our country, we can date it back to the period of the Ottoman Empire. At that age, some regulations with the quality of self-regulation were introduced in order to protect consumers. More particularly, the *'Ahilik Teşkilatı'* that resembles to our current chambers was later turned into a guild by the *'ahis'*. One of the most significant aspect of these guilds is that they were able to develop a very effective self-regulatory mechanism. In this respect, the quality of goods and services, the conditions of manufacturing, fair prices for consumers were issues that were regulated. However, while the setting of the rules and imposing sanctions were executed through the state, the guilds only had authority over regulations.[326]

Today, we observe that it is the Advertising Self-Regulatory Board that essentially conducts the function of self-regulation on advertising practices. In addition to

[326] BABAOĞUL, Müberra / ALTIOK, Nihal: *Evrensel Tüketici Hakları*, **Tüketici Yazıları (I)**, Ankara – 2007, p. 38; GÖLE (1983), p. 8-9.

the board, we will also analyze the Istanbul Chamber of Commerce's Obligatory Vocational Resolution on Honest Advertising in relation to self-regulation below. Before that, it is adequate to summarize the state of self-regulation mechanisms in our country. The main formations in this scope are Media Ethics Council, Press Council of Turkey, and press and audience representation.[327]

Press Council operates a self-regulation directed at the print media, and the Media Ethics Council operates a self-regulation directed at all the areas of the media. The main purpose of the councils is regarded as realize a self-regulatory operation in every aspect, especially in relation to ethics, and not only monitoring based on complaints, through the principles they establish. Yet, it is observed that the media organizations that are dominated by their commercial concerns are failing to conduct sufficient self-regulatory operations. In order for self-regulation to operate in a healthy way, it is crucial to ensure that the principles of publication ethics are internalized by media professionals, and that the publications should be done within this framework.[328] As we explained in the related section above[329], ombudsman institution in the field of media is defining audience and reader representation mechanism in our country. The system of audience representation was put into practice in 2006 with the aim of maintaining self-regulation at the television channels, and the legal ground of this practice was established with the art. 22 of the Law No. 6112. This practice aims that when television audience want to reach television channels in order to make their complaints on the programs, they find an interlocutor. It is stated that the audience representation system, which is a practice of ombudsmanship, had not reached the level where it can serve the desired functions; and it is emphasized that in order for these representatives to conduct self-regulation in a healthy way, the conditions for them to make objective decisions without being under influence, have to be ensured.[330] On the other hand, reader representation is a formation that does not yet have a legal ground in our country, and it serves the function of

[327] KARADAĞ (2012), p. 54, 129.
[328] http://www.medyaetikkonseyi.com/page/Ilkelerimiz.aspx (26.11.2014); http://www.basinkonseyi.org.tr/basin-meslek-ilkeleri (26.11.2014); KARADAĞ (2012), p. 54, 129.
[329] Please see p. 112-113.
[330] KARADAĞ (2012), p. 129; Radyo Televizyon Üst Kurulu: **Radyo ve Televizyon Yayıncılığı Sektör Raporu**, 2014, p. 41-42.

supervising the newspaper to which the representative is assigned, and to create a bridge between the reader and the editorial team. This formation is part of the function of transparency and accountability, and its independence is very important, just like the case with audience representation.[331]

3.3.2 Istanbul Chamber of Commerce's Obligatory Vocational Resolution on Honest Advertising:

This decision was accepted by the Istanbul Chamber of Commerce in 1981. Even though the decision was important in its time as a step taken on advertising self-regulation, it should be also mentioned that since it only covers the advertisements made on goods and services within the scope of the Istanbul Chamber of Commerce, this leads to diminishing its effectiveness.[332] As stated in the article on the purpose of the decision, it sets the rules of commercial ethics and honest behavior that all the parties about advertising (advertiser, advertising agency and advertising media) have to comply with. The aim of these rules is basically to ensure that all advertisements should comply with the law, public morality and are honest and accurate. Accordingly, the decision primarily determines the general principles in a wide range such as the basic principles of conformity with reality and morals, honesty and various issues such as imitation, testimony and protection of privacy. These principles are observed to be parallel with those in the International Code of Advertising Practice, (the final consolidated version is the ICC Consolidated Code of Advertising and Marketing Communications Practice). The following section, under the title of special principles, stipulates on many issues such as sale through mail, real estates, hazardous materials. Pursuant to the decision, those who can complaint are consumers and chamber members. The Board of Assessment formed by the chamber conducts necessary operation in relation to inspect the complained advertisements. When incompliance with the decision is detected, the chamber can demand the suspension of the practice, a corrective announcement or practice from the advertiser on the issues that are incompliant in the following

[331] ATABEK, Nejdet: *Dünyada ve Türkiye'de Okur Temsilciliği*, **İstanbul Üniversitesi İletişim Fakültesi Dergisi**, No.: 24, 2006, p. 15-21.
[332] ÖZDEMİR (2004), p. 76.

advertisements, and can impose a fine up to 10 times the chamber dues (20 times when repeated). The decision also stipulates disciplinary penalties to companies which insist on not complying.[333]

3.3.3 Advertising Self-Regulatory Board:

The efforts of forming the Advertising Self-Regulatory Board began in December 1993 under the leadership of Association of Advertising Agencies, and were completed in 1994 after meeting with all the actors of the media and convincing them. The board is established with a joint declaration of Association of Advertising Agencies, Association of Advertisers, and advertising media. It began to operate by promising, through full page notices in newspapers on April 27-28 1994, to the public that they will correct advertisements that are incompatible with the principles of the board. Hence, even though the board does not have any legal ground, it is actually a very powerful ethic service platform with the joint support it received, and the sanction power it administers within the framework of self-regulatory voluntariness. It has the right to demand media to implement these decisions based on the promise it had given to the public. Furthermore, the board is a member of the EASA[334], which we analyzed in detail above[335].

The board decides on the compliance of advertisements, that are disseminated via advertising media, to the Principles of Advertising Self-Regulatory Board, which are established on the basis of the International Code of Advertising Practice, (the final consolidated version is the ICC Consolidated Code of Advertising and Marketing Communications Practice). However, beside this role of controlling, one of the main purposes of the board is to infuse the understanding of self-regulation to advertising agencies, advertisers and advertising media, and to earn them the habit of practicing the

[333] GÖLE (1983), p. 144-147; ÜREY (2010) p. 85-86; http://www.ito.org.tr/wps/portal/mevzuat-bilgilendirme?WCM_GLOBAL_CONTEXT=durust-reklamcilik (26.11.2014).
[334] Please see p. 119 and following pages.
[335] Reklam Verenler Derneği: **Reklamda Denetim**, 1996, p. 34-35; ÖZDEMİR (2004), p. 76; http://rok.org.tr/misyon.html (26.11.2014).

regulations on their own, which would prevent the emergence of any complaints. The board also conducts training and promotion activities.[336]

The board is composed of 29 people, pursuant to the principles mentioned above, who are an independent chairman; seven advertisers designated by the Association of Advertisers; seven advertising agencies designated by the Association of Advertising Agencies; ten people from television, radio, press, and outdoor media designated by the International Advertising Association; one member from consumer organizations; one member from universities; one member is the representative of the Istanbul Bar Association. Executive Council of the Advertising Self-Regulatory Board can meet more frequently in order to decide on applications more rapidly, and has the authority to decide on the applications and to enforce these decisions on behalf of the board, using the authorities of the board. The executive council is composed of seven people, including the chairman, two advertisers, two advertising agencies, two media representatives (one from print media, one from visual media), all chosen among the board members. The Advertising Self-Regulatory Board convenes the first and third week of every month, with the participation of at least ten members (providing at least one member from each group is present). Executive Council convenes the second and fourth week of every month, with the participation of at leastfour members (providing at least one member from each group is present). The board member who is a member of the either party of the dispute (advertiser or advertising agency) cannot participate in the meeting during the discussion and decision periods. The decisions are taken with simple majority, the side for which the chairman votes takes the majority vote, in case the votes are equal. Yet, as we will explain below, the decisions that are taken without getting opinions require unanimous vote of the participants.[337]

Within the scope of its principles, the duties of the Advertising Self-Regulatory Board are as follows: (a) To decide on the consumer complaints about misleading advertisements; decides on complaints by advertisers or advertising agencies about each

[336] http://rok.org.tr/misyon.html (26.11.2014).
[337] http://rok.org.tr/ilkeler.html (26.11.2014).

other's commercial communication or promotion activities. (b) In order to protect the image of the advertising institution, and increase its respectability, decides on advertisements that are not honest or accurate and that are put on the agenda by the chairman or the member, without waiting for a grievance application. (c) Provides advice service to advertising agencies or advertisers before the publication of advertisement; provides its opinion in the nature of advice to the media. (d) Decides definitively on the objections that are made to the decisions of the Executive Council, and on the advertisements that are submitted by the council that are considered important but not urgent, and those advertisements that deemed by the council to require the resolution of the board. (e) To establish guidelines, by taking into consideration the developments in advertising and media, whenever and on whatever issues it finds necessary.[338]

Consumers, consumer and environment or other organizations and related occupational organizations, competitor advertisers or advertising agencies can apply to the board. The applications have to be in writing (one copy is submitted electronically), and had to be submitted until 16:00 on Wednesdays so that it can be evaluated in the next meeting. The application has to specify which article of principles is violated, and a copy of the disseminated advertisement (the original, photograph, or on a CD) is attached. The applications of consumers, environmental etc. organization and related occupational organizations, and of the advertisers who pay an annual fee in order to finance self-regulation are received free of charge, the other applications are charged in the way that was established by the principles. The decisions on advertisements whose incompliance is very obvious or requires immediate termination, or whose compliance is obvious, can be taken without getting the opinion of the advertiser. The operations of the public agencies and occupational organizations, and their duties and authorities which have a legal ground, cannot impede the board's performing its function. The board cooperates with this type of organizations in its operations about the effectiveness of self-regulation. Yet, it does not handle complaints or disputes that are submitted to the court.[339]

[338] http://rok.org.tr/ilkeler.html (26.11.2014).
[339] http://rok.org.tr/ilkeler.html (26.11.2014).

After the Executive Council or the Advertising Self-Regulatory Board examines and decides on a file: (i) if the advertisement is found to be misleading, its correction, or (ii) its termination is requested from the advertiser and advertising agency. The Executive Council is authorized to decide whether the correction is appropriate to the decision or not. A corrected advertisement cannot be disseminated without the approval of the council. The council notices its view on this topic to the concerned by the end of the working day the latest after it has received the corrected advertisement. The council waits two working days for the advertisement to be corrected or discontinued. In case the advertisement is not corrected or suspended, then the concerned media organizations are informed and requested in writing to terminate its dissemination.[340] It should be remarked at this point that, while the advertiser or advertising agency may not want to implement the decision taken against them, that the media organizations comply with the decision is going to help in a very serious way to self-regulation to fulfill its function. Naturally, the effective use of this method may invalidate the claim that self-regulatory mechanisms will remain ineffective since they have no sanction power; which is one of the most important criticism directed at these mechanisms.[341] Objections to the decision do not stop the implementation of the decision. Final decisions are published on the website of the board with their reasons every month; however, only those advertisers who pay an annual fee for the financing of the self-regulation can access this page, and it is not shared with any person, legal entity or body.[342] It should be stated here that it is hard to comprehend why the decisions are not open to the public, and this is criticized within the doctrine as well.[343]

Finally, when we examine the Advertising Self-Regulatory Board in terms of the complaints that it handled; 3,892 applications were made to the board between 1994 and 2014 and 1,875 of these were found incompatible with the principles. Furthermore, as

[340] http://rok.org.tr/ilkeler.html (26.11.2014).
[341] İÇÖZ (2008), p. 134-135.
[342] http://rok.org.tr/ilkeler.html (26.11.2014).
[343] PEKMAN (2001) p. 223.

much as we can understand from the doctrine, the industry actors mostly comply with the decisions taken by the board.[344]

[344] BOZBEL (2006), p. 130; İNAL (2000) p. 96; http://rok.org.tr/incelenendosya.asp (26.11.2014).

CONCLUSION AND ASSESSMENT

Legal regulations on advertising practices are convened in two sources within Turkish legislation: (a) Regulations on consumer protection, and (b) Regulations on audiovisual media.[345] The main documents on advertising practices within the scope of regulations on consumer protection are the new Law on Consumer Protection No. 6502[346], which come into effect on May 28, 2014; and, the Regulation on the Application Rules and Principles Concerning Commercial Advertisement and Announcement [347] that is issued directly on advertising practices. The main documents which cover provisions on advertising practices among regulations on audiovisual media are the Law on the Foundation and Broadcast Services of Radio and Television No. 6112, and the Regulation on the Procedures and Principles of Broadcasting Service[348]. In addition to these two main sources that constitute the fundamental principles and rules on advertising practices, there are also special regulations on advertising practices in relation to a variety of goods and/or services, in a scattered way.[349] The provisions on basic principles within these special regulations are mostly the same or parallel to those in the regulations that constitute the main sources, which we mentioned above. Within special regulations, the prohibition provision on the advertising practices of goods and services that are prohibited within the scope of general provisions are repeated in the same way; and the regulations on goods and services whose advertising practices are restricted are detailed without departing from the main principles. Lastly, advertising practices as one instances of unfair competition, which is introduces by the new Commercial Code No. 6102 through art. 55, as openly included in the law with the following definition: *'advertising and sale methods that are incompatible with the principles of honesty.'*

[345] İNAL / BAYSAL (2008) p. 10-12; PEKMAN (2001), p. 221-224.
[346] RG. 28.11.2013, S.28835.
[347] RG. 14.8.2003, S. 25138.
[348] RG. 02.11.2011, S. 28103.
[349] ZİYLAN (2009), p. 3-4; İNAL / BAYSAL (2008) p. 12.

When we look at the regulations on advertising practices within the legislation of the EU, we observe that it is mostly covered within the context of consumer protection, yet they find an expression area in relation to information technologies, in the area of unfair competition, and under the term of commercial communication. These regulations have been clarified through classifying them into documents, those contain general principles on advertising practices; those contain provisions on the media; and those contain provision on particular products. The most up-to-date regulation among those that constitute general principles is the Directive 2006/114/EC Concerning Misleading and Comparative Advertising[350]. This directive 2006/114/EC is a codified document bringing together all the previous regulations issued on the topic; that is, Directive 84/450/EEC, which is the first regulation providing general principles, Directive 97/55/EC and Directive 2005/29/EC which attempted to amend Directive 84/450/EEC. The main document among regulation on the media is the Directive 89/552/EEC; the Directives 97/36/EC and 2007/65/EC amended it. However, these documents were finally codified with the Directive 2010/13/EU Audiovisual Media Services Directive[351]. Lastly, regulations on particular goods that take place in advertising practices are regulating products such as tobacco products, medicinal products for human use, and foodstuff that are required to be regulated especially in separate documents because of the conditions by the EU.

Turkey's relationship with the EU began shortly after the European Economic Community was established, with submitting its application for accession on July 31, 1959. The first step in the slow negotiation process, for which the ultimate goal is the full membership, is the Ankara Agreement signed on September 1963.[352] Today, according to the 'Negotiation Framework' document that describe the procedure and principles of the EU-Turkey negotiation process, one of the three priorities in the process is the adoption

[350] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:376:0021:0027:EN:PDF (26.11.2014).
[351] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:095:0001:0024:EN:PDF (26.11.2014).
[352] GÜNUĞUR (2005), p. 181-182; http://www.ikv.org.tr/icerik.asp?konu=tarihce&baslik=Tarih%C3%A7e(26.11.2014); http://www.abgs.gov.tr/index.php?p=111 (26.11.2014).

and implementation of the acquis (EU policies and legislation) that is called *'acquis communautaire'* that covers the sources of EU Law.[353] We should emphasize as an important issue here is that the negotiations are not a bargaining process, but express a harmonizing process, and Turkey is obliged to make the entire acquis a part of its national legal system and implement it.[354] There are 35 sections classifying the acquis.[355] The sections which include regulations on advertising practices are; section 10, 'Information Society and Media' that covers rules on information society services and audiovisual services (for instance, regulations on television advertising); and section 28, 'Consumer and Health Protection' that covers the principles of consumer policies, the protection of the health and economic interests of the consumer, and providing the protection of the consumer (such as regulations on the issues of misleading advertisements and advertisements of tobacco products). Works continue in order to achieve complete adoption of the legislation which is one of the criteria for closing the sections.[356]

Among the regulations on consumer protection which is one of the two source we mentioned above, the first regulation we can deal with on advertising practices that is constituted as a result of the works[357] done in relation to section 28 is the new Law on Consumer Protection No. 6502. As expressed in the general preamble of the new law, the need to revise and partially rewrite the old law No. 4077 in order to harmonize it completely with the EU legislation has emerged within the framework of the screening meetings. Accordingly, the main purpose of forming new regulations is to convey some of the directives which the EU has issued recently that are not yet adapted into our legislation. Among these directives, there is the Directive 2005/29/EC The Unfair Commercial Practices Directive and Directive 2006/114/EC Directive on Misleading and Comparative Advertising, both of which we listed under the EU regulations on

[353] BÖREKÇİ / YURDAKUL (2011), p. 127, 131; http://europa.eu/abc/eurojargon/ (26.11.2014).
[354] BÖREKÇİ / YURDAKUL (2011), p. 128-129; DÜZEL (2004), p. 72.
[355] http://ec.europa.eu/enlargement/pdf/enlargement_process/accession_process/how_does_a_country_join_the_eu/negotiations_croatia_turkey/overview_negotiations_tr_en.pdf (26.11.2014).
[356] http://www.euractiv.com.tr/3/link-dossier/turkiyenin-abye-uyelik-muzakerelerinde-son-durum-000141 (26.11.2014); http://www.ab.gov.tr/files/ardb/evt/3_ab_bakanligi_yayinlari/AB_Rehberleri/07_rehber.pdf (26.11.2014).
[357] http://tuketici.gtb.gov.tr/ab-ve-dis-iliskiler (26.11.2014).

advertising practices above. Furthermore, the preamble explicitly states that the new law covers only the most important and fundamental issues, considering the fact that the EU consumer legislation is revised frequently, and that the preference is made about regulating especially all the technical details through by-laws.[358] In this context, among the regulations on consumer protection, we should mention the Regulation on the Application Rules and Principles Concerning Commercial Advertisement and Announcement that is issued directly on advertising practices. Regulation on the Application Rules and Principles Concerning Commercial Advertisement and Announcement is prepared by adapting the International Code of Advertising Practice (the final consolidated version is the ICC Consolidated Code of Advertising and Marketing Communications Practice) issued by the ICC, which is the most effective regulation on advertising that is constituted at the international level and used very actively globally.[359] Yet, this situation does not guarantee legislative alignment. Moreover, for instance the situations listed on the basis of concrete examples that were provided under the title of accuracy and honesty in the art. 7 of this regulation aim at being specific, but end up being restrictive. Hence, both in order to meet the requirement of determining rules in a general and abstract way, and to achieve the harmonization of our legislation with the legislation of the EU, it is necessary that the details of the directives are regulated through by-laws, as already remarked in the preamble of the Law No. 6502.[360]

It is possible to associate regulations on audiovisual media, which we indicated as the other main source of legal regulations directly on advertising practices within Turkish legislation, with section 10. Old law No. 3984 could not keep up with the fast paced technological developments even though it was amended before the new Law No. 6112 comes into effect. Furthermore, it appeared that this law needs to be harmonized with the provisions of the Directive 2010/13/EU Audiovisual Media Services Directive, the codified version of the Directive 89/552/EEC Television without Frontiers Directive that is the main document on the media among the EU regulations on advertising

[358] http://www.ttkd.org.tr/assets/4077kanuntasari.pdf (26.11.2014).
[359] PEKMAN (2001) p. 224.
[360] İNAL / BAYSAL (2008) p. 71-74.

practices. As a result of all these developments, the Law on the Foundation and Broadcast Srvices of Radio and Television No. 6112, and the Regulation on the Procedures and Principles of Broadcasting Service, the secondary regulation based on the law, came into effect.[361]

Since special regulations on the subject of advertising practices are scattered around within our legislation, as we already mentioned, the issue of in which scope the connection with the EU legislation should be evaluated demands a separate study on the topic. It will be more appropriate to touch on this issue by giving an example and then continue: the Communiqué on Rules for General Labelling and Nutritional Labelling of Foods[362] also includes provisions on advertising practices. This regulation has a separate article titled 'Harmonization to the EU' and it is stated within the article that, such regulation is being prepared within the framework of harmonizing with the EU and by taking into account the Directive 2000/13/EEC.

On the current situation, we observe that the Turkish legislation on advertising practices is quite scattered, yet it is an area that is taken up during the EU negotiations and in which effort is made for maximum harmonization. Yet, it is our conviction that even though the EU regulations indicate that the provisions of the directives can be detailed and tougher conditions can be stipulated in the national legislations of the member states; with respect to a phenomenon such as advertising practices that are rapidly changing in today's technological and social circumstances, the legislator should not present regulatory bodies a prohibitive perspective through details, but rather should determine the basic principles and rules, and ensure that the parties adopt a balancing attitude.

When we analyze the control and combatting with advertising practices that are incompatible with legal regulations within legal systems, we observe that there are four

[361] SÖZERİ / GÜNEY (2011), p. 19-20; COŞAR (2011), p. 51; ADAKLI / SÜMER (2011), p. 141-158.
[362] RG. 25.8.2002, S. 24857.

methods that are used in general; civil cases, administrative control, criminal proceeding and self-regulation. Among these methods, civil cases especially with unfair competition lawsuits and criminal proceeding which is a very rarely used system, are the most classical control and combatting methods. Administrative control is directly performed by the administrative bodies, and consists of monitoring the compliance with specified principles and guidelines. Lastly, self-regulation, also have the types of common control (hybrid control) and ombudsmanship, takes place when persons, institutions, organization or societies regulated themselves within the framework of rules.[363]

The control mechanisms in the member states of the EU display a wide and diversified range of systems. As seen from examples of Germany and Austria, which have a very comprehensive legal legislation and hence the field of self-regulation is quite limited; to examples of Italy and Britain, at which legislation allows for a wide scope of self-regulation and the functioning of self-regulation is at a very high level, presenting a wide field of responsibility. And as examples of some new members such as Poland, Slovakia and Slovenia, that need support and guidance in forming their regulatory systems since their systems only recently establish the relations with each other and with the consumers; to examples from Scandinavian countries such as Finland and Sweden who had a well-established Consumer Ombudsman institution that is authorized by the legal bodies.[364]

The provisions within the regulations of the EU on advertising practices which are on control and combatting with advertising practices that are violating the legal regulations, generally have a guiding nature. If we look at regulations based on type, we observe that the Directive 84/450/EEC which is on general principles, the Directives 97/55/EC and 2005/29/EC which amend it, and the codified directive of all these three directives, Directive 2006/114/EC; impose the member states the obligation to regulate a proper judicial and administrative control structuring that within the scope of local

[363] İNAL (2000) p. 96-102; AVŞAR / ELDEN (2004), p. 94-104; AYGÜN (2007), p. 33; AVŞAR / DEMİR (2005), p. 32.
[364] Health and Consumer Protection Directorate General (2006), p. 15-17; PETTY (1997), p. 3.

legislation. In this structuring, it is stated that there is a need to give concern bodies the authority to prohibit or suspend; furthermore, there are provisions on various issues on the content of the authority such as the fault or damage of advertiser is not sought for or that the demand for corrective notice is possible, or on different points such as the impartiality of the body, sanctions, or taking reasoned decisions. An important issue that is touched upon in the directive is that voluntary control conducted by self-regulatory bodies cannot be exempted. Furthermore, the introductory section of the Directive 97/55/EC reflects on topics such as the encouragement of voluntary controls by the self-regulatory bodies; the coordination of local self-regulatory bodies through associations or organizations that are going to be formed at the level of the union and hence the possibility of responding to cross border complaints along with the others.[365]

The regulations on the media within the legislation of the EU on advertising practices include Directive 89/552/EEC, Directives 97/36/EC and 2007/65/EC which amend the previous directive. A remarkable provision within these directives on control mechanism is the emphasis that the member states should support common and self-regulatory mechanisms as much as their local legislation allows, in the areas that are covered within these directives. Directive 2010/13/EU, which is the final codified version of the mentioned directives, furthermore adds in the explanation at the introductory section that the common and self-regulatory mechanisms that the member states conduct according to their legal tradition can play a significant role in achieving a high level of consumer protection, and that the measures that aim at reaching the targets of public interest in this sector would become more effective if the active support of the service providers are attained. Furthermore, it states that even through effective self-regulatory systems are complementary to the judicial and administrative control mechanisms that are in force, they do not constitute a substitute to the obligations of the national legislator; that common control creates a minimum legal bond between self-regulation and national legislator. It is also remarked that the use of self-regulatory and common control are

[365] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31984L0450:EN:HTML (26.11.2014); http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31997L0055:EN:HTML (26.11.2014); http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:149:0022:0039:en:PDF (26.11.2014); http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:376:0021:0027:EN:PDF (26.11.2014).

encouraged, without aiming at making these types of systems obligatory, or at harming the current attempts.[366]

Parallel to the evolution process of the legislation on advertising practices, the steps taken in forming a body at the level of the EU in the area of self-regulation on these practices also clarify the tendency on control at the scope of the union. In parallel to the statements of the members of the European Commission encouraging self-regulation that is established to function properly rather than a detailed legislation[367], the EASA is founded in 1992 and is a effective institution functioning at the level of the union. Established as a settlement body for cross border complaints, the alliance has continued its operations with success aiming at improving responsible advertising through constituting the best practice principles in self-regulation that will function for the benefit of the consumer and the trader, and at proving that regulating advertising practices can be effective without detailed rules in the legal framework. In addition to these, through the network it provides to the self-regulatory bodies, it brings together countries that are either a member state of the EU or not, and/or the institutions as a part of a structure that has a wider perspective on self-regulatory systems.[368] The most valuable work of this institution are the regulations that are agreed upon by its members that aim at setting the best practice self-regulatory model and the standards of practice and principles on this topic, and which serve as a guideline for the self-regulation of advertising practices. An important point that we need to mention here is that the purpose of the institution is not to create a type of self-regulation that will meet all the conditions, but to create a common reference point for all the systems that have different social and legal substructure, in parallel with the mentality of the EU institutions. In the following period, the alliance

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366 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1989L0552:20071219:EN:PDF (26.11.2014);
http://eur-lex.europa.eu/legal-content/en/ALL/;jsessionid=GTQLTyLNLP01Xj9yXMZp6gJrPcKQfpQ0zYLF4jWwX6QQ2j20QfhV!413646683?uri=CELEX:31997L0036 (26.11.2014);
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:332:0027:0045:EN:PDF (26.11.2014);
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:095:0001:0024:EN:PDF (26.11.2014).

367 http://europa.eu/rapid/press-release_SPEECH-91-76_en.htm (26.11.2014).

368 Moscow Media Law and Policy Center (2005), sf. 19-20; European Advertising Standards Alliance (2005), p. 1; European Advertising Standards Alliance (2003), p. 17;
http://www.easa-alliance.org/About-EASA/History/page.aspx/117 (26.11.2014).

allocated its resources in order to improve the current self-regulatory systems within member and candidate states, and to establish new systems created through promoting the best practice with the program it established.[369]

Under the light of these informations, we can say that even though the EU legislation on advertising practices does not contain compelling provisions in implementing a certain system of control and combatting practices contrary to law, both in the unofficial statements of the EU institutions and the advisory provisions on the topic within the regulations demonstrate an orientation toward self-regulatory mechanism. A supporting evidence of this situation is the EASA, again supported openly by the EU institutions, which functions both within the EU and outside, helping to improve and spread self-regulatory mechanisms that are established on firm foundation with its successful projects.

In controlling and combatting with respect to advertising practices within the Turkish legal system, we observe civil cases, administrative control and self-regulation. The legal reasons of civil cases can be listed as incompliance with debt with reference to culpa in contrahendo, deception and warranty against defects and unfair competition. The most typical method is of filing a lawsuit, and this can be applied within the scopes of the Law on Consumer Protection, Code of Obligations and Turkish Commercial Code. Within the scopes of the Law on Consumer Protection and Code of Obligations, one can demand termination of contract, discount on the sale price proportional to the defect, free of charge repair, replacing with a non-defective one. Within the scope of Turkish Commercial Code, lawsuit can be filed by basing on unfair competition and claims specified in the code can be requested. Furthermore, in relation to advertising practice many issues can emerge within the scope of the Law on Intellectual and Artistic Works, such as on the presence of the work, ownership of the work and the rights about the work; hence, it is possible to file a lawsuit pursuant to the related provisions within this context.

[369] http://www.easa-alliance.org/page.aspx/237 (26.11.2014).

In our country, control on advertising practices is mainly performed by the administrative control bodies. The administrative control bodies in Turkey are the Radio Television Supreme Council, an independent executive authority, which is formed with the Law on the Foundation and Broadcasts of Radio and Television; and the Advertisement Board, which is formed pursuant to the Law on Consumer Protection, under the Ministry of Customs and Trade - Directorate General of Consumer Protection and Market Surveillance. The Radio Television Supreme Council performs regulations and sanctions only directed at television and radio broadcasters, while the Advertisement Board can also perform sanctions to advertisers and advertising agencies that advertise in audiovisual and print media.[370]

Even though the Radio and Television Supreme Council is very passive in controlling advertising practices, and though most of the complaints on these practices are received by the Advertisement Board, this double-headed structure of administrative control is a state that is widely criticized by the media organizations. It is not possible to have an opinion about the contents and qualifications of the decisions taken by the Radio and Television Supreme Council, or whether these decisions are pertinent or not because there is a full confidentiality about decisions. Clearly, decisions that are not made public are incompatible with transparency and lose the quality of being accountable, therefore, since they are not comprehensible, they are unacceptable. Furthermore, since the control of the Radio and Television Supreme Council in relation to advertising practices is limited to radio and television broadcasting organizations, and it is not possible for it to control advertisers and advertising agencies, the scope of its control is limited. The most prominent criticism of the market actors is that television broadcasting has its own particular forms and practices of advertising, and that the penalties imposed by the Advertisement Board are very high.[371] Yet, if we take into account the fact that one of the members of the board is assigned by the Radio and Television Supreme Council, it does not seem reasonable that impertinent decisions on advertisements that are peculiar to television broadcasting would be taken in the meetings that this member participates.

[370] İNAL / BAYSAL (2008) p. 79; İNAL (2000) p. 99-101; AVŞAR / ELDEN (2004), p. 95-96; BOZBEL (2006), p. 133; PEKMAN (2001) p. 222; ÖZDEMİR (2004), p. 82-83; ÇAKIR (2007), p. 204.
[371] ÇAKIR (2007), p. 207; DİŞBUDAK (2007), p. 119-120.

The most powerful and active regulatory body on advertising practices today in our country is the Advertisement Board, which performs its investigations according to the provisions that take place in the Law on Consumer Protection, and in the Regulation on the Application Rules and Principles Concerning Commercial Advertisement and Announcement which was issued based on the law. The detailed provisions on the forming, tasks, procedures and principles of work of the board and its specialized commissions take place in the By-law on Board of Advertisement. Yet, the board which assumes the main responsibility on advertising practices is subject to serious criticisms on many issues, including its formation and the decisions it takes.

If we start our assessment with the formation of the Advertisement Board, it is likened to an assembly composed of representatives of public agencies and organizations, certain occupational and non-governmental organization, rather than a board suitable to make regulations. With the new Law on Consumer Protection No. 6502, the number of the board members is reduced from 25 to 19. The preamble of that article by the legislator states that by this, the aim is to ensure that the board work more dynamically and effectively, and takes decisions faster; which indicates that the criticisms are justified. At this point, that a member that is chosen by the advertisers' association, an addition according to the new structuring, can be considered as a positive step toward creating closer contact with the market actors. Yet, those removed from the board are, expect the member defined by the Directorate of Religious Affairs, the members that are designated by the, chambers, associations and union confederations. Hence, the disputed situation is maintained since the reduction of the members has led to the weakening of the non-governmental organizations while making no changes to the public agencies. Furthermore, since the board can request the opinion of the institutions and organization who provide a member, especially public agencies, when deemed necessary; it is hard to comprehend the need for the board to be composed of representatives of these agencies and institutions.[372]

[372] İNAL / BAYSAL (2008) p. 80-83.

Another aspect that of the Advertisement Board criticized is the qualifications of its board members. Among the members of such a board, that conducts legal regulation and authorized to impose high sanctions, only the member that is designated by the Council of Higher Education is required to have expertise in advertising, communication or commercial law. Such that, the condition of expertise, which is imposed on the member designated by TRT in the old law, is not stipulated for the member that is assigned by the Radio and Television Supreme Council in the new law. Besides, while the problems about advertising practices are intricate problems even for lawyers all around the world, the requirement of having lawyers among the members on the board is only limited to two members which are assigned by the Ministry of Justice and the Union of Bar Associations of Turkey, and the member that is assigned by the Council of Higher Education has the optional conditional of having expertise in commercial law. Along with criticisms that are directed at the entire board, there are also suspicions about the board, whose members' personal professional qualifications are disputed, can decide with a healthy legal and technical substructure. Moreover, the quorum is kept at 11 members, and this makes it more susceptible that the decisions may vary from one meeting to the other according to those who are present, and make those decisions circumstantial. In other words, as the subjects of the complaints that are going to be discussed at meetings are differing and as the qualifications of the members that attend to such meetings are irrelevant to the field of the complaint, the appropriateness of the decisions becomes questionable.[373]

When we move on to the topic of the decisions taken by the Advertisement Board, the most fundamental criticism is that the decisions are unreasoned. When administration takes an action, even if that action depends on discretionary power, the decision has to be taken as a reasoned decision.[374] At this point, the decisions of the board do not provide a concrete, verifiable justification/explanation in which aspect the advertisement is inaccurate, or in which aspect it misleads consumers, hence they do not provide the criteria in determining their incompatibility with the law. This situation,

[373] İNAL / BAYSAL (2008) p. 80-83.
[374] GÖZÜBÜYÜK, Şeref / DİNÇER, Güven: **İdari Yargılama Usulü**, 2001, p. 301.

which can lead to decrease of the feeling of trust to the control mechanism and to the failure of believing that the decisions are just and fair, become a general method of the board. Furthermore, that the board does not seem to cite the precedents is also one of the issues that shake confidence. In addition to those who are imposed with a sanction may want to know on what legal reasoning the decision is taken; anyone who wants to evaluate any decision and to follow an advertising policy with a proper legal ground would not be able to develop a healthy strategy under such circumstances. This situation clearly leads to the questioning of the reliability and competence of the board.[375] We may clarify the unreasoned decisions and uncertainty of the criteria of decision making of the board with some samples of the decisions of the board.[376]

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[375] İNAL / BAYSAL (2008) p. 83-86; AYGÜN (2007), p. 34.

[376] - Under the 2007/368 numbered file of the board, with regard to 'Li Da Daidaihua 30 Capsule' of Farmalife İlaç Sanayi ve Ticaret Limited Şirketi, 'Li-Da Daidaihua Capsule' of Farmed İlaç San. ve Tic. A.Ş. and 'Li-Da Daidaihua Capsule' of Marjinal Org. Elek. Rek. Tur. Eğ. Eml. Gıd. San. Tic. Ltd. Şti., it was decided that the advertisements that which were published at different medium and internet are against art. 5/a and 5/e titled 'Basic Principles', art. 7/a and 7/c titled 'Honesty and Accuracy', art. 13 titled 'Burden of Proof' of the Regulation on the Application Rules and Principles Concerning Commercial Advertisement and Announcement and without specifying the violation, three months detain penalty was given about the mentioned products.

- Under the 2007/302 numbered file of the board, 'Education at classes of maximum 4 people, flexible timing of lessons, lessons from the teachers whose native language is English' statements at advertisement and announcements, titled 'Wall Street Institute English Language School', which was published at various medium, that belongs to Bel Eğitim Ltd. Şti. which is in activity under title 'Street Institute School of English', are deceptive and misleading and against art. 16 titled 'Commercial Advertisement and Announcements' of the relevant law and without indicating the violation seen at the advertisement in accordance with the articles and without indicating the criteria that deceptive and misleading concepts based on, detain penalty and 59.192 TL administrative fine were given.

- Under the 2009/569 numbered file of the board, with regard to 'Gutto – Ant Egg Oil Cream' marked product of Gutto Kozmetik Doğal Ürünler Temz. Tekstil Tur. Paz. İth. İhr. San. ve Tic. Ltd. Şti., as some statements detected at advertisements on www.gutto.com.tr web address, leaflets and product packages has scientifically no validity within the context of the comment of Ankara University Medical Faculty Department of Dermatology, it was declared that such announcements are deceptive and misleading and without any assessment about the comment detain penalty about the mentioned products was given.

- Under the 2011/1594 numbered file of the board, with regard to the advertisements of T. Garanti Bankası A.Ş. that involves '40 TL Bonus to Any Requester' statement, it was indicated that the information which is exception to the main promise were not declared at the radio, not declared in an appropriate way at the written medium to the consumer and detain penalty and 73.966 TL administrative fine were given without any specification about the mentioned information or required form.

- Under the 2013/592 numbered file of the board, with regard to the advertisements at the web site www.ankaraerotikshop that belongs to Cemil Ermiş – Alara Sağlık Ürünleri, it was declared that the mentioned site contains statements and images which are against public morality and without any assessment of the mentioned statements and images or any discussion of the criteria of public morality, detain penalty was given.

The attitude of the Advertisement Board during the process of taking decisions is also subject to criticism. It is observed that the attitude is extremely harsh, and even has the nature of almost paying extra effort in considering the advertisement as contrary to the law and imposing a fine, sometimes with unlawful assessments. Censoring and punitive attitude is adopted instead of presenting an attitude that aims at educating the market actors (through providing explanatory principles, guidelines, training on establishing advertising control policies). In parallel with this attitude, that the board mostly finds elements of humor and exaggeration, which are essential to advertising, as unacceptable, and that the model consumer that the board takes as a benchmark in controlling the compliance of the advertisement to law is not an average reasonable and rational consumer but a very naïve model, which are issues also contribute to this unnecessarily limiting picture.[377] In situations that require expertise during the process of making a decision, that the board acts as if it has expertise on any subject, also an issue that damages the trust in this process. In this respect, we believe that the criticisms are relatively taken into consideration; while the old law stipulated that the specialized commissions may be formed in cases deemed necessary, the new law stipulates that the specialized commissions are to be formed in sectoral fields permanently. The preamble of the article states that with this provision, in parallel with the issues we pointed out, the aim is to ensure that more pertinent decisions are taken. The abovementioned points can be seen at several decisions of the board relevant to various subjects.[378]

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[377] İNAL / BAYSAL (2008) p. 95-100; AYGÜN (2007), p. 34.

[378] - Under the 2011/1017 numbered file of the board, the advertisements to present 'Boymax Food Supplement that Increase the Length' at the web site www.boymax.aktarci.net of the complainee Aktar Kör İsmail Gıda San. ve Tic. Ltd. Şti. found contrary to the relevant legislation. It was declared that following the assessment, it was decided to give detain penalty, as because the statements at the mentioned site misled the average consumer due to their perception of healing feature of the product. At this point, we do not understand the average consumer criteria; namely, as food supplement is a statement which is at the name of the product, the consumer profile who had a perception about healing feature of the product is far under the average.

- Under the 2013/713 numbered file of the board, the 'Take your prescription to the agreed institution, get your 2 years guaranteed glasses and frame' statement at the advertisement and announcements at www.opmar.com.tr web site of the complainee Opmar Optik Merkezi Sanayi ve Ticaret Limited Şirketi, it was decided that this is causing unfair competition against the other opticianry institutions in the similar field by emphesizing that it is giving priviliges to consumers other than the other firms; furthermore, the '100% Satisfaction Guarantee' statement at the sane web site is not a verifiable claim and so detain penalty was given. At this decision, determination of emphesizing the privilege other than the other firms shows both a very strict point of view and a very low average consumer criteria. In addition, it is obvious that the '100%' statement is an exaggeration and as we mentioned the humor and exaggeration is coming from the advertisements nature and the board's attitude is very hard.

- Under the 2013/1285 numbered file of the board, the complained 'Turkey's first slow food certified coffee' titled column published at 'V2' of Vatan Newspaper of Vatan Gazetecilik A.Ş. was found contrary to the relevant legislation because of the implicit advertisement. A detain penalty and 87.915 TL administrative fine were given to Vatan Gazetecilik A.Ş. by indicating that, the statements in the column and the photos of the relevant firm is an implicit advertisement of the trademark 'Cafem'O' that belongs to Adnan Aksoy. This decision can be shown as an example for the strict attitude and unlawful approach of the board. In other words, basic aim of such publications is detecting different and delighting points of the social life culture and presenting them to the readers in a tempting style. In case we analyse the content of the article, the board's treating manner; regarding an informative life culture writing depending on a service sector's details about a pioneer which was awarded, had special featured product range, is producing a certified first in Turkey, has particular methods; cannot be comprehensible.
- Under the 2013/713 numbered file of the board, as because the goods and services which are compared at the advertisements should have the same feature or respond to the same demand and need and as the comparison with the Türk Telekom rates were done and they do not have similar features, a detain penalty and 8.153 TL administrative fine were given regarding the complained 'Turkcell My Home Packages' titled advertisements of Turkcell İletişim Hizmetleri A.Ş. Such decision also shows the strict attitude and unlawful approach of the board. As because, even it is obvious that both rates are responding to the sane demand and need, basing on the service providers' services in different fields (land phone communication service and mobile phone communication service) the board interpreted the comparative advertising in a wrong way.
- Under the 2013/659 numbered file of the board, it was decided that with the statements 'Love your heart, be healthy', 'Move, move, move: Moving to an active life from a motionless life decreases the heart attack risk 50%', 'Healthy nutrition: 20% of the heart diseases on earth is because of nutrition lack of vegetables and fruits', 'Do not smoke: When you are reading this article six people is going to die due to smoking' whch were under the announcement titled 'Love your heart, be healthy' at 'Health and Human' magazine of Anadolu Eğitim ve Sosyal Yardım Vakfı Sağlık Tesisleri İktisadi İşletmesi, are contrary to the relevant legislation, as because advertising of such institution which acts in the health field was done and such advertisements are over the limits of information and presentation activities in accordance with the relevant legislation. A detain penalty and 8.788 TL administrative fine were given. Such decision is also showing the strict attitude and unlawful approach of the board, as because it is not comprehensible that how can these statements which are indicating the general facts about health exceed the limits of presentation activities.
- Under the 2013/335 numbered file of the board, a detain penalty was given by defining that, through the statement 'Help decreasing cellulitis, oedema and regional fats' at the announcement of the product named 'Ananas Arkocaps' which was published at 'Edaktüel' magazine of Optimalise Sağlık Hizmetleri İlaç San. A.Ş., mentioned nutrition supplement was introduced as 'medical product', an impression as such product is healing or helping to healing some health problems which are assessed as disease at medical literature and should be healed under doctor control was led, so it is deceptive and misleading. At such decision, we can see again that the board assumes the consumer perception at very low limits, at the same time we also see that a medical issue which should be evaluated professionaly was examined by acting that they had expertise, even they had a very amateur approach.
- Under the 2012/662 numbered file of the board, it was defined that using 'Turkish Peadiatrics Institution', even its official name is 'Turkish Peadiatrics Institution Organisation', at the advertisements of the product 'Molfix' of the complainee Hayat Kimya A.Ş. is causing an impression in the eye of consumers that the recommending institution is a public institution. A detain penalty and 81.554 TL administrative fine were given. With regard to such advertisement it is obvious that the basic consumer audience that it is addressed to is parents and it is not reasonable to suppose that people who had children are ignorant and unconcerned about such issue. On the contrary, it should be considered that such people act primarily and specially sensitive and careful.
- The last file that we are going to mention under these examples is remarkable from the aspect of the relations between institutions in addition to the attitude of the board. Under the 2012/806 numbered file of the board, it was determined that at the programme 'Gülben' at TRT1 TV channel of the complainee TRT General Directorate, the implicit advertisement of Ahmet Maranki and his nutrition supplement products were done. A detain penalty and 81.554 TL administrative fine were given. What we criticize here is further than the attitude, it is the expectation of institutions work in coordination and, because of the

Another important issue about decisions relate to the sanctions that are imposed when the decision is unfavorable. The Advertisement Board can impose suspension, correction, administrative fine, short-term suspension up to three months, separately or jointly according to the nature of violation. There are no clarifications on the criteria of the nature of violation that takes place in the article. Hence, the board is granted with a large judicial discretion on what type of penalty is to be imposed in which cases, and the board is criticized for using this discretion arbitrarily and inconsistently. More particularly, when combatting with advertisements that are contrary to law, the balance between protecting consumers, the operation of the free market and preserving moral values should be maintained. Yet, it is observed that the board is ambiguous and inconsistent in specifying the type of penalty (of two cases with the same aspects, one is given an administrative fine while the other is only given suspension; insignificant violations receive pecuniary fine while a decision in which the board makes the observation that the advertisement may cause danger for the consumers results only with suspension, etc.), and that it mostly imposes administrative fines.[379] These fines do not impact well-established advertisers who may continue with advertisements that are contrary to law, by taking the risk of receiving sanctions. Yet, these penalties can cause significant economic suffering to the advertisers who have less financial power. Thus, deterrent sanctions should be imposed according to the nature of the violation, its number of occurrence during a period, the impact it has on the economic situation of the consumer, and to the degree the advertisement is misleading or deceptive. On this point, we believe that detterence can be achieved through diversifying the sanctions such as imposing a gradual advertising ban, a temporal advertising ban, advertising ban in various media, advertising ban on various topics, restricting the duration of the advertisement. The penalties of suspension and correction imposed by the board become meaningless as a result of not taking/not being able to take action rapidly, and hence it does not fulfill the purpose of the legislator. In other words, since the main purpose of these sanctions is to immediately and functionally stop the possible suffering (through being misled or deceived) of the consumer inflicted by the advertisement, that the board

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contradiction as we see at the file, the effect on the other market players' from the aspect of their reliance on the operation.

[379] İNAL / BAYSAL (2008) p. 86-92.

takes a decision mostly after the broadcasting of the advertisement is already over does not amount to anything factually/legally. Giving samples, regarding our criticisms under this paragraph, with comparisons is going to show the situation much clearer.[380]

[380] - Under the 2014/230 and 2013/703 numbered files of the board, at the meeting on the same date, even under the same title 'Implicit Advertisement' very different decisions were taken. First of this files is 2014/230 numbered file at which the complainee is Habertürk Matbaacılık A.Ş. The board decided to give a detain penalty with regard to 'Deliver your teeth to safe hands' titled article published at 'HT Egeli' magazine of Habertürk Newspaper, by determining that with the complimentary and demand stimulating statements implicit advertisement of the reffered medical institution 'Dent Ege' was done through such article. The other file is 2013/703 numbered file and the complainee is Samanyolu Yay. Hiz. A.Ş. (STV) and it was determined that the images and statements regarding Eymen Baharat at the programme 'Maceracı' are implicit advertisement, but a detain penalty and 87.915 TL administrative fine were given in this file. As a result, there is two different issues, but they were complained basically due to same reasons; but we cannot understand the criteria of such different approaches from the contents of the decisions.
- The 2014/84 and 2013/1312 numbered files of the board are about health which can be counted as the most important subject from the consumers' aspect and the weakest point from the aspect of disordering perception of consumers. However, as we may see above, even about very insignificant subjects board could decide on serious administrative fines; however, at such health issues the criteria to decide on detain penalty instead of fines is incomprehensible. The first file that we mentioned is 2014/84 at which it was declared that, at presentations through banners and web site, even it is not that kind of an institution a perception as activities in the field of health were conducted was created with regard to the complained beauty salon, in addition it was declared that presentation of medical treatments which are not allowed for such kind of salons were done. A detain penalty was given in this file. 2013/1312 numbered second file is about the advertisements of a product named 'Sweden Syrup' which was presented at the web site www.isvecsurubu.com that belongs to Okan Oktay Yurdakim. It was declared at the file that, such product was presented like a 'medical product', the consumers were misled by creating a perception as such product could heal or help healing of some health issues which were named disease at medical literature and should be healed under doctor control; in addition, it was declared that in case such products can prove the claims of their advertisements, they should be licensed as 'human medicinal product' or 'medicine' not 'nutrition supplement', and in accordance with the relevant legislation advertising of the 'human medicinal product' or 'medicine' is prohibited, so such advertisements are against the relevant provisions anyway and a detain penalty was given in this file.
- The 2014/432 and 2013/882 numbered files of the board are relevant to health plus children which is the weakest point that the consumers could be attacked easily; however at such issues the board decided on only detain penalties instead of serious fines that we saw at several above mentioned examples. The 2014/432 numbered first file is about 'Pepee Eker Chocolate Milk, Pepee Eker Chocolate Puding and Pepee Eker Banana Puding' named products of the complainee Eker Süt Ürünleri Gıda Sanayi ve Ticaret A.Ş. At the presentation of such products it was declared that they are '100% Natural'; however, such products contains unnatural additives such as 'modified starch' and 'karragennan (E407)' and so such statement is misleading for consumers and a detain penalty was given in this file. The 2013/882 numbered second file is regarding the presentations such as 'Zinco C – Syrup contains zinc and vitamins' about a product for children and 'Zinco Getter for Babies' about a product for babies which are amoung the announcements of the products placed at the www.eczanem.com.tr web site that belongs to the complainee Müfide Atalay. At the board decision, it was declared that all the presentations includes health declarations that contains indications, thus products which were on the market as 'nutrient supplement' were introduced as 'medical product', a perception was created as such product could heal some health issues which were named disease at medical literature and should be healed under doctor control; and so, they are misleading and deceptive and a detain penalty was given in this file.
At the below mentioned files, which should be assessed much more precisely than some of the abovementioned files, as because they were about the children and with reference to the general morality approach; the board sometimes gave only detain penalty and sometimes gave administrative fines which are far under the fines that sometimes it gave easily. First example is 2011/2384 numbered file is about the advertisement of 'Gucci' trademarked children clothes at 100. edition of 'Elle Kids' magazine of Doğan

We notice that some of the criticisms about administrative fines are attempted to be responded within the scope of the new law No. 6502. More particularly, unlike the old law, the new law follows a more detailed sanction policy by specifying media separately. Yet, the issue of transparent and objective criteria in determining the type of penalty is still unclear in this designation as well, only the media are classified. Hence, when the decision process remains unclear, trying to maintain a fair distribution of administrative fines does not make sense. Furthermore, the article also introduces a percentage limitation based on the annual gross revenue in relation to the total administrative fine to be imposed, but the pecuniary fines to advertising practices are exempted from this provision, for unknown reasons. This situation gives the impression that, instead of, as we have emphasized repeatedly, finding a balance between the interests of the consumers and the operations of the free market, the market actors are almost seen as a limitless and uninterrupted financial source.[381]

The third control method in relation to advertising practices is the self-regulation system, and it is performed by the Advertising Self-Regulatory Board in our country. The board is established with a joint declaration of Association of Advertising Agencies, Association of Advertisers, and advertising media. It is a formation that is established within the framework of self-regulation principle of voluntariness, and it does not have any legal ground. It fulfills the function of control in accordance to the Principles of Advertising Self-Regulatory Board, which are established on the basis of the

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Burda Dergi Yay. ve Paz. A.Ş. At the advertisement an image of a boy with a pipe at his mouth was placed. The board decided to give a detain penalty and 73.966 TL administrative fine as because such situation is against the relavant legislation, because it negatively effects the mental, educational, moral and psychological development of children. Second file that we examine is 2008/368 numbered file which is about advertisement of a child drink 'Tommy Drink Child Champagne' presented at the www.partidunyasi.com web site that belongs to Gaye Özbal. A detain penalty was given by the board. Another example is 2008/356 numbered file which is about 'Hipp 1' marked infant formula which was imported by Hipp Dış Ticaret Ltd. Şti. The board declared that the statements at the label of the product is misleading; in addition, even it is not a 'probiotic product', it was presented as 'probiotic product' and this is misleading as well and board decided to give a detain penalty and 6.000 TL administrative fine. The last example is 2008/297 numbered file which is about 'Child Slip' named product which is at sale for 1-2 years old children that belongs to Güneri Tekstil Konfeksiyon San. ve Tic. Ltd. Şti. The board declared that at the label and presentation of the product at www.guneriunderwear.com named web site, it was seen that there was a 10-12 years old girl image that covers her chest which is irrelevant. The board decided a detain penalty as because such presentations are sexual abuse and negatively effected the moral development of the children.

[381] İNAL / BAYSAL (2008) p. 86-92.

International Code of Advertising Practice, (the final consolidated version is the ICC Consolidated Code of Advertising and Marketing Communications Practice). To the extent that the sanction power it uses within the frame of voluntariness is effective, it is actually a very powerful ethic service platform. One of the important aspects of the board is that beside its controlling function, it works toward infusing the understanding of self-regulation to market actors, to earn them the habit of practicing the regulations on their own, and it does training and promotion works on regulations on advertising practices and in this field. In this way, both the consumers and the advertising market actors can take their precautions before the risks. Another issue that has to be mentioned is that when the concerned party does not implement the decision of correction or suspension on a particular advertising practice, the board can inform in writing and demand the related media organization to terminate the advertising, and this functioning of the board is a serious practice that invalidates the claim that self-regulatory function does not have sanction power. Even though the finalized decisions are published on the board's website with their reasoning, the fact that they are not open to public (as because they can be seen by the persons that will do the relevant payment) is a serious point of criticism that we have to mention.

The Advertising Self-Regulatory Board follows the self-regulatory operation at the level of the EU through the EASA of which it is a member. Turkey is one of the countries that take place in the latest progress assessment report of the EASA because of the Advertising Self-Regulatory Board. The report states that Turkey, with its advertising self-regulatory body has maintained legal substructure, obtaining advisory decision, ex officio investigation, receiving consumers' complaints free of charge, online complaint system, appeal procedure, website, independent member within the jury; yet it has not maintained publishing the decisions, promotional activities, and consulting market actors in making legislations.[382]

[382] European Advertising Standards Alliance (2011), p. 23.

Even though the EU legislation seems to prefer self-regulation among the control mechanisms of advertising practices, it does not seem likely that the self-regulatory system in Turkey will improve in the near future. Actually, it has to be kept in mind that the Advertising Self-Regulatory Board has mostly met the conditions of the EASA; however, because the Advertising Board, the primary administrative regulatory body in advertising practices, does not recognize the Advertising Self-Regulatory Board as a complementary body, in effect does not want to do any task sharing, these positive developments does not mean much. In addition to that, it cannot be ignored that the Advertising Self-Regulatory Board fails to publish its decisions, to consult market actors during promotional activities or the process of establishing laws. These unfavorable situations, that originate both from the attitude of administrative regulatory bodies as well as from itself, results in the Advertising Self-Regulatory Board remaining ineffective and failed to be embraced. The reasonable attitude is to have the Advertising Self-Regulatory Board not as an alternative to administrative control, but as an active complementary mechanism. While the control mechanisms in the member states of the EU are presenting a picture of operating through sharing, more peculiar to democracies; these control systems are conceiving of each other as competitors in our country. Hence, it is possible to start with increasing the dialogue between regulatory bodies. It is very important both with respect to decisions and for the self-regulatory body to understand the sensitivities of the administrative regulation, furthermore, the Advertisement Board benefits from the self-regulatory body that can recognize and steer the market actors during the process of assessing the advertisement, instead of maintaining its tough attitude toward advertising practices. In this way, if the administrative regulation gives self-regulation a chance in steering the market, this can reduce incompliances to a minimum and directly protects the consumer. Another area that the administrative regulatory bodies and self-regulatory body have to focus on is training. It is clear that intensive training provided by the coordination of institutions both at the level of consumers and at the level of market actors will lead parties to examine and understand each other, and will have a preventive aspect before the risk even emerges. In addition to all these, a likely practice within this picture is to have the ombudsman institution regulated in such a way that it may serve as a bridge between self-regulation and administrative regulation. However, whether these suggestions can be put into practice depends first of all on a solid technical and legal

basis, which can be established by remedying the defective points that we stated when we examined the activities of these bodies above.

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