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COMPARISON OF UNFAIR COMPETITION RULES UNDER THE LIGHT OF DRAFT TURKISH COMMERCIAL CODE AND EU REGULATIONS

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LIST OF ABBREVIATIONS

Art.	: Article
COM.	: European Commission
EC	: European Community
ECR	: European Court Reports
ECJ	: European Court of Justice
EEC	: European Economic Community
etc.	: *et cetera*
EU	: European Union
GATT	: General Agreement on Tariffs and Trade
GRUR	: German Association for the Protection of Intellectual Property
Ibid.	: *Ibidem*
i.e.	: *Id est*
MHEA	: Swiss Association of Manufacturers and Suppliers of Household Electrical Appliances
No.	: Number
OJ	: Official Journal of the European Communities
p.	: Page
Para.	: Paragraph
TCC	: Turkish Commercial Code
TL	: Turkish Liras
TRIPS	: Trade Related Aspects of Intellectual Property Right
TVWF Directive	: Directive 89/552/EC on Television Broadcasting Activities
UCA	: Swiss Federal Unfair Competition Act
UCPD	: Unfair Commercial Practices Directive
UK	: United Kingdom
USA	: United States of America
v.	: *versus* (towards)
WIPO	: World Intellectual Property Organization
WTO	: World Trade Organization

INTRODUCTION

Freedom to compete and freedom to operate a business are essential elements for the proper operation of the market system in all systems considered as free enterprise systems. Within this context, competition among the traders promotes the creation of incentives for businesses aimed to earn customer's loyalty by offering, at reasonable prices, quality goods. In the normal course of business, the traders usually tempt customers away from each others through the freedom of compete. As in some of the above mentioned cases traders may achieve to tempt important number of customers away from competitors and to force the customers to shut down their businesses or move to another location, the implementation of a regulation on unfair competition is a requirement of all modern society. This regulation, however, should be aimed to penalize a business from unfairly profiting at a competition's expense and not to penalize a business merely for being successful in the market place.

Unfair competition can be defined as the body of doctrines which gives rises to several causes of actions in case of the infringement of trade marks and copyrights and patents, actions related to the illegal appropriation of trade names, secrets and services marks and related to those actions in case of publication of defamatory, false and misleading representations. The law of unfair competition is primarily comprised of torts that cause an economic injury to a business, through a deceptive or wrongful business practice.

Despite differences in methods, all countries in Europe have set up mechanisms based on the principle of fairness in order to control activities related to commerce. Some authors consider that there is no European Unfair competition law in the sense of one uniform coherent set of regulations.[1] Nevertheless, we find selective regulations on the topic dealing with different problems in the area of unfair competition. Recently, progress had been made with the Directive on Unfair Commercial Practices in 2005.[2] We observe, on the other hand, how often the Turkish legal system, and among this

[1] HENNING-BODEWIG, Frauke; *Unfair Competition Law: European Union and Member States,* Kluwer Law International, 2006 p.10
[2] COLLINS, Hugh; *The Forthcoming EC Directive on Unfair Commercial Practices: Contract, Consumer and Competition Law Inplications*, Kluwer Law International, 2004, p.13

system, the milestone of Turkish regulation on trade, the Turkish Commercial Code, is in a process of modernization.[3] The TCC, enforced in 1956, has become inadequate in the present to meet the current needs in company law and investments. As a consequence of this, a Draft Turkish Commercial Code has been prepared by the Turkish legislator in order to harmonize the commercial regulations with EU legal system. Apart from a series of developments in different areas of commercial law, the Draft Code, considered as one of the biggest revisions in Turkish legal history, will bring Turkey and EU closer from the unfair competition point of view. The provisions of the Draft Code in this subject are aimed to ensure an honest and non corrupted fair competition environment to the benefit of all market players. Furthermore, the scope of the unfair competition provisions, as understood by the Draft, shall cover not only those actions among suppliers and the competitors, but also those actions which are considered to affect the economy as a whole and the customers as part of it.

This study introduces a comprehensive outline of unfair competition law and comparative advertisements both in the European Union and Turkey. It is structured in two main chapters focused each of them on the regulations, jurisprudence and doctrine in each of the above mentioned levels. In the first chapter; general information on competition law, unfair competition term and international regulations and community law regarding the unfair competition is provided. Within this context and, from an international perspective, the Paris Convention of 1883, the TRIPS agreements and the WIPO provisions on Unfair Competition are presented. As regards the European Union level we will analyze the provisions in the European treaty which provides the general legal frame and the secondary community law through the study of the main directives on unfair competition such as Directive 89/452/EC on Television Broadcasting Activities, Directive 2003/33/EC on Tobacco Advertising, Directive 97/7/EC of Distance Contracts, Directive 2000/31/EC on Electronic Commerce shall also be subject to our study. After providing brief information about the referred Directives, we will focus our efforts on Directive 84/450/EEC concerning misleading advertisement and Directive 2005/29/EC on unfair commercial practices. In the second chapter; the

[3] ARKAN, Sabih, *Ticari İşletme Hukuku*, Banka ve Ticaret Araştırma Enstitüsü, Ankara, 2004

sources of Turkish law related to unfair competition will be presented and the enforcement and sanctions in Turkish Commercial Code will be described. Finally the provisions on unfair competition in the Draft Code will be analyzed from an EU regulation perspective with special emphasis on subject of comparative advertisement which is not regulated under the current Turkish Commercial Code.

CHAPTER ONE
UNFAIR COMPETITION LAW IN GENERAL AND THE REGULATIONS FROM THE INTERNATIONAL AND COMMUNITY PERSPECTIVE

1. UNFAIR COMPETITION

1.1 Definition of Unfair Competition

What lies behind the term 'unfair competition'? The term 'unfair competition' initially describes a specific constellation of facts, which involves commercial or business conduct that does not satisfy the generally accepted requirements of fairness.[4] Where the term 'competition' is used, it should not be regarded as 'unfair' in the commercial sector falls under unfair competition law. Instead, there is a wide variety forms of unfair conduct. Within this sense, *inter alia*, it is certainly unfair to enter into price fixing agreements, to put unsafe products on the market, to disregard contractual obligations, to spread rumors about competitors, to infringe another's patent, to harass consumers with unsolicited emails, or to conduct misleading advertising.[5]

We can define unfair competition as the body of doctrines giving rise to several causes of actions in case of infringement of trade marks and copyrights and patents, actions related to the illegal appropriation of trade names, secrets and services

[4] HENNING-BODEWIG, p.9

[5] According to Frauke Henning-Bodewig; Unfair competition law regulates only a part of what is regarded as unfair commercial practices in a broader sense. If it is acknowledged as a field of law in its own right, a differentiation must be made on the basis of additional criteria. In the past, the main criterion was seen in the competitive relationship between the parties in EU Law. However, this approach is regarded as too narrow today, since it excludes the impact of unfair competition on the market participants, especially consumers, and neglects the interest of the general public in the fairness of competition. Consequently, the legislation in a number of Member States is no longer directed against unfair competition only, but concerns quite broadly trade practices or market conducts generally. HENNING-BODEWIG, p.8

marks and related to those actions in case of publication of defamatory, false and misleading representations.[6]

The general purposes of unfair competition may be set forth as follows; (i) the protection of the economic, intellectual and creative investments made by business in distinguishing themselves and their products, (ii) the preservation of the good will that businesses have established with consumers, (iii) the protection of businesses from appropriating the good will of their competitors, (iv) the promotion of clarity and stability by encouraging consumers to rely on a merchant's good will and reputation when evaluating the quality of rival products, (v) the increase of competition by the provision to businesses with incentives to offer better goods and services than others in the same field[7].

1.2. Subject Matters of Unfair Competition Law

Most of Member States regulate the subject of unfair competition law starting from a core area that corresponds with the traditional view of *"concurrence déloyale"* focused in the possibility of confusion, disparagement and deception. Nevertheless, almost none of the legal systems have gone beyond this limit. It should be noted that most of the regulations are drafted in the interest of all market participants and they mostly regulate the entire field of advertising, sales promotions, special sales, price indications, direct marketing through modern forms of communication, business secrets, slavish imitation, and breach of the law among others.[8] Nevertheless, some Member States choose to regulate the entire field possibly with addition of consumer protection regulations containing provisions regarding standard business terms in a single law, while other States choose to regulate it a number of different laws; adopting

[6] SHILLING, Dana; *Essentials of Trademarks and Unfair Competition,* John Wiley and Sons Publication, 2002, p.192

[7] American Law Institute *Restatement (third) of Unfair Competition.* Published by the American Law Institute, NewYork, 1995, p. 13

[8] FIRTH, Alison, LEA Gary, CORNFORD, Peter; *Trade Marks: Law and Practices*, Jordans Publication, 2nd Edition, 2005, p.51

in some cases the sanctions to the concrete purpose of protection the consumers and consequently the traders.[9]

These differences are partly due historical and national peculiarities of each Member States and should not be overrated.[10] Although in some national laws we can find regulations distributed over a number of laws, the aim of all of them remains the regulation of the market activities under the aspect of fairness. It should be noted that the reason of this is that market practices can be divided up and classified in legal terms but not in commercial terms. On the other hand, the protection of both sides of the market activity becomes evident in the case of misleading practices. In such cases the deception of the consumers has a consequently negative effect on the competitors´ sales. Within this sense, even the harassment of consumers, which is considered without doubt as a business practice concerning primarily consumers, has an effect on the sales opportunities of the offender's competitors. Other actions as slavish imitation, disparagement etc. affect indirectly the interest of consumers, at least their interest in the well functioning of competition[11]. We can conclude therefore that under the subject of unfair competition, the consumers and competitors have one common goal: to prevent a distortion of competition through unfair acts or practices.

2. INTERNATIONAL REGULATIONS ON UNFAIR COMPETITION

2.1. Paris Convention (1883)

1883 was marked by the birth of the Paris Convention[12] for the Protection of Industrial Property, the first major international treaty designed to help the citizens of

[9] BEVERLY-SMITH, Huw, OHLY, Angar, LUCAS-SCHLOETTER, Agnés; *Privacy, Property and Personality: Civil Law Perspectives on Commercial Appropriation,* Cambridge University Press, 2005, p.75

[10] DWORKIN, Gerald; *Unfair Competition: is it time for European Harmonization?* Intellectual Property in the New Millennium: Essays in Honour of William R. Cornish, Edited by David Vaver and Lionel Bently, p.175-177

[11] For this reason, most of the EC Directives protect consumers and competitor equally. The restriction on consumer protection in Directive 2005/29/EC on Unfair Commercial Practices seems to be more due to questions of responsibilities commission. Recital 8 itself acknowledges the fact that the interests of consumers and competitors are intervened.

[12] According to Frauke Henning-Bodewig; the Paris Convention served the International regulation of the "hard core" of industrial property right protection. Above all, patent law, where the principle of

one country to benefit from in foreign countries for their intellectual creations. The Convention entered into force in 1884 with 14 member States, which set up an International Bureau to carry out administrative tasks, such as organizing meetings of the Member States.[13]

It should be noted that the Paris Convention was chosen as next best solution, since the creation of a uniform legal patent law was not reliable.[14] It was characterized by the national treatment principles, i.e. citizens of the contracting states of the Paris Convention are to be treated like nationals in all other contracting states. Beyond this, in many areas the Paris Convention also regulates a certain minimum protection, which shall be guaranteed to these contracting parties. However, the Paris Convention does not mandate the introduction of relevant provisions in national laws, and therefore permits what is known as "national discrimination".

The protection against unfair competition was not considered as one of the targets of the Convention.[15] However, even when the protection against unfair competition was not considered as one of the topics of the Convention, it was the only development in most of the contracting states.[16]

In 1900, at the Brussels Diplomatic Conference for the Revision of the Convention, Article 10bis, considered as the first legal arrangement regarding the unfair competition, was added to the Convention. Accordingly, unfair competition was accepted as an international legal concept in most of the countries with Paris Convention and national regulations on this subject have started to be based on this

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territoriality dominated in the individual states, was felt to be unsatisfactory because of increasing International connections and the disparity between the national laws. HENNING-BODEWIG, p.12

[13] A more recent introduction on Paris Convention can be found in Kamperman Sanders, *Unfair Competition Law: The Protection of Intellectual and Industrial Creatvity*, 1997, p.6 et seq.

[14] ROFFE, Pedro, TANSEY, Geoff, EUGUI David Vivas; *Negotiating Health: Intellectual Property and Access to Medicines,* Eathscan Publication, 2006, p.135

[15] World Intellectual Property Organization; *Introduction to Intellectual Property: Theory and Practice,* Published by Kluwer Law International, 1997, p.252

[16] France was the first country to provide legal protection against unfair competition at International level in order to ensure comparable protection to its own nationals abroad. It is generally assumed that the United Kingdom was strictly against any such protection and that the proposal foundered on the resistant from the Anglo-American Group. This, however, seems not to be true. On the contrary, in the period 1919 to 1925 the United Kingdom was one of the deriving forces for establishing International protection against unfair competition, although there was a strong opposition to achieve this by means of general clause.

convention.[17] In its original version, as adopted at the Brussel Diplomatic Conference, the Article 10*bis* read as follows: "*Nationals of the Convention (Articles 2 and 3) shall enjoy, in all the States of the Union, the protection granted to nationals against unfair competition.*" As a result of the subsequent revision conferences (in the Stockholm Act (1967) of the Paris Convention), the Article now reads as follows:

> *"(1) The countries of the Union are bound to assure to nationals of such countries effective protection against unfair competition,*
>
> *(2) Any act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition,*
>
> *(3) The following in particular shall be prohibited:*
>
> *1. all acts of such a nature as to create confusion by any means whether with the establishment, the goods, or the industrial or commercial activities, of a competitor;*
>
> *2. false allegations in the course of trade of such a nature as to discredit the establishment, the goods, or the industrial or commercial activities, of a competitor;*
>
> *3. indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods."*

At first glance, there seem to be basic differences between the protection of industrial property rights, such as patents, registered industrial designs, registered trademarks, etc. on the one hand, and protection against unfair competition on the other hand. Whereas industrial property rights, such as patents, are granted on application by industrial property offices and confer exclusive rights with respect to the subject matter

[17] Please see the Paris Convention for the Protection of Industrial Property of March 20, 1883; http://www.wipo.int/treaties/en/ip/paris, (12.09.2008)

concerned, protection against unfair competition is based not on such grants of rights but on the consideration – either stated in legislative provisions or recognized as a general principle of law – that acts contrary to honest business practices are to be prohibited.[18]

Acts of unfair competition may be categorized in a variety of ways, depending on the criteria applied or the emphasis given to certain aspects of a given act or form of behavior. For the purposes of establishing categories of acts of unfair competition, two broad groups of acts are distinguished, namely acts of the types expressly mentioned in Article 10bis of the Paris Convention and acts not expressly mentioned in Article 10bis. On the other hand, Article 10bis(3) contains a non-exhaustive list of three types of acts of unfair competition, namely, (i) acts likely to cause confusion, (ii) acts that discredit a competitor, and (iii) acts that may mislead the public.[19] Because the acts that are likely to cause confusion and those acts may mislead the public are linked to each other and in some cases overlap, they are dealt under the perspective of the act of discrediting a competitor.[20]

Consequently, Art.10 does not only specify the unfair business practices, but also obliges the contracting states to take the measures in order to be protected from the unfair competition. Furthermore, it may also been seen that, with the Complementary Act of Stockholm of July 14, 1967 the parties took one more step for the protection and they created a union having legal entity.

2.2. TRIPS

The Agreement on Trade Related Aspects of Intellectual Property Rights (hereinafter referred to as the "TRIPS") is an international agreement administered by

[18] Nevertheless, the link between the two kinds of protection is clear when certain cases of unfair competition are considered. For example, in many countries unauthorized use of a trademark that has not been registered is considered illegal on the basis of general principles that has not been registered is considered illegal on the basis of general principles that belong to the field of protection against unfair competition (in a number of countries such as unauthorized use is called "passing-off"), Please see World Intellectual Property Organization; *Introduction to Intellectual Property: Theory and Practice,* Published by Kluwer Law International, 1997, p.244

[19] PIRES DE CARVALHO, Nuno; *The TRIPS Regime of Trademarks and Designs,* Kluwer Law International, 2006, p.86

[20] ISAAC, Belinda; *Brand Protection Matters*, Sweet & Maxwell Press, 2000, p.234

the World Trade Organization[21] (hereinafter referred to as the "WTO") setting down minimum standards for many forms of intellectual property regulation.[22] It was negotiated at the end of the Uruguay Round of the General Agreement on Tariffs and Trade (hereinafter referred to as the "GATT") in 1994.[23]

Specifically, the TRIPS contains requirements that national laws must meet in this subject. Within this context, states should regulate as per this international obligation: copyright rights, including the rights of performers, producers of sound recordings and broadcasting organizations; geographical indications, including appellations of origin; industrial designs; integrated circuit layout-designs; patents; monopolies for the developers of new plant varieties; trademarks; and undisclosed or confidential information. The TRIPS also specifies enforcement procedures, remedies, and dispute resolution procedures. Protection and enforcement of all intellectual property rights shall meet the objectives to contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and to a balance of rights and obligations.

Furthermore, a most favored nation clause which has been introduced into the context of international law agreements on intellectual property is also contained by the TRIPS.[24] In contrast to the Paris Convention, the TRIPS also contains an independent obligation to adequate the national law to the international obligations in the regulated sectors. In case a state refuses to fulfill the above mentioned obligation, the non-fulfillment of obligations from the TRIPS Agreement can form the basis for the trade policy sanctions and the withdrawal of the trade privileges. Moreover, it should be

[21] 'The WTO is the only global international organization dealing with the rules of trade between nations. At its heart are the WTO agreements, negotiated and signed by the bulk of the world's trading nations and ratified in their parliaments. The goal is to help producers of goods and services, exporters, and importers conduct their business. At its heart are the WTO agreements, negotiated and signed by the bulk of the world's trading nations. These documents provide the legal ground-rules for international commerce. They are essentially contracts, binding governments to keep their trade policies within agreed limits.', http://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm, (11.01.2009)

[22] BLAKENEY, "*The Trade Aspects of Intellectual Property Rights: A Concise guide to the TRIPS Agreement*, London, 1996

[23] PIRES DE CARVALHO; p.97

[24] For an indepth discussion see Havana-Club case, which concerned the protection of a trade name; Panel Report, US-Section 211 Omnibus Appropriations Act of 1998 of 6.8.2001 and 22.2.2002.

noted that the TRIPS is directly applicable as far as the national constitutional law of the Member States permits such direct application upon ratification.

Henning-Bodewig states that "yet in some places reference is indeed made to unfair competition law. Thus there are two cases in the TRIPS Agreement in which competition law elements at least play a role.[25] These concern the protection of trade secrets and the protection of geographic indications, neither of which can be counted as the central subject matter of unfair competition law, but which nevertheless exhibit clear links to unfair competition law."[26]

As per Art. 22(2) of the TRIPS Agreement; the member states are obliged to protect geographic indications of source from the application of misleading designation. Furthermore, they are also obliged to protect such indications of source from any use which "constitutes an act of unfair competition within the meaning of Art.10bis of the Paris Convention". 'As per Art.10bis of the Paris Convention, geographic origin is therefore protected against any unfair use, particularly through the creation of a risk of confusion or other such misleading indications.'[27] In connection with the same article, it has also been argued that the use of designations that lie in the field of similarity with geographic indications may also be covered under the Paris Convention. Moreover, also for the protection of trade secrets, blanket reference is made to Art.10bis of the Paris Convention.[28] Thus, Article 39(1) states that:

> *"In course of ensuring effective protection against unfair competition as provided in Art.10bis of the Paris Convention, Members shall protect undisclosed information in accordance with paragraph 2 below and data*

[25] As to the link between TRIPS and the EU see the secision of the ECJ 16.6.1998, Case C-53/96 *Hermés* (1998) ECR I-3603 and 14.12.2000, Case C-300/98 *Dior*

[26] HENNING-BODEWIG, p.21

[27] PIRES DE CARVALHO, Nuno; *The TRIPS Regime of Patent Rights: With an Introduction on the History and the Economic Function of Patents*, Kluwer Law International, 2005, p.68

[28] In this respect Epstein states that the 'TRIPS Agreement confers protections for undisclosed information, but does so in the course of ensuring effective protection against unfair competition, and as such as it does not seem to treat such information as a form of 'property'. Though Article 3 is incorporated within Part II of the Agreement, it does not extend exclusive rights to the person lawfully in control of the information, a formulation that itself may not convey the same ownership attributes of more traditional forms of intellectual property.'; EPSTEIN, Michael A.; *Epstein on Intellectual Property,* Aspen Publishers Online, 2005, p.45

submitted to governments and governmental agencies in accordance with paragraph 3 below."

Furthermore, pursuant to Paragraph 2 of the article; natural and legal persons shall have the possibility or preventing information within their control from being disclosed to, acquired by, or used by others without their consent in a manner contrary to honest commercial practices.

Apart from these two special cases above referring to Art.10bis of the Paris Convention and the provision specified there, TRIPS also makes a general reference to the Paris Convention.[29] Within this sense, Art.2 (1) states that:

"In respect of Parts II, III and IV of this Agreement, Members shall comply with Articles 1-12 and 19 of the Paris Convention"

Whether this means that members of the WTO must take up the substantive legal standard in Art.10bis of the Paris Convention in their national legislation in favor of their own citizens is to be doubted.[30] It must also be recalled that the Paris Convention only stipulates national treatment and not the protection of a member state's own citizens in its own country.[31] The effect of the reference in Art.2 of the TRIPS Agreement to Art.10bis of the Paris Convention is therefore restricted in those members of the WTO which are not party of the Paris Convention are henceforth obliged, with regard to the subject matter regulated in the TRIPS Agreement (in the field of competition law: trade secrets and geographic indications), to grant foreigners at least the protection provided for under Art.10bis of the Paris Convention, and that the failure to fulfill this obligations leads to the application of the specific sanctions regulated under the TRIPS Agreement, i.e., the dispute settlement procedures.

It may be concluded that, due to the close relationship of the law of unfair competition to intangible property rights, the TRIPS Agreement refers to several

[29] GHIDINI, Gustavo, REICHMAN, J.H.; *Intellectual Property and Competition Law: The Innovation Nexus*, Edward Elgar Publishing, 2006, p.111
[30] The reference to the Paris Convention, pursuant to the unambiguous wording of Art. 2(1) of the TRIPS Agreement only applies to subject matter expressly named in Parts II, III and IV.
[31] COLSTON, Catherine; *Principles of Intellectual Property Law*, Routledge Publication, 1999, p.17

occasions to Art.10bis of the Paris Convention and therefore to specific unfair competition law principles. These sporadic mentions of unfair practices law do not, however, lend themselves to be interpreted as an international regulation of the legal protection against unfair competition.

2.3. WIPO Model Provisions against Unfair Competition

The Agreement to Establish a World Intellectual Property Organization (hereinafter referred to as the "WIPO") was adopted at the Stockholm Conference on the revision of the Paris Convention.[32] The developments in industrial property were proved with the WIPO repeatedly. This also applies to the field of unfair competition law. From a WIPO perspective; it is understood that as per Art.2 of the TRIPS Agreement the contracting states are obliged to adequate the international regulation into national law in order to satisfy Art.10 of the Paris Convention.[33]

The WIPO Model Provisions make reference to Art.10bis of the Paris Convention. However, such provisions are not only to be seen as an interpretation of the regulation in the Paris Convention. Therefore, the primary points of interest are those in which the WIPO Model Provisions differ from Art.10bis of the Paris Convention.[34]

It should be noted that the most important introduced change is that the examples of prohibited acts were expanded from three to five. In addition to the risk of confusion, disparagement and misleading, as per the WIPO Provisions, the damaging goodwill or reputation and the protection of trade secrets should also be considered. Nevertheless the field of application of the three "old" groups of prohibited acts in Art.10bis (3) of the Paris Convention has also been expanded due to the adoption of sub-examples.[35] Nevertheless it should also be stated that the general clause in Art.10bis of the Paris Convention, as the Notes on Art.1 also ascertain, at first appears

[32] WIPO is structured on the model of the United Nations and is an organization with its own international law objectivity.
[33] JONES, Clifford A., MATSUSHITA, Mitsuo; *Competition Policy in the Global Trading System: Perspectives from The EU, Japan & the USA*, Kluwer Law International, 2002, p.377
[34] HENNING-BODEWIG; p.23
[35] Ibid., p.23

unchanged, i.e., is based on "contrary to honest practices", when the notes emphasize that the construction of this concept should also be on the basis of international trade practices. This is considered as substantial novelty compared with Art.10bis(2) of the Paris Convention. Although, currently Art.1 of the WIPO Model Provisions only mentions "any act or practice in the course of industrial or commercial activities", the Notes specifically emphasize that this must be interpreted in a broad way and therefore also embrace professional activities and non-profit making activities.

Nevertheless, the WIPO Model Provisions provide a regulation of sanctions in Art.1b in contrast to the Paris Convention. Pursuant to the WIPO Model Provisions, in case any legal or natural person is "damaged or likely to be damaged" by a competitive act, then such persons should be entitled to legal protection.

Furthermore, the second paragraph of Art.1 regulates one of the most important new aspects of the WIPO Model Provisions. The limits of protection against unfair competition and intellectual property rights are concerned in this article. It is also regulated that the protection regulated in articles 1-6 is independent and supplementary to any special statutory regulation in the field of copyrights, industrial designs, marks, patents, "and other intellectual property subject matters".[36] For example, as per the referred articles; an inventor has the option to keep his invention secret as a trade secret and to protect it under competition law. It should also be stated that; in particular, the relation between the protection of competition and the specific standards of the special laws is not clear in the area of industrial property.

3. UNFAIR COMPETITION IN EU LAW

3.1. General

Despite differences, all countries in Europe have set up mechanisms based on the principle of fairness in order to control activities related to commerce. It is generally believed that the market should act in a fair way towards the interests of all

[36] HOEKMAN, Bernard M., MATTOO, *Aaditya; Development, Trade and the WTO: A Handbook*, World Bank Publications, 1976, p.398,

participants and therefore that some rules should be agreed in order to secure such fairness.

One may not agree in calling this conviction among the Members States as unfair competition, unfair trade practices or unfair commercial practices. Nevertheless, the use of the term unfair competition is based above all on the fact that it has long been the expression used at international[37] and European level[38].

Most of the Member States refers to *unlauterer Wetteberwerb, concurrence déloyale, ongeoorloofd mededinging, competenzia sleale* etc. Hence, the unfair competition concept seems the most familiar concept in Europe. Some authors consider that there is no European Unfair competition law in the sense of one uniform coherent set of regulations[39]. Nevertheless, we find selective regulations on the topic dealing with different problems in the area of unfair competition. Recently progress had been made with the Directive on Unfair Commercial Practices[40] in 2005.

"The judicial practice of the ECJ is of particular for both primary and secondary Community law. The interpretation of the directives which are in force is monitored by the ECJ. Furthermore, it is checked by the ECJ if the national regulations are compliance with Articles 28 and 49 of the EC Treaty. National regulations regarding the unfair competition law can be submitted to the ECJ by some different ways. It monitors both the interpretation of existing directives etc. by the Member States and the compatibility of national regulations with Articles 28 and 49 of the EC Treaty."[41] National unfair competition law regulations can be submitted to the ECJ by a number of routes. As per Art.234 EC Treaty, in case of a consideration of a court or tribunal of

[37] Please see Article 10 bis Paris Convention.

[38] Art 14 (2) of the Council Regulation 40/94/EC on the Community Trade Mark expressly reserves the application of national laws against unfair competition; the ECJ occasionally speaks of "legislation on unfair competition".

[39] HENNING-BODEWIG, p.21

[40] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business –to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council, OJ L 149, 11.6.2005, p.22

[41] RITTER, Lennart, BRAUN, David W.; *European Competition Law: A Practitioner's Guide,* Kluwer Law International, 3rd Edition, 2005, p.133

a member state that a decision of a question concerning these matters is necessary, it may request a preliminary ruling of the ECJ provided there will be no further judicial remedy under national law. Moreover, the harmonization of competition law is not being achieved by a preliminary rule directly. If a court or a tribunal of a Member State considers that a decision of a question concerning these matters is necessary it may request a "preliminary ruling" of the ECJ provided there is no further judicial remedy under national law[42] .

A preliminary ruling of the ECJ does not achieve harmonization of competition law directly. Instead, the ECJ is limited to deciding whether the provision in question is compatible with secondary community law or infringes the principles of the free movement of goods or services. However, from a practical perspective, this has a substantial harmonization effect since it leads to an adjustment of the contested aspect of national competition law. A uniform standard of protection can only be created by means of secondary community law.

3.2. The General Clause and Definition of "Unfair" under the EU Law

With the exception of Great Britain, Ireland, Malta and Cyprus, all Member States consider general clauses mandatory in order to control over changing marketing practices and to supplement the system of express legal provisions. Although these general clauses are drafted differently, the core issue is the fairness of commercial practice.[43]

This leads to the difficult question of how commercial fairness is to be determined. Most Member States try to describe it (in the general clauses or in interpretation by the courts) through terms like "honest practices", "bones mores", "more marketing" or "good faith". This choice of these words, largely historical on the whole, is only of limited relevance. The decisive factors are how judicial practice and literature interpret the respective terms.[44] This has currently been considered as a matter

[42] Please see Art.234 EC Treaty
[43] Ibid; p.9
[44] GHIDINI, Gustavo/REICHMAN, J.H.; *Intellectual Property and Competition Law: The Innovation Nexus*, Edward Elgar Publishing, 2006, p.111

of national law, although the requirements laid down in the new Directive 2005/29/EC on Unfair Commercial Practices have to be taken into account.

In most Members States, the interpretation of "fairness"- irrespective of the term actually used- is based above all on the regulatory context, hence in particular on any statutory explanation of the general clause given by means of examples. Reference is oftenly made to the definition in the Paris Union Convention which, since 1925, defines unfair competition as "any act of competition contrary to honest trade practices in industrial and commercial matters"[45]. This reference brings clarification to two aspects: the stating point is what is actually usual in business life ("trade practices") corrected by the ethical aspect of "honest". Thus the Paris Union Convention (also) refers to extra-legal standards. These standards must however be derived from market activity: what counts are not the "ten commandments" or other morally based requirements, but rather the business ethics of the trade in question[46] . To this extent, one may speak of a functional interpretation.

The attempt to arrive to a more precise definition of this perspective achieved by the Directive 2005/29/EC of 11 May 2005. Article 5(2) describes unfair commercial practices that are "contrary to the requirements of professional diligence" and capable of materially distorting the economic behavior of the average consumer. The concept of professional diligence (better known in the field of tort law) was originally defined as "the measure of special skill and care exercised by a trader commensurate with the requirements of a normal market practices towards consumers"[47]. This wording was later extended through the addition of "honest market practices and/or the general principle of good faith in the trader's field of activity", which ultimately brings us back to the wording of the Paris Union Convention. The definition used in the Directive

[45] Please see p.4-8 of this study for deeper information regarding the connection between unfair commercial practices and Paris Convention.
[46] HENNING-BODEWIG, p.25
[47] Ibid; p.9

contains the additional clarification about the reference of the effect on the economic behavior of the addressee[48].

Despite these difficulties of terminology, the concept of unfairness is not entirely "vague".[49] "On the contrary, there are number of approaches to its determination that are generally accepted in most Member States: (i) Reference points are actual commercial practices; (ii) In the individual case, these practices may be corrected by an extra-legal value judgment; (iii) the "ethical criteria" are to be taken from business life (self-regulatory agreements can provide valuable indications, provided that they take account of all interests)[50]; (iv) The interpretation is "functional", i.e. takes into account both the importance of any express regulation of unfair competition and the specific context of the general clause, in particular its connection with the purpose of the protection; (v) Unfair practices must be able to influence the commercial conduct of the addressee; (vi) There is a balancing of interests which also includes the balancing if constitutional positions."[51]

In addition, it is worth highlighting that the decisions of the national courts and in cases of conflict by the ECJ, gives more contours to the concept of fairness. The disadvantage of the general clause as being too open to a certain extent is necessary if the aim of such provision is flexibility. Such concept is familiar in almost all Member States; even in the Anglo-American legal systems there are no reservations against, for instance, a "fair-use" doctrine. At Community level, general clauses are familiar in particular in carter law; for instance in Article 82 of EC Treaty[52]. It is task of such

[48] This corresponds with the general opinion at Community level and with national law. Cf. Directive 84/450/EC and in particular the interpretation by the ECJ in the "Nissan" decision (Case C-373/90 (1992) ECR-1-00131).

[49] CAMPBELL, Dennis, COTTER, Susan; *Unfair Trading Practices: The Comparative Law Yearbook of International Business Special Issue*, Kluwer Law International, 1997, p.20

[50] For instance, the IIC Codex is often used in the Scandinavian countries to assist interpretation of "good marketing behaviour".

[51] HENNING-BODEWIG; p.10

[52] Art.82 of the EC Treaty states that any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may aspect trade between Member States. Such abuse may, in particular, consist in: (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) limiting production, markets or technical development to the prejudice of consumers; (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (d) making the conclusion of contracts subject to acceptance by the other

general clauses in cartel law as well as in the law if unfair competition to mark the borderline between legitimate use of freedom of competition and the misuse of this freedom.

3.3. National Unfair Competition Law and articles 28, 49 EC.

3.3.1. Article 28 EC

Most of the ECJ decisions on unfair competition law are based on Art.28 of the EC Treaty (formerly Art.30). The above mentioned article states that;

> *"Quantitative restrictions" on imports and all measures having equivalent effects shall be prohibited between Member States."*

As per Art.30 EC Treaty (formerly Art.36)[53], the national prohibitions which are justified on the ground expressly cited are not precluded. Despite of the wording remaining the same; the basis for a decision in the field of unfair competition law has been changed in the course of time. This does not, however, preclude national prohibitions which are justified on the grounds expressly cited. The basis for a decision in the field of unfair competition law has changed in the course of time, despite the wording remaining the same. The landmark judgments here are "Dassonville", "Cassis de Dijon" and "Keck&Mithouard".

According to the "Dassonville" decision [54] (which concerned the importation of Scotch whisky into Belgium from France) all

> *"...trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-*

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parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts. http://eur-lex.europa.eu/en/treaties/index.htm, (12.01.2009)

[53] Article 30 states that: "The provisions of Article 28 and 49 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.", http://eur-lex.europa.eu/en/treaties/index.htm, (05.01.2009)

[54] Please see Case 8/74 Procuerur du Roi v. Dassonville [1974] ECR 837

Community trade are to be considered as measures having an effect equivalent to quantitative restrictions."

Since a trade restriction could be constituted by all national regulations regarding the unfair competition, accordingly practically all regulations of national unfair competition law could constitute a restriction of trade; particular importance was attached to the grounds for justification. Unlike the Paris Convention, the ECJ does not consider unfair competition law within "intellectual property"[55]. On the contrary, the leading decision "Cassis de Dijon"[56] recognized the following "mandatory requirements" of Art.28 EC:

8. "Obstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of the product in question must be accepted in so far as these provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions or/and the defense of the consumer…."

Subsequently, more and more questions were submitted to the ECJ, which consequently found itself obliged to impose restrictions on the cases it hears. In 1993, in the Keck&Mithouard judgment[57], which concerned a prohibition on resale at a loss, the court tried to draw the line as follows;

[55] ECJ Case C-113/80, [1981] ECR I-01625

[56] Case C-120/78 Rewe-Zentrale AG v. Bundesmonopolverwaltung für Brannwein, [1979] ECR-649

[57] The case of Keck and Mithouad regarded two men by the names Keck and Mithouard, managers of supermarkets at Mundolsheim and Geispolsheim, which were prosecured in France for selling 1.264 bottles of Picon beer and 544 grams of Sati Rouge coffe at prices blow these which they had purchased them. Resale at loss was prohibited under French Law but the law in question did on the other hand not ban sale at loss by manufacturers. Keck and Mithouard argued that the law was contrary to Community law concerning free movement of goods, persons services and capital and the principles of free competition within the Community. The joined cases, Keck and Mithouard, posed an interesting point of consideration to the ECJ, involving non-discriminatory legislation. The cases involved French prohibitions on resale of goods lower than purchase price. The ECJ ruled that these were permissible provided that those provisions apply to all affected traders operating within the national territory and provided that they affect in the same manner, in law and in fact, the marketing of domestic products and those from other member states. Please see the Case C-267 & 268/91 Keck and Mithouard [1995] 1 CMLR 101

12. National legislation imposing a general prohibition on resale at loss is not designed to regulate trade in goods between Member States.

13. Such legislation may, admittedly, restrict the volume of sales, and hence the volume of sales of products from other member states, in so far as it deprives traders of a method of sales promotion. But the questions remain whether such a possibility is sufficient to characterize the legislation in question as a measure having equivalent effect to a quantitative restriction on imports.

14. In view of the increasing tendency of traders to involve Art.30 of the Treaty as a means of challenging any rules whose effect is to limit their commercial freedom even where such rules are not aimed at products from other member states, the court considers it necessary to re-examine and clarify its case law on this matter.

15. It is established by the case law beginning with "Cassis de Dijon" (Case-120/78 Rewe-Zental v. Bundesmonopolverwaltung fuer Branntwein) that, in the absence of harmonization of legislation, obstacles to free movement of goods which are the consequence of applying, to goods coming from other member states where they are lawfully manufactured and marketed, rules that lay down requirements to be met by such goods such as those relating to designation, form, size, weight, composition, presentation, labeling, packaging) constitute measures of equivalent effect prohibited by Art.30. This is so even if those rules apply without distinction to all products unless their application can be justified by a public, interest objective taking precedence over the free movement of goods.

16. By contract, contrary to what has previously been decided, the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly actually or potentially, trade between member

states within the meaning of the Dassonville judgment (Case 8/74 [1974] ECR 837), so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and those from other Member States.

17. Provided that those conditions are fulfilled, the application of such rules to the sale of products from another Member State meeting the requirements laid down by the State is not by nature such as to prevent their access to the market or to impede access any more than it impedes the access of domestic products. Such rules therefore fall outside the scope of Art.30 or the Treaty.

It should be stated that, in practice, the measures regarding the equivalent effect prohibited in Art.28 are constituted by national rules laying down requirements to be met by goods (such as those relating to form, weight, size, presentation, composition, packaging, labeling designation). Furthermore, as per Art.28 EC, "selling arrangements" do not hinder trade between Members States provided that they apply to all relevant traders and provided that they affect in the same manner, in law and in fact, domestic and foreign products. In practice, all national rules that lay down requirements to be met by goods (such as those relating to designation, form, size, weight, composition, presentation, labeling, packaging) constitute measures of equivalent effect still prohibited by Art.28, EC whereas "selling arrangements" (such as advertising rules) do not hinder trade between Member States provided that they apply to all relevant traders and provided that they affect in the same manner, in law and in fact, domestic and foreign products[58].

Consequently, it can be stated that the ECJ examines national unfair competition regulations on the basis of Art.28 of the EC Treaty as follows;

[58] Mere "selling arrangements" are, for instance, advertising restrictions and prohibitions in the field of television advertising (Case C-412/93 Leclere-Siples [1995] ECR 1-179), the prohibitions on advertising the sale of pharmaceuticals by mail order (Case C-322/01 Deutscher Apothekerverband v.Doc Morris [2004] ECR I-0000) and the prohibition on certain announcements of bankrupt stock sales (Case Kamer (2004) ECR 1-3025

- All national unfair competition regulations (or their interpretation) acting like a “measure of the same effect” are covered by Article 28 EC as a matter of principle.

- This is not the case for “selling arrangements” that affect the sale of domestic and foreign products both legally and in fact in the same way (“Keck Doctrine”)

- Even when there is an obstacle to the free movement of goods, this can be justified, for instance, by the protection of health (Art.30) or by “mandatory requirements of the fairness of commercial transactions or consumer protection”, provided that the principle of proportionality is maintained (“Cassis de Dijon”).

3.3.2 Article 49 EC

National unfair competition law regulations (e.g. on advertising services) are also increasingly reviewed by the ECJ from the point of view of the freedom of services are regulated under Art.49 of the EC Treaty. However, it is not yet clear whether the Keck doctrine will apply accordingly to this subject. Nevertheless, currently national restrictions on the freedom of services can also be justified by mandatory requirement of the fairness of commercial transactions and consumer protection.

3.4. Secondary Community Law: Directives and Other Regulations

3.4.1 Basis of secondary community law

The directives in connection with the unfair competition law have affected the partial harmonization of national unfair competition law. Only in exceptional cases third-party claims can be directly based on directives.[59] It is worth noting that these

[59]HENNING-BODEWIG, p.34

regulations are generally and directly applicable and therefore they need no implementation in national law. The ECJ is responsible for their interpretation[60]

Art.95 of the Treaty regarding the establishing of functioning of the common market can be deemed as the basis of most approximation measures in the field of unfair competition law. Pursuant to Para.3 of Art.95[61]; the Commission shall seek "a high level protection", especially in matters concerning environment, safety, and health and consumer protection.

Following the enforcement of the Treaty of Rome; the field of unfair competition law is now covered in a broad sense. Because some of the Member States had a similar approach to the competition law, the prospects of a successful result were relatively good with a strong focus on the individual rights of the competitor[62].

The political difficulties set forth above led to the regulation being restricted to specific aspects in the field of unfair competition law, in particular advertising. After the adoption of Directive 84/450/EEC[63], the unfair advertising was supposed to follow "in a second stage". Nevertheless, this did not happen. On the contrary, the provisions of the above mentioned directive were extended in 1997 by a regulation of comparative advertising. Some product-specific and media-specific regulations such as the Television Directive and the E-Commerce Directive specified the rules in accordance with advertising. Afterwards, in 2005, a Directive on Unfair Commercial Practices was adopted. It was only in 2005 that a Directive on Unfair Commercial Practices was adopted. This Directive is broader insofar as it is not restricted to specific products, media or types of market behavior. On the other hand it is restricted to business-to-

[60] According to Art.220 of the EC Treaty; The Court of Justice shall nsure that in the interpretation and application of the law is observed.
[61] Pursuant to Para.3 of Art.95; the Commission in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection, taking account in particular of any new development based on scientific facts. Within their respective powers, the European Parliament and the Council will also seek to achieve this objective.
[62] HENNING-BODEWIG, p.35
[63] 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 http://ec.europa.eu/consumers/cons_int/safe_shop/mis_adv/index_en.htm, (09.08.2008)

consumer practices and thus does not-like most other Directives- protect consumer and competitor alike.[64]

As far as advertising is concerned there is now indeed extensive and detailed regulation on community level. This regulation, however as mentioned above, is fragmented into several directives[65], which partly overlap each other, making comprehension more complicated with every new directive. The constantly repeated purpose to "increase legal certainty for both consumers and business" by eliminating "the barriers stemming from the fragmentation of the rules on unfair commercial practices…" thus becomes somewhat doubtful[66].

3.4.2. Directives related to Unfair Competition

A. Directive 89/552/EC on Television Broadcasting Activities

Council Directive 89/552/EC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the Pursuit of Television Broadcasting Activities, as amended by Directive 97/36/EC of 30 June 1997 (hereinafter referred to as the "TVWF Directive")[67] was generally implemented word for word in most Member States. It contains among others. Provisions regarding the (television) advertising, sponsoring etc which, in the view of most Member States, concern aspects of unfair competition law.

The TVWF Directive covers all aspects of television activity originated within the EU. Nevertheless, it does not apply to radio activities. As per Article 2.3.i the provisions of the this directive do not apply to broadcasts "intended exclusively for reception in States other than Member States, and which are not received directly or indirectly in one or more Member States".

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[64] HENNING-BODEWIG, p.35

[65] Directive 84/450/EEC on misleading advertising; Directive 97/55/EC on comparative advertising; Directive 89/452/EC on television broadcasting; Directive 2000/31/EC on E-Commerce; Directive 2003/33/EC on Tobacco advertising; Directive 76/68/EEC concerning cosmetic products; Directive 92/28/EEC on the advertising of medical products for human use; Directive 97/112/EEC relating to labeling, presentation and advertising of foodstuff etc

[66] Recital 12 of the Unfair Commercial Practices Directive

[67] OJ 1989 L 298, p. 23

According to Article 1.a "*Television broadcasting can be defined as the initial transmission by wire or over the air, including that by satellite, in unecoded or encoded form, of television programmes intended for reception by the public. It includes the communication of programmes between undertakings with a view to their being relayed do the public with the exception of communication services providing items of information or other messages on individual demand such as telecopying, electronic data banks and other similar services".* Furthermore, any form of announcement broadcast whether in return for payment or for similar consideration or broadcast for self-promoting purposes 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 shall be considered as Television advertising in accordance with Article 1.a.

The ECJ had stated in Baccardi of the ECJ[68] that the provisions of the TVWF Directive do not cover "indirect" television advertising, resulting for instance from the fact that advertising hoardings are broadcast during the transmission of a sport event.

General principles to distinguish between advertising and programmes can be found in Article 10 of the TVWF Directive. Therefore television advertising shall be "readily recognizable as such and keep quite separate from other parts of the programme service by optical and/or acoustic means". By the provisions of the TVWF Directive, subliminal techniques and surreptitious advertising are expressly forbidden.[69]

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[68] Case C-429/29 *Baccardi* (2004) ECR I-000*27.* In this case, for the reasons set out by the Advocate General in paragraphs 48 to 52 of his Opinion, the indirect television advertising for alcoholic beverages resulting from hoarding visible on screen during the retransmission of sporting events does not constitute a separate announcement broadcast in order to promote goods or services. For obvious reasons, it is impossible to show such advertising only during the intervals between the different parts of the television broadcast concerned. The images on the advertising hoarding which appear in the background of the pictures broadcast, in a random and unpredictable fashion according to the requirements of the retransmission, do not have any distinct character in that context. Such indirect television advertising cannot, therefore, be regarded as television advertising within the meaning of Directive 89/552 and accordingly the directive is not applicable to it.

[69] Article 1.c. defines surreptitious advertising as "… 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 programmes 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 international in particular if it is done in return for payment or for similar consideration".

There are several prohibitions or restrictions on the advertising of potentially dangerous products contained in the TVWF Directive. Television advertising for cigarettes and other tobacco products (art.13) and for medicinal products and medical treatment available only on prescription (Art. 14) is strictly prohibited under the provisions of the Directive. Article 15 imposes restrictions on advertising for alcoholic beverages which correspond with the Codes of Conduct of the International Chamber of Commerce. The protection of children and minors against television advertising is also contained in Article 16 of the TVWF Directive. Under this Article television advertising "shall not cause moral or physical detriment to minors" and therefore it shall not directly exhort minors to buy a product or a service by exploiting their inexperience or credulity", nor directly encourage minors to persuade their parents to buy the goods being advertised, exploit the special trust in parents and teachers or unreasonably show minors in dangerous situations. Art 12 contains additional general requirements applicable to the content of all television advertising.

Accordingly, pursuant to the requirements under the TVWF Directive; television advertising shall not (i) prejudice respect for human dignity; (ii) discriminate on grounds of race, sex, nationality; (iii) be offensive to religious or political beliefs, (iv) encourage behavior prejudicial to the protection of the environment.

B. Directive 2003/33/EC on Tobacco Advertising

Directive 2003/33/EC of the European Parliament and the Council of 26 May 2003 on the approximation of the laws, regulations and the administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products[70] makes Directive 98/43/EC[71], previously annulled by the ECJ.[72] The prohibition on television advertising and sponsoring of tobacco products is extended to printed media and information society (Article 3), radio advertising and sponsorship (Art.4) and sponsorship of events (Art.5).

[70] OJ L 152.20.6.2003, p. 0016. The Directive must be transferred into national law by 31.7.2005.
[71] OJ Nr L 213 30.7.1998, p 0009
[72] Case C-376/98 Federal Republic of Germany v. European Parliament and Counsel and Case C-74/99, The *Queen v Secretary for Health ex parte Imperial Tobbaco Limited (2000)* ECR I-8599

Art. 2.b defines the concept of advertising in a broad way

"… any form of commercial communications with the aim or direct or indirect effect of promoting a tobacco products".

Unlike the Directive 84/450/EEC on misleading and comparative advertising, under the provisions of this Directive, the mere effect of promoting tobacco shall be sufficient and therefore there is no need to intent to promote the products. However in other aspects, the Directive 2003/33/EC is considered to be less rigid than the annulled Directive 98/43/EC[73]. A prohibition on advertising ban by using brand names, trademarks, emblems or other distinctive features of tobacco products was included in the original version of Art.2. Currently, Recital 12 states "other forms of advertising such as indirect advertising, as well as the sponsorship of events or activities without cross border effects, fall outside the scope of this Directive". This includes the old Article 3.a regarding the prohibition of the use of tobacco trademarks for non tobacco products.

In addition, Article 5.2 sets the limits of the former prohibitions of any free distribution which purpose is the direct or indirect effect of promoting a tobacco product to promotions "in the context of the sponsorship of the events". Nevertheless it is not clear whether Member States are allowed to impose more extensive and stricter regulations (as was provided for in the former Art.5).

C. Directive 2000/31/EC on Electronic Commerce

Directive 2000/31/EC on Certain Legal Aspects of Information Society Services, in particular Electronic Commerce, in the Internal Market of 8 January 2000 (hereinafter referred to as the "E-Commerce Directive" or "Directive 2000/31/EC")[74] regulates three topics-contracts concluded by electronic means, the liability of intermediary service providers and the regulation of "commercial communication".

Pursuant Article 1.1; this Directive seeks to contribute to the proper

[73] HENNING-BODEWIG; p.55
[74] OJ L 178, 17,7, 2000, p.1

functioning of the internal market by ensuring the free movement of information society services between the Member States". It is worth noting that the Directive is not restricted to the protection of consumers as it aims to ensure legal certainty for competitors and business as well. Nevertheless its main goal is to increase consumer confidence.

The Directive's scope of application can be defined as all "commercial communications" in electronic commerce. The concept of commercial communication was launched for the first time in the Green Paper on Consumer Protection[75]. This concept is broader than the advertising concept and includes sales promotion and sponsoring, among others.

As per Art. 2.f, it covers

"…any form of communication designed to promote, directly or indirectly, the goods, services or image of a company, organization or person pursuing a commercial, industrial or craft activity or exercising a regulated profession".

Nevertheless, the following situations do not constitute any type of commercial communications: (i) information that allows direct access to the activity of the company, organization or person, in particular a domain name or an electronic mail address, (ii) communications related to the goods, services or image of the company, organization or person compiled in an independent manner, particularly when this is without financial consideration.

As per Art 7.1 of the Directive, all commercial communications must identifiable in a clear way. Under the provisions of the Directive the legal and natural person on whose behalf the communication is made shall also be identifiable in a clear way.

Briefly, the purpose of the E-Commerce Directive is to endure the free movement of information society services across the European Community and to encourage greater use of e-commerce by breaking down barriers across Europe and

[75] COM (2001) 531 final

boost consumer confidence and trust by clarifying the rights and obligations of businesses and consumers. Adopted in June 2000, the objective was to ensure that information society services benefit from the internal market principles of free movement of services and freedom of establishment, in particular through the principle that they can trade throughout the European Community unrestricted or what is known as the country of origin rule.[76]

D. Directive 97/7/EC of Distance Contracts

Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the Protection of Consumers in respect of Distance Contracts[77] regulates the civil-law consumer protection in case of contracts concluded in distance sales. This Directive regulates specially the right to withdraw. Nevertheless, this Directive also contains some regulations belonging to the field if direct marketing. The Directive 97/7/EC must be seen in understood with the Directives 2000/31/EC and 2002/58/EC.

Article 9 sets up the prohibition of the supply of goods or services to a consumer without their prior order in case a demand for payment is involved. It should be noted that this Article on the supply of goods or services was removed with the Art. 15 of the Directive on Misleading Advertisement.[78] As per Article 10.1 direct marketing via telephone calls by automatic calling machines and faxes to consumers require the consumer's prior consent. Nevertheless, all other means of distant communication are allowed by the provisions of the Directive in case there have been "no clear objection from the consumer" (Article 10.2).

Art. 14 states that the above mentioned requisite is nevertheless a minimum standard. Consequently, Member States may adopt or retain further and stricter regulations.[79]

3.5. Directive 84/450/EEC Concerning the Misleading Advertisement

[76] http://www.euroispa.org/files/060601_euroispa-avms-final.pdf, (12.11.2008)
[77] OJ L 144, 4.6. 1997, p.19
[78] http://www.berr.gov.uk/files/file32081.pdf, (14.12.2008)
[79] HENNING-BODEWIG; p.55

Council Directive 84/450/EEC of September 10, 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising (hereinafter referred to as the "Directive 84/450/EEC" or the "Misleading Advertisement Directive") was for a long time the most important regulation in the field of unfair competition law. Its aim is to "set out minimum objective criteria that can be used to determine whether advertising is misleading". The purpose of the Directive 84/450/EEC grants a minimum level of protection[80] , so that the Member States can retain and adopt stricter regulations. In other words; as per Art.1 of the Directive 84/450/EEC the purpose was "to protect consumers, persons carrying on a trade or business or practicing a craft or profession and the interests of the public in general against misleading advertising and the unfair consequences thereof". Since some Member States had already achieved the minimum level of protection the Directive has not been implemented expressly in all Member States.

This Directive was amended in 1997 by Directive 97/55/EC (hereinafter referred to as the "Directive 97/55/EC" or the "Directive" in this section) concerning misleading advertising so as to include comparative advertising[81]. Currently as per this amendment the Directive 84/450/EEC covers two fields: misleading advertising and comparative advertising. It is worth noting that Directive 97/55/EC has already been implemented in most of the Member States and in many cases such implementation had been taken into consideration word by word of the Directive.

One of the main objectives of this Directive is to "lay down the conditions under which comparative advertising is permitted"[82]. Directive 2005/29/EC has not modified Art. 1 in this respect to comparative advertising and therefore this part of the Directive is still covered by the protection of the interest of consumers, traders and

[80] Please see Art.7 of the Directive 84/450/EEC
[81] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31997L0055:EN:HTML, (05.11.2008)
[82] Art. 1 of the Directive 97/55/EC states that "the purpose of this Directive is to contribute to the proper functioning of the internal market and achieve a high level of consumer protection by approximating the laws, regulations and administrative provisions of the Member States.

general public[83]. The scope of protection is furthermore determined through the term "comparative advertising" namely any advertising"… which explicitly or by implication identifies a competitor or goods or services offered by a competitor" (Art 2.2.a).

According to the Recital 6 of Directive 97/55/EC, the concept of comparative advertising was deliberately given a broad wording in order to cover all manifestations.

This is also assumed by the ECJ[84]. There is no doubt that the Directive covers criticizing comparative advertising and advertising by association. In contrast, it is not entirely clear whether this also applies to personal advertising or a comparison shall always be required. The legal definition in Art 2.2.a lacks this requirement. It might be concluded from the overall context, the repeated use of the term "comparative advertising" and the reference to "competitors" that there must be a comparison of competing enterprises, good or services, which would exclude from the scope of regulation one-sided criticism, in particular disparagement.

On the other hand, the Toshiba decision[85] of the ECJ seems to be in favor of the possibility of comparative advertising without a comparison. The decision concerned advertising by Katun, a producer of spare parts, which had referred in its advertising to the trademark and the Article number of the Toshiba devices for which the spare parts were intended. To begin with, the ECJ held, referring to the deliberately broad wording:

> *30. In order for there to be comparative advertising within the meaning of Article*

[83] BODEWIG, p.42
[84] Case C-112/99 *Toshiba Europe* (2001) ECR 1-7945; Case C44/01 *Pipping* (2003) ECR I-03095
[85] In the Toshiba Case submitted the German Regional Court (Landgericht Düsseldorf), in the context of a law suit, filed by Toshiba Europe GmbH against a competitor company, Katun Germany GmbH, the ECJ clarified that within the meaning of the Directive 97/55/EC, comparative advertising necessarily implies identification, explicit as well as by implication of *"a competitor or goods or services offered by a competitor".* Within this context, the ECJ also stated that product numbers (used by a manufacturer to identify spare parts and consumable items), resulting in combinations of numbers or of letters and numbers and if used alone, i.e. without indication of the manufacturer's trade mark or the equipment they pertain to, are not necessarily or automatically. Case C-112/99 *Toshiba Europe* (2001) ECR 1-7945

2.2.a of Directive 84/450 as amended, it is therefore sufficient for a representation to be made in any form which refers, even by implication, to a competitor or to the goods or services which he offers. It does not matter that there is a comparison between the goods and services offered by the advertiser and those of a competitor.

In spite of this, there is an attempt to construe a "comparison":

38. In a situation such as that in the main proceedings, specification of the two products have equivalent technical features, that is to say, a comparison of material, relevant, verifiable and representative features of the products within the meaning of Article 3a.1.c of Directive 84/450 as amended.

In practice, the problem is less important, since most references, indications etc that appear one-sided at first sight contain direct claims of equivalence. According to the meaning and purpose of the regulation, the decisive factor should be whether the addressee of the advertising is presented with purchase alternatives. According to the second Recital of the objectives of the Directive, comparative advertising must help demonstrate objectively the merits of the various comparable products. This is not the case if a known product is for instance primarily used as an attention grabber, but is the case for an invitation to compare or a reference to the suitability of the advertiser's own product as spare part, accessory, etc.[86]

In the Toshiba decision, the ECJ also distinguished the Directive on comparative advertising from the Trademark Directive. Both directives were to be reconciled in the light of their meaning and purpose:

33.It follows from a comparison of Article 2.2.a of Directive 84/450 as amended, one the one hand, and Article 3.a of that directive, on the other

[86] See, for instance the decision of the German Federal Supreme Court, GRUR Int. 1999, 453-"Vergleichen Sic": GRUR 2001. 350-OP Lampen and GRUR 2005, 1110-Aluminiumrader

hand; that, on a literal interpretation, they would render unlawful any reference enabling a competitor, or the goods or services which he offers, to be identifies in a representation which did not contain a comparison within the meaning of Article 3a. That would have to be the case where there were mere mentions of the trade mark of the manufacturer of the original models or of the reference numbers of models for which the spare parts and consumable items are manufactured. In the main proceedings, Toshiba Europe does not contest Hatun's use of such marks or reference numbers.

34. However, it is apparent from Article 6.1.c of First Council Directive 89/104/EEC of 21 December 1988 to approximate that law of the member states relating to trade marks (OJ 1989 L 40, p.1) and the case law of the Court (Case C-63/97 BMW (1999) ECR I-905ç paragraphs 58 to 60) that the use of another person's trade mark may be legitimate where it is necessary to inform the public of the nature of the products or the intended purpose of the services offered.

35. A literal interpretation of Directive 84/450 as amended results in a contraction with Directive 89/104 and cannot therefore be accepted.

36. In those circumstances, it is necessary to take account of the objectives of Directive 84/104 as amended. According to the second recital of the preamble to Directive 97/55, comparative advertising will help demonstrate objectively the merits of the various comparable products and thus stimulate competition between suppliers of goods and services to the consumer's advantage.

37. For those reasons, the conditions required of comparative advertising must be interpreted in the sense most favorable to it.

The direct or indirect reference to one or more competitors, his products or services as required in Art.2.2.a is an indispensable part of comparative advertising. There is a direct reference if the competitor, his products, services or trademark are mentioned directly. There may be an indirect reference if the reference to specific competitors etc. is obvious in the light of the circumstances (from the point of view of the target group). In this, the overall arrangement of the advertising (e.g. a more or less clear reference to the competitor's trademark or his famous advertising) plays just as much a role as the market conditions. The closer the situation is to an oligopoly, the easier it will be for the public to identify a specific competitor even without the express mention of his name or trademark.

It is a matter for the Member States to determine the requirements to be made of "identifiable"; the ECJ has not yet decide on this point. No doubt in all countries, a mere comparison of system or type of product where no individual supplier is identifiable will not be regarded as comparative advertising within the meaning of Directive 97/55/EC, but will be measured directly against the prohibitions on deception and disparagement.

According to the definition in Art.2.2.a, the comparison must relate to a "competitor" or his "products and services". The concept of "competitor" causes difficulties in those countries whose unfair competition laws no longer require a competitive relationship, and based on the contrary on criteria like "seller". A competitor is anyone whose products or services are, from the point of view of the target public, identical, the same or at least substitutable. The requirements made of substitutability are not set too high, and in particular it is sufficient if such substitutability is created by the advertising itself.

As regards the misleading comparisons, pursuant to Art. 3.a.1.a, the comparison must not be misleading. In the relationship between business and consumer, the question of deception has now to be answered on the basis of Articles 6 and 7 of Directive 2005/29/EC; in the business to business relationship it continues to be dealt

with on the basis of Art.2.2 of Directive 84/450/EEC. It remains to be seen whether there are any differences, and what these might be.

The prohibition on misleading comparisons is actually self-evident, since it applies to all types of advertising. In particular, the question arises whether a comparison that does not list all relevant aspects is misleading for this reason. The answer must be negative as a matter of principle. There is fundamentally no to be complete, as follows inter alia by reverse conclusion from Art. 3.a.1.c, according to which the characteristics compared must be "representative". Only in exceptional cases can the selection of characteristics be so arbitrary that the overall impression is misleading.

This and the question of misleading comparative advertising in general were addressed in particular by the *"Pippig v. Hartlauer"* decision of the ECJ in 2003. The decision concerned a comparison by the Austrian retailer Hartlauer between the prices for its own spectacles and the prices for those supplied by traditional opticians. The comparison related to "branded spectacles" marketed by the specialist optical store, Pipping, fitted with lenses of the famous Zeiss brand (while Hartlauer's parallel import spectacle frames used lenses form the unknown Optimed brand). The Hartaluer television advertisements also showed the Pippig store and the company logo.[87]

The ECJ first held that the Member States were not entitled to apply stricter criteria to misleading comparative advertising than the Directive, since according to Art.7.2, the "minimum standard clause" of the Directive 84/450/EEC does not apply to comparative advertising.[88] This is true of all three parts of the comparison, namely the statements about the advertiser's own product, the statements about the competing product and the statements about the relationship between these two:

44. It follows that Directive 84/450 carried out an exhaustive

[87] BODEWIG, p.168
[88] http://curia.europa.eu/en/actu/activites/act03/0312en.htm, (18.01.2009)

harmonization of the conditions under which comparative advertising in Member States might be lawful. Such a harmonization implies by its nature that the lawfulness of comparative advertising throughout the community is to be assessed solely in the light of the criteria laid down by the community legislature. Therefore, stricter national provisions on protection against misleading advertising cannot be applied to comparative advertising as regards the form and content of the comparison.

The ECJ also addressed the question whether and under what circumstances the identification of the competitor's product- or even its non identification- constitutes deception:

56. Article 3.a.1.a of Directive 84/450 must be interpreted as meaning that, whereas the advertiser is in principle free to state or not to state the brand name of rival products in comparative advertising, it is for the national court to verify whether, in particular circumstances, characterized by the importance of the brand in the buyer's choice and by a major difference between the respective brand names of the compared products in terms of how well known they are, omission of the better-known brand name is capable of being misleading.

In contrast, it was not considered misleading to omit a reference to the fact that the branded spectacle frames used by the advertiser were parallel imports[89]. Nor is it unfair to determine comparative prices by means of test purchases[90] or to choose a rival product where the price difference (or quality difference) is particularly large. Insofar the ECJ stated:

81. The choice as to the number of comparisons which the advertiser

[89] Please see Para. 59 of the Case C-44/01 Pippig Augenoptik v. Hartlauer [2003] ECR I-3095
[90] Ibid, Para 67

wishes to make between the products which he is offering and those offered by his competitors falls within the exercise of his economic freedom. Any obligation to restrict each price comparison to the average prices of the produces offered by the advertiser and those of rival product would be contrary to the objectives of the Community legislature.

82. In the words of the second recital in the preamble to Directive 97/55, comparative advertising must help demonstrate objectively the merits of the various comparable products. Such objectivity implies that the persons to whom the advertising is addressed are capable of knowing the actual price differences between the products compared and not merely the average difference between the advertiser's prices and those of its competitors.

Article 3.a.1.b regulates the comparison of products for the same needs or purpose. According to the referred article; a comparison shall only be permitted if "it compares goods or services meeting the same needs or intended for the same purpose". Accordingly it must be at least a substitution product (from the point of view of the target group). In contrast, the comparison need not necessarily concern identical products.

According to Article 3.a.1.c, comparative advertising shall only be permitted if "it objectively compares one or more material, relevant, verifiable and representative features of those goods or services, which may include price". As mentioned above, "objectivity" does not necessarily mean completeness. It is not clear t the moment whether a comparison of purely subjective preferences is prohibited. Strictly speaking, such a comparison is neither objective nor verifiable. However, a prohibition would lead to the curious result that the Directive, which aims at the liberalization of comparative advertising, would be stricter than the previous national law of almost all the Member States, which had at least tolerated such subjective preference

comparisons.[91] In addition, the comparison must concern the features of goods or services (or their price).[92]

The need for verifiability is closely related to the requirement of the objectivity. Verifiability requires the comparison to involve allegations of fact, since only these type of allegations can be checked for objective justification. The decisive factor in this case is focused in whether the addressee can verify such claims, i.e. the addressee of the advertising must at least with reasonable effort himself be able to check the feature compared.

The features compared must also be "material, relevant and representative". This ultimately amounts to the same thing, the aim being to prevent the creation of the distorted overall impression by selecting irrelevant secondary features that are as a rule of no relevance for the purchase. What is decisive for the purchase and hence "material" etc., depends strongly on the type of product. While for instance the packaging of most products is of secondary importance, it may for certain products (perfume, sweets, etc.) indeed also be a material, relevant or representative feature.

Comparisons creating confusion are regulated by Article 3.a.1.h. This article prohibits any comparison that *"creates confusion among traders, between the advertiser and a competitor or between the advertiser's trademarks, trade names, other distinguishing marks, goods or services and those of a competitor"*. Comparative advertising that creates such a risk of confusion towards consumers is now prohibited by Art. 6.2.a[93] of the Directive 2005/29/EC so that insofar two different sets of

[91] Thus for instance the German Federal Supreme Court GRUR 1987, 49- "Cola Test" with comment by Sack and in Belgian Cour d'appel de Bruxelles 7.6.1983, 117; confirmed by Cass 21.3.1985, Arr. Cass, 1985, 1001

[92] According to this; personal comparative advertising is no doubt prohibited. The term 'features of goods and services', if construed literally, would also not include company related details such as turnover, the product fame or the media's audience penetration. Possibly, their inclusion could be justified by the broad interpretation of the concept of comparative advertising in the ECJ Toshiba decision and the information needs to addressee, to whom such advertising can also present alternatives. BODEWIG, p.170

[93] According to Article 6.2.a of the Directive 2005/29/EC; a commercial practice shall be regarded as misleading if, in its factual context, taking into account of all its features and circumstances, it causes or is likely to cause the average consumer to take transactional decision that he would not have taken

regulation apply. Whether this will also lead to a difference in interpretation remains to be seen.

As a consequence of the prohibition of confusion, trademark claims may also be possible in many cases. As stated by the ECJ in the Toshiba decision, the rules on comparative advertising are to be construed taking into account the purpose of trademark law (and vice versa). It is generally assumed that terms that are used identically in both directives-for instance the likelihood of a confusion-are to be interpreted on the basis of the same principles (such that in 3.a.1.h, as in trademark law, the abstract likelihood of confusion is sufficient and there is no need for there to have been actual confusion). In addition, the underlying benchmark of the "reasonably informed and reasonably observant and circumspect average consumer" is identical.

According to Article 3.a.1.d, comparative advertising "shall not discredit or denigrate the trademarks, trade names, other distinguishing marks, goods, services, activities or circumstances of a competitor". Discrediting is a milder form of denigration and since both are covered there is no need for further distinction. System-immanent discrediting does not constitute discrediting within the meaning of Art. 3.a.1.e since any critical comparative advertising involves a certain discrediting of the competitor or his products. If this were prohibited, the intended liberalization of comparative advertising would not be achieved. Therefore, it shall only be considered illegal. This occurs, in particular, in case the comparative advertising does not primarily emphasize the benefits of the advertiser's own achievement- which is always permissible even if this logically means showing the disadvantages of the rival product- but rather focuses on the negative aspects of the competitor or his product. Discrediting can also result from an inappropriate and aggressive tone, an unobjective representation or valuation or even an unspecific, global disqualification.[94]

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otherwise, and it involves any marketing of a product, including comparative advertising, which creates confusion with any products, trade marks, trade names or other distinguishing marks of a competitor. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31997L0055:EN:HTML, (21.12.2008)

[94] HENNING-BODEWIG, p.178

In the *Hartlauer v. Pipping* decision, the ECJ based its conclusion in the interpretation and purpose of the Directive, in particular the public's interest in information. According to this, neither the selection a competitor's product (e.g. the one with the greatest price or quality difference) nor the pictorial representation of the competitor's store and trademark is of itself disparaging. It can also be concluded from the interaction between the Comparative Advertising Directive and the Trademark Directive that as a rule which will not involve a trademark infringement either:

> *83. Having regard to the above considerations, the answer to the fourth question must be, first that a price comparison does not entail the discrediting of a competitor, within the meaning of Article 3.a.1.e. of Directive 84/450 either on the grounds that the difference in price between the products compared is greater than the average price difference or by reasons of the number of comparison made. Secondly, article 3.a.1.e of Directive 84/450 does not prevent comparative advertising, in addition to citing the competitor's name, from reproducing its logo and a picture of its shop front, it is important to note that, according to the 15th recital in the preamble to Directive 97/55, use of another's trade mark, trade name or other distinguishing marks does not breach that exclusive right in cases where it complies with the conditions laid down by the directive.*

Nevertheless, the question of discrediting remains one of the aspects where the interpretation of the Member States diverges most. While the courts of some states apply a relatively strict standard, others have shown themselves to be rather tolerant.

According to Article 3.a.1.f, comparative advertising shall not "take unfair advantage of the reputation of a trademark, trade name or other distinguishing marks of a competitor or of a designation of origin of competing products". We find some inconvenience in this subject, in drawing a distinction to trademark law. It should also be noted here that the "attachment" to another's reputation necessarily associated with comparative advertising must be permitted, since otherwise derivative comparative

advertising would *per se* forbidden. The wording of subparagraph f. (unlike for discrediting comparative advertising) makes this clear in that the advantage must be "unfair". Furthermore, the reference must be accompanied by "particular circumstances" for the transfer of the reputation of a sign to another to be regarded as unfair, for instance an excessive emphasis of the well-known rival product. However, it is not an unfair exploitation of another's reputation to claim expressly or implicitly that an inexpensive ("no name") product is equivalent to a prestigious brand product[95].

Article 3.a.1.e restricts comparisons for products with designation of origin to products with the same designation. According to this "Champagne clause" (included at the request of France), products bearing designations of origin (thus Champagne cannot be compared with sparkling wine, instead comparisons can only be made between various Champagne brands). It is doubtful whether this restriction results already from Art. 13 of Regulation 2081/92/EC on the Protection of Geographical Designations.

According to Article 3.a.2 of the original version of the Directive 84/450/EEC comparisons referring to a special offer had to meet certain transparency requirements. This paragraph seems to have been repealed through Directive 2005/29/EC. In any event the information about any restrictions applying to special offers, in particular the indication of possible restricted stocks can already be seen from the point of view of deception (see the Directive on Unfair Commercial Practices) and is subject to additional regulations in the field of the Internet (E-Commerce Directive). These information requirements apply irrespective of whether the advertising in question is a comparison or not.

3.6. Unfair Commercial Practices Directive (2005/29/EC)

On May 11, 2005 the European Community adopted Council Directive 2005/29/EC of the European Parliament and of the Council concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market and Amending Council Directive 84/850/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the

[95] Please see the Case C-44/01 Pippig Augenoptik v. Hartlauer [2003] ECR I-3095

European Parliament and of the Council and Regulation (EC) No.2006/2004 of the European Parliament and of the Council (hereinafter referred to as the "UCPD" or "the Directive") concerning unfair business-to-consumer commercial practices in the internal market.[96] This introduces a general prohibition on unfair business-to-consumer commercial practices that is fleshed out by reference to the concepts of misleading and aggressive commercial practices and an annex listing practices considered unfair in all circumstances. 'The reference point for judging the fairness of a practice is the average consumer, building on the jurisprudence of the ECJ; although this standard is adapted to tale interests of vulnerable consumers into account as considered appropriate.'[97]

Under the EU Law system, commercial practices[98] between enterprises and consumers within the internal market are benefited by the UCPD which is a uniform set of rules.

Following the adoption of the UCDP, the work began with the Green Paper on Consumer Protection in the European Union dated October 2, 2001.[99] The UCPD has had an eventful legislative history. "Political agreement having been achieved in the Council on May 18, 2004 and the Joint Position having been adopted on November 15, 2004, the European Parliament in its recommendation for the second reading on February 7, 2005, put forward 19 proposals for amendments, which were accepted by the Commission in its Statement dated March 15, 2005, thereby clearing the way to the adoption of the UCPD."[100]

The UCPD harmonizes the legal frameworks of the Member States concerning unfair commercial practices, including unfair advertising that directly harm consumers' economic interests and as a result indirectly harm of the economic interests of

[96] OJ 2005 L 149/22 (hereinafter referred to as the UCPD)
[97] HOWELLS, Geraint, MICKLITZ, Hans-W., WILHELMSSON, Thomas; *European Fair Trading Law: The Unfair Commercial Practices Directive,* Ashgate Publishing, 2006, p.2
[98] Commercial practice refers to activities related to the promotion sale or supply of a product to consumers. It covers any act, omission, course of conduct, representation or commercial communication – including advertising and marketing – which is carried out by a trader. If it is unfair, this means it is deemed to be unacceptable with regards to the consumer, according to specified criteria. http://www.springerlink.com/content/h42g36p8701n5671/, (10.09.2008)
[99] http://www.ec.europe.eu/consumers/policy/developments/fair-comm-pract/gfa_report_en.pdf, (11.12.2008)
[100] HOWELLS, MICKLITZ, WILHELMSSON; p.19

legitimate competitors. Measures seeking to curb unfair commercial practices harmful to the economic interest of consumers are fully harmonized by the UCPD. Moreover, the purpose of contributing to the correct operation of the internal market and providing a high level of protection to consumers are pursued by the UCPD. It should be noted that the consumers, businesses and traders are affected in a positive way by the existence and functioning of the internal market. Such market functioning requires respecting to guarantee the free movement of goods and services, the protection of the environment, the freedom to establish business across borders, non-restrict competition and the concurrent diverse policies.[101]

Further more, Poncibo and Incardona consider that the UCPD sets ups general principles in unfair competition[102]. Apart from most of other directives in the same field, Member States are not permitted to deviate from the standards it specifies under the UCPD, even where this would result in a higher level of protection for consumers. The same substantive rules defining what constitutes business to consumer unfair practice will apply throughout the internal market, independently of the jurisdiction of which the business or the consumers is domiciled or located.

3.6.1. Application of the Unfair Commercial Practices Directive

As long as the European Union exits, the potential of internal markets keep growing. Hence, new possibilities for consumers and businesses open at every time. Nevertheless, many European citizens still do not trust in cross-border transactions, and worried that they will not be guaranteed with the same level of protection they have in their own country or they are confused about the different laws in other Member States. In order to overcome this obstacle to the internal market development within Europe, the UCPD was created, from the start of the Consultation process in 2001 to its adoption May 11, 2005[103].

[101] PONCIBO, Cristina, INCORDANO, Rosella; "The EU Unfair Commercial Practices Directive: A Faltering First Step", *London Law Review* Vol.I, October 2005, Issue 2, p.319-320

[102] "The Commercial Practices Directive indicates a general clause designed to preclude unfair commercial behaviours by traders in most circumstances." Ibid. 319

[103] As regards the background of this Directive, In October 2001, the European Commission launched a wide-ranging consultation on a Green paper on EU Consumer Protection. The Commission suggested there

The process of defining an unfair commercial practice is clarified and simplified by the UCPD. The Directive replaces national rules of some countries with common legislation and, by this way, clarifies and simplifies the definition process of unfair commercial practice. It provides both consumers and traders with a European reference point, stating, in a clear way their rights defining which commercial practices should be considered as allowed or not.[104] Until the adoption of the Unfair Commercial Practices Directive, each Member State had its own regulations on unfair competition practices, which lead many times to contradictions between states. Therefore, it is worth noting that the UCPD means an important step for the harmonization and recognition between states, bringing down internal market barriers. As per Art 1 of the UCPD, the purpose of the UCPD is to contribute to the proper functioning of the internal market and achieve a high level of consumer protection by approximating the laws, regulations and administrative provisions of the Member States on harmful commercial practices.

The Directive's structure starts with a general prohibition on unfair commercial practices between traders and consumers[105]-[106] and then goes into wider detail defining what that means. Pursuant to Art.1 of the UCPD; the purpose of the Directive is to contribute to the proper functioning of the internal market and achieve a high level of consumer protection by approximating the laws, regulations and administrative provisions of the Member States on unfair commercial practices harming

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were a number of problems: gaps in the existing EU consumer protection regime; the use of minimum clauses allowing rules to become quickly outdated; the use of minimum clauses allowing national legislation to create barriers to cross-border trade. The Commission's intention to propose a framework directive containing a "general duty not to trade unfairly". The Commission set up an "expert group" of national officials to discuss national fairness law and to consider that basis of an EU framework directive. There have been two previous consultations based on two European Commission documents which have involved written consultations and meetings. DTI *The Unfair Commercial Practices Directive. Consultation on a draft EU Directive COM (2003)* July, 2003. p.5

[104] http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/ucp_en.pdf, (17.08.2008)

[105] As per Article 2 (a) of UCPD defines consumer as any natural person who in commercial practices covered by the directive is acting for purposes, which are outside his trade, business or profession. This is the same definition as in most consumer protection directives such as the Directive on unfair terms in consumer contracts Article 2 (b), Directive 1993/13/EEC.

[106] Articles 3 (1) and 5 (1) of the UCPD Directive

consumers' economic interests.[107] Furthermore, unfair commercial practices are defined under Art.5.2 of the Commercial Practices Directive.

According to this article

> "*A commercial practice shall be unfair if; (i) it is contrary to the requirements of professional diligence, and (ii) it materially distorts the economic behavior with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers.*"

In order to understand when we shall consider a consumer as an average consumer[108] as stated in the above mentioned article, the particular group of consumers to which the commercial practice[109] is directed should be taken into consideration, as the benchmark[110]. Hence, the fairness or unfairness of a particular commercial practice is then assessed against such benchmark. The ECJ refers to the "average consumer" in its case-law[111]. The average consumer, is interpreted by the ECJ, as an individual who is "reasonably well-informed and reasonably observant and circumspect", taking into consideration social, cultural and linguistic factors.[112] As per the UCPD, in accordance with the principle of personality, and in order to permit the application of the protections in an effective way, this Directive takes as a benchmark the average consumer, who is reasonably observant and circumspect, considering factors such as social, cultural and linguistic as interpreted by the ECJ. Nevertheless, the Directive also contains provisions aimed to prevent the exploitation of consumers particularly

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[107] Art.1 of the Commercial Practices Directive Article text here

[108] An average consumer is defined in Art 2(b) as the consumer who is reasonably well informed and reasonably observant and circumspect

[109] A commercial practice is defined in Art. 2 (e) as any act, omission, and course of conduct or representation directly connected with the promotion, sale or supply of a product to consumers.

[110] For instance, where product marketing is targeted towards children, it will be judged in terms of its effects on the average child.

[111] Case C-315/92, Verband Sozialer Wettberwerb eV v. Clinique Laboratories SNC and Estée Lauder Cosmetics GmbH (1994) ECR I-317; Case-210/96, Gut Springheide GmbH v. Oberkreisdirektor des Kreises Stenfurt (1998) ECR I-4657

[112] Case-210/96, Gut Springheide GmbH v. Oberkreisdirektor des Kreises Stenfurt (1998) ECR I-4657
see also on this subject, PONCIBO, Cristina, INCARDANO, Rosella; "*The Average Consumer, the Unfair Commercial Practices Directive, and the Cognitive Revolution*", March 2007, Journal of Consumer Poolicy Issue, Vol.30, No.1, p.24-26

vulnerable to unfair commercial practices.[113] In most EU countries, national courts are already using the average consumer test.[114]

Pursuant to the UCPD, National courts and authorities shall emit their judgments considering in such duty the case-law of the ECJ in order to determine the typical reaction of a reasonable consumer in a given case.[115] The analysis of the effect of particular commercial practices on some kinds of consumers, especially those who are unusually vulnerable, can replace the "average consumer" test if the practices are directed at those kinds of consumers or will foreseeable affect them.

As indicated above, the UCPD harmonizes the unfair commercial laws in all EU member states and introduces a general prohibition on traders not to treat consumers unfairly. Therefore we can say that the UCPD aims to clarify consumers' rights and to simplify cross-border trade. The UCPD introduces the obligation towards traders not to mislead consumers through acts or omissions; and not to subject them to aggressive commercial practices such as high pressure selling techniques. The UCPD also provides additional protections for vulnerable consumers who are often the targets of unscrupulous traders.

Some authors consider that unfair practices among competitors, when they are not completely neglected by the Community Law, remain a national concern. As per

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[113] As per Art. 18 of the Directive the Commission shall submit to the European Parliament and the Council a comprehensive report on the application of this Directive, in particular of Articles 3(9) and 4 and Annex 1 on the scope fro further harmonization and simplification of Community law relating to the consumer protection, and, having regard to article 3 (5) on any measures that need to be taken at Community level to ensure that appropriate levels of consumer protection are maintained.

[114] This test provides that when a commercial practice is specially directed to a "particular group of consumers", the capacity to materially distort should be examined from the perspective of the average member of that group. This is considered to make it easier for action to be taken in respect of vulnerable consumers. DTI *The Unfair Commercial Practices Directive. Consultation on a draft EU Directive COM (2003)* July, 2003. p.22

[115] The origins of ECJ jurisprudence based on the average consumer can be traced in *Gut Springheide*. Gut Springheide marketed ready packed eggs under the description g-grain-fresh eggs, as the feed mix used to feed the hens contained 60% of a variety of six different cereals. In each pack of eggs, a piece of paper was enclosed stating the beneficial effect of this feed on the quality of the eggs. The German authorities claimed that this mislead consumers. The ECJ discussed whether this description was misleading and stated that: *in order to determine whether a statement or description designed to promote sales … is liable to mislead the purchaser … the national court must take into account the presumed expectations which it evokes in an average consumer who is reasonably well-informed and reasonably observant and circumspect.* Please see Case C-210/96, ECR, 1998, I-4657, Gut Sprigenheide GmbH, Rufolf Tusky v. Oberkreisdirektor des Kreises Steinfurt – Amt für Lebensmittelüberwachung

Art.6 of the UCPD, member states will still be able to regulate such practices in conformity with Community Law, taking full account of the principle of subsidiary, if they chose to do so.[116]

3.6.2. Prohibition of unfair commercial practices

Art.5.4 of the UCPD imposes on traders a general prohibition of unfair commercial practices. It sets two cumulative tests for the purpose of deeming whether a practice is "unfair": (i) It is contrary to "professional diligence" and (ii) It materially distorts or is likely to materially to distort the economic behavior regarding the product of the average consumer to whom it is addressed, or of the average member of the group when a commercial practice is specifically directed to a particular group of consumers.[117]

Although this general clause is not restricted by the "unfairness categories", it is settled out between articles 6 and 9. Art 5 of the Directive states that commercial practices shall be considered as unfair in particular when are misleading or aggressive. It is, therefore, important to carefully consider how the general clause and the tests might work in practice to protect consumers and their effect in harmonizing national law in this area.

The prohibition of unfair commercial practices applies at both the promotional stage and to the after-sale of a product. Art.5(1) is limited to affirm that 'unfair commercial practices shall be prohibited. This has the clear advantage of confirming easily to the constant evolution of sales and promotional techniques, but it could also have proven to be difficult to apply if the UCPD had not specified the two criteria for assessing possible unfairness of commercial practices."[118]

As set forth above, the general prohibition is elaborated by rules on the two types of commercial practices, which are by far the most common, namely misleading

[116] PONCIBO/INCARDONA; p.321
[117] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32005L0029:EN:HTML, (10.01.2009)
[118] Ibid; p.321

commercial practices, and aggressive commercial practices. These two types of commercial practices will be analyzed herein below.

The "Professional diligence" is defined in Art 2(j) as "the measure of special care and skill exercised by a trade commensurate with the requirements of normal market practice towards consumers in his field of activity in internal market". This concept can be understood as analogous to notion of good business conduct found in most legal systems of the Member States. The "material distortion" test needs to be read in conjunction with the definition in Article 2(f) which states that the practice must significantly impair the consumer's ability to make an informed decision. It had been argued that this test does not distinguish between fair marketing practices, which are intended to cause the consumer to act in way they would not otherwise have done and those marketing practices, which are genuinely "unfair" and seek to use misleading or oppressive techniques[119].

Furthermore, Annex 1 of the Directive (hereinafter referred to as the "Black List") contains the list of those commercial practices, which shall in all circumstances be regarded as unfair, independently of any test or evidence. This is not an exhaustive list but is intended to provide clear guidance on practices that are unfair. Nevertheless, it is important to note that these additional categories do not limit the general clause in any way.[120]

Art.13 of the UCPD states that the general clause is elaborated by rules on the two types of commercial practices, namely misleading commercial practices and aggressive commercial practices which will be evaluated under sections 5.3. and 5.4. of this thesis.

3.6.3. Misleading Commercial Practices

Misleading commercial practices make use of information, which is false or, even when factually correct, influence the consumer to make a transaction which would

[119] This second test uses the benchmark of the "average consumer" as defined in Art. 2 DTI *The Unfair Commercial Practices Directive. Consultation on a draft EU Directive COM (2003)* July, 2003. p.2
[120] HOWELLS/ MICKLITZ/WILHELMSSON; p.118

have not made otherwise. The definition and the criteria for identifying misleading commercial practices, as well as the examples contained in the Black List, acclaim the consumer right to correct and complete material information[121].

In conformity with the laws and practices of Member States on misleading advertising, the UCPD classifies misleading practices into two categories namely misleading actions and misleading omissions.

A. Misleading Actions

Actions are the activities trades carry out in the promotion and sales of their products. As per the Directive an action shall be considered as misleading if contains false information and is therefore untruthful or in any way, including overall presentation, deceives or likely to deceive the average consumer, even if the information is correct and causes or is likely to cause him to take a transactional decision that he would have otherwise not taken[122].

The criteria are objective so that there is no need to prove that the consumer was actually misled. The possibility of deception is sufficient to consider the actions as

[121] HAUPT, S.; *An Economic Analysis of Consumer Protection Law*, German Law Journal, 2003 www.germanlawjournal.com/pdf/Vol04No11/PDF_Vol_04_no_11_11_1164_Private_Hauot.pdf, (09.09.2008)

[122] As per Art.6(1) of the UCPD;"A commercial practice shall be regarded as misleading if it contains false information and is therefore untruthful or in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct, in relation to one or more of the following elements, and in either case causes or is likely to cause him to take a transactional decision that he would not have taken otherwise:(a) the existence or nature of the product;(b) the main characteristics of the product, such as its availability, benefits, risks, execution, composition, accessories, after sale customer assistance and complaint handling, method and date of manufacture or provision, delivery, fitness for purpose, usage, quantity, specification, geographical or commercial origin or the results to be expected from its use, or the results and material features of tests or checks carried out on the product;(c) the extent of the trader's commitments, the motives for the commercial practice and the nature of the sales process, any statement or symbol in relation to direct or indirect sponsorship or approval of the trader or the product; (d) the price or the manner in which the price is calculated, or the existence of a specific price advantage;(e) the need for a service, part, replacement or repair; (f) the nature, attributes and rights of the trader or his agent, such as his identity and assets, his qualifications, status, approval, affiliation or connection and ownership of industrial, commercial or intellectual property rights or his awards and distinctions;(g) the consumer's rights, including the right to replacement or reimbursement under Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, or the risks he may face.

misleading if the other elements are present. There is no need to prove the financial loss among others.[123]

The underlying idea behind what constitutes a misleading action is that the average consumer must not be caused to take a decision, which he would not have taken if he had been well informed. Such actions can happen "by deception" or "in a factual context"[124].

Art.6.1 (a) of the Directive addresses misleading claims about after-sales. As per Art.6.1(a), (f),(g) a trader misleads about benefits or risks, claims about the product which the trader cannot substantiate, or the circumstances of the consumer, including the consumer's rights and the risks he may face. These provisions complement the UCPD's overall attempt to protect vulnerable consumers and more aggressive forms of marketing.[125] Furthermore, Art.6.1(b), (c) also requires that a trader shall not mislead in relation to claims about any statement or symbol related to the direct or indirect sponsorship or approval or the existence of a specific price advantage.

Article 6.2 mainly covers misleading actions regarding the company or brand. These provisions introduce new rules which contribute to the transparency on codes of practice: non compliance by the trader with a code of conduct will be misleading, provided that the trader has signed up, the commitment is firm and verifiable, and membership of the code is public knowledge. In addition, a trade must not mislead with

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[123] *The Unfair Commercial Practices Directive* Health & Consumer Protection. Directorate General European Commission. P 11

[124] Misleading practices in a factual context are related to situations where the marketing of a product may create confusion with products or marks of a competitor and where the trader does not comply with provisions of a code of conduct by which he has undertaken to be bound.

[125] Pursuant to Art 1 of the UCPD; "A commercial practice shall be regarded as misleading if it contains false information and is therefore untruthful or in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct, in relation to one or more of the following elements, and in either case causes or is likely to cause him to take transactional decision that he would not have taken otherwise: (a) the existence or nature of the product; … (f) the nature, attributes and rights of the trader or his agent, such as his identity and assets, his qualifications, status, approval, affiliation or connection and ownership of industrial, commercial or intellectual property rights or his awards and distinctions; (g) the consumer's rights, including the right to replacement or reimbursement under Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, or the risk he may face.

regard to non-compliance with a commitment given to a public authority to cease an unfair commercial practice under the UCPD[126].

B. Misleading Omissions

Omissions refer to the fact that consumers need information to make informed choices. Therefore a trader must provide material information that the average consumer needs.[127]

As per Art 7.1 of the UCPD, The omission or the act of hiding information shall be considered as a misleading omission[128]. It shall also be considered as a misleading omission the provision of unclear or ambiguous use information or failure to identify commercial intent.

In other words, these are omissions that the trader made, impairing the consumers' ability to make a justly informed choice. This includes the omission of material information that the average consumer needs in a particular transaction.[129] In concrete terms, it shall be considered as a misleading omission whenever a trader hides such material information or provides it in an ambiguous or untimely manner, or when a trader "fails to identify the commercial intent of the commercial practice".

As per article 7.1 of the Directive, a commercial practice shall be considered as misleading in case that the average consumer is not provided by the required material information in order to enable him to make an informed decision taking into consideration the particular context of the transaction. This provision applies directly to

[126] According to Art.6.2 of the UCPD; "A commercial practice shall also be regarded as misleading if, in its factual context, taking account of all its features and circumstances, it causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise, and it involves:(a) any marketing of a product, including comparative advertising, which creates confusion with any products, trade marks, trade names or other distinguishing marks of a competitor;(b) non-compliance by the trader with commitments contained in codes of conduct by which the trader has undertaken to be bound, where:(i)the commitment is not inspirational but is firm and is capable of being verified, and;(ii) the trader indicates in a commercial practice that he is bound by the code.

[127] HENNING-BODEWIG; p.34

[128] According to Art.7/1 of the UCPD; "A commercial practice shall be regarded as misleading if, in its factual context, taking account of all its features and circumstances and the limitations of the communication medium, it omits material information that the average consumer needs, according to the context, to take an informed transactional decision and thereby causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise."

[129] PONCIBO/INCARDONA; p.324

information regarding promotion, sales and supply of a product. Nevertheless, the requirement settled by this article is a broad one and therefore creates some degree of flexibility in favor of the trader regarding what should be considered as material in every particular case. We could say that this general provision implies a step away from specific and often detailed regulation.

Furthermore, Art.7.2 states that;

> *"It shall also be regarded as a misleading omission when, taking account of the matters described in paragraph 1, a trader hides or provides in an unclear, unintelligible, ambiguous or untimely manner such material information as referred to in that paragraph or fails to identify the commercial intent of the commercial practice if not already apparent from the context, and where, in either case, this causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise."*

As per the article mentioned above, the directive additionally requires to the trader not to hide information or provide it in an unclear, unintelligible, ambiguous or untimely manner and not to fail in the identification of the commercial intent of the commercial practice. By this provision the situation where the traders do not explicit the additional charges to a price is cover by the regulations of the UCPD.[130]

Further to this, Art.7.4 defines the information to be considered material when a trader invites a consumer to purchase as defined in Art.2. These are the required information by the Directive as (i) the main characteristics of the product; (ii) name of the trader and, if applicable, the name of the person on whose behalf is acting; (iii) the price inclusive of taxes and additional delivery charges or, where these additional charges cannot reasonably be calculated in advance, the fact that additional charges may be payable (iv) arrangements for payment, delivery and performance, and complaint handling policy, if they depart from the requirements of professional diligence; (v) the existence of any right to withdrawal or cancellation.

[130] Ibid, p.125

3.6.4. Aggressive Commercial Practices

In case the average consumer's freedom of choice or conduct is significantly impaired, the practice will be deemed aggressive under the UCPD.

As per Art.8 of the UCPD;

> *"A commercial practice shall be regarded as aggressive if, in its factual context, taking account of all its features and circumstances, by harassment, coercion, including the use of physical force, or undue influence, it significantly impairs or is likely to significantly impair the average consumer's freedom of choice or conduct with regard to the product and thereby causes him or is likely to cause "him to take a transactional decision that he would not have taken otherwise."*

This article defines an aggressive commercial practice as a practice in which harassment, coercion, or undue influence significantly impairs or is likely to significantly impair the average consumer's freedom of choice or conduct regarding the product and thereby causes him or is likely to cause him to take a transactional decision that he would not have taken otherwise. The purpose of the Directive in this point is to protect consumers from those practices which affect the sensitivity, emotions, conditions, state of mind, or simply the patience of the consumer, impairing considerably his/her decisional capacity and inhibiting the capacity to make an attentive and judicious economic decision even in those cases where there is no use of violence or threat.[131]

The UCPD contains a list of criteria in order to determine whether a commercial practice uses harassment, coercion, including physical force, or undue influence.

According to Art.9 of the Directive:

[131] PONCIBO/INCARDONA, p.322

"In determining whether a commercial practice uses harassment, coercion, including the use of physical force, or undue influence[132]*, account shall be taken of:*

(a) its timing, location, nature or persistence;

(b) the use of threatening or abusive language or behavior;

(c) the exploitation by the trader of any specific misfortune or circumstance of such gravity as to impair the consumer's judgment, of which the trader is aware, to influence the consumer's decision with regard to the product;

(d) any onerous or disproportionate non-contractual barriers imposed by the trader where a consumer wishes to exercise rights under the contract, including rights to terminate a contract or to switch to another product or another trader;

(e) any threat to take any action that cannot legally be taken."

As per Art.9, the following elements should be considered in order to determine wherever a practice shall be considered as aggressive: the timing, location, nature or persistence of the commercial practice. Generally the analysis is focused on the nature of the practice and not in the means employed (e.g. telephone, post, and internet).[133] The Black List includes, among its unfair practices, repeated and unwanted sales pitches by phone, fax, e-mail or by use of any other means of communication, except under the circumstances and to the extent to which they are justified by national law with the objective being the enforcement of a contract. As per the provisions of the Directive initiating telephone solicitations, allowing the consumer to choose to be informed on the product shall not be considered *per se* aggressive if the solicitations are

[132] According to the Health & Consumer Protection Directorate-General of European Commission; "Undue Influence" means "exploiting a position of power in relation to the consumer so as to apply pressure, even without using or threatening to use physical force, in a way which significantly limits the consumer's ability to make an informed decision". http://ec.europa.eu/dgs/health_consumer/index_en.htm, (12.12.2008)

[133] HOWELLS/ MICKLITZ/WILHELMSSON; p.119

aimed only at consumers who have previously consented to receive telephone solicitations.[134] Nevertheless such telephone conversations shall be considered as aggressive when a recorded voice proposes every day to the consumer-victim the purchase of something, five times a day for a month and allows the consumer to get rid of that voice only by not answering the phone. Besides violating the UCPD, this solicitation may further breach various laws on privacy protection.[135]

The UCPD also considers the practice of resorting to threat or abusive language or behavior as aggressive.[136] In addition to this according the UCPD any exploitation on the part of the trader of any tragic event or circumstances serious enough to alter the judgment capacity of the consumer, with the intention of influencing the decision related to the product is also interpreted as an aggressive practice. This is a common situation as traders generally attempt to take benefits of the consumer's particular situation in order to sell their products. Nevertheless, in order to determine to what extent such behavior can be equivalent to an aggressive commercial practice, specific circumstances of the case should be taken into consideration.[137]

It shall also be considered as aggressive, all disproportionately difficult obstacle, which was not initially included in the contract, but was created by the trader in case that the consumer tries to exercise the rights derived from such contract or in the case that the consumer intends to exchange the purchased good or to perform the transaction with other trader. Finally, any threat to begin legal action when such action is not legally allowed is also considered to be aggressive[138].

[134] PONCIBO/INCARDONA, p.322
[135] Ibid, p.322
[136] Section 24 of The Black List specifies that it is an aggressive commercial practice to create the impression that the consumer cannot leave commercial premises until the contract is concluded. Intencives sucha as a beverage or free transportation to the commercial premises of the trader are not considered, however, unfair commercial practices.
[137] Section 30 of the Black List does, however, expressly state that the practice of stating to the consumer that the trader's /seller's professional livelihood depends on the product's purchase
[138] The Black List also deems aggressive per se demands for immediate or deferred payment or the restitution or the custody of products whish the trader supplied without any request from the consumer.

3.6.5. Code of Conduct

The UCPD defines "code of conduct" as an agreement or set of rules not imposed by law, regulation or administrative provision of a Member State which defines the behavior of traders who undertake to be bound by the code in relation to one or more particular commercial practices or business sectors[139].

The UCPD does not encourage Codes of Conduct and does not give them a fundamental role in the prevention and resolution of controversies related to unfair commercial practices between companies and consumers[140]. The UCPD recognizes the existence of codes of conducts that can serve as additional mechanism but can not replace the judicial and administrative proceedings established by each member states to resolve disputes arising from unfair commercial practices.[141]

As per Art.10 of the UCPD; the control exercised by those responsible for the codes of conduct can be encouraged by the Member States, but they are not expressly held to do so. Unfair commercial practices would be naturally regulated by Codes of Conduct operating in a efficient way in order to fulfill the needs ob business and consumers in a quick way and in a more flexible way than is done by national laws.

Poncibo and Incardona state that Codes of Conduct should be in compliance with the UCPD and its Black List, which are both clear and rather strict regarding what constitutes an unfair practice. In those Member States where there is no culture of self-regulation, Codes of Conduct may be subject to approval procedures operated by independent authorities. This would allow public authorities to set out a blue print that business associations would have to follow in order to secure approval[142].

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[139]Codes of Conduct, source of soft law and expression of private self-regulation are defined and often mentioned in the UCPD and were extensively discussed in the Green Paper on European Union Consumer Protection, Brussels, 2.10.2001, COM (2001) 531 fin, and in the Green Paper Follow-up Communication to the Green Paper on EU Consumer Protection, Brussels, 11.6.2002, COM (2002) 289 fin

[140] HOWELLS, G., *Co-Regulation's Role in the Development of European Fair Trading Laws*, in G. Colins (editor), The Forthcoming EC Directive on Unfair Commercial Practices (The Hague-London, New York, 2004) p.208-119

[141] RITTER/BRAUN, p.138

[142] PONCIBO/INCARDONA; p.322

3.6.6. Enforcement of the UCPD

The enforcement of the UCPD is regulated under Art.11 of the UCPD. According to this article:

> *"Member States shall ensure that adequate and effective means exist to combat unfair commercial practices in order to enforce compliance with the provisions of this Directive in the interest of consumers.*
>
> *Such means shall include legal provisions under which persons or organizations regarded under national law as having a legitimate interest in combating unfair commercial practices, including competitors, may:*
>
> *(a) take legal action against such unfair commercial practices; and/or*
>
> *(b) bring such unfair commercial practices before an administrative authority competent either to decide on complaints or to initiate appropriate legal proceedings.*
>
> *It shall be 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 Article 10. These facilities shall be available regardless of whether the consumers affected are in the territory of the Member State where the trader is located or in another Member State.*
>
> *It shall be 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."

As per the article mentioned above, the chosen legal facilities can be either directed in a separate or joint way against a number of traders from a sector or against a code owner. Therefore an action should be available against individual traders or a particular group of trades depending on the approach taken by national law. This would enable actions in a particular Member State if such actions are normally allowed in such State.

Furthermore; Art.11/2 requires the member states to confer powers upon the courts or administrative authorities enabling them: (i) to order the cessation of, or institute appropriate legal proceedings for an order for the cessation of, unfair commercial practices; (ii) if the unfair practice has not yet been carried out, to order the prohibition of the practice, or to institute appropriate legal proceedings for an order for the prohibition of the practice. This can be done without proof of actual loss or damage of intention or negligence on the part of the trader[143].

Moreover, it is also stated under the Article above that member states put in place an 'accelerated procedure' for measures to be taken to order the cessation of the practice *either* with interim effect[144] *or* with definitive effect[145] . Member states can also choose to require courts or administrative authorities to require publication of their final decision in full or in part and/or to require the publication of a corrective statement with a view to eliminating the continuing effects of an unfair commercial practice.

On the other hand, Art.11/3 of the UCPD sets requirements for the administrative authorities set forth above. According to Art.11/3 these authorities must: (i) be composed so as not to cast doubt on their impartiality; (ii) have adequate powers, where they decide on complaints, to monitor and enforce the observance of their decisions effectively; (iii) normally give reasons for their decisions.

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[143] See Art.11/2 of the Directive 2005/29/EC of the European Parliament and of the Council of 11 May 205
[144] "Interim" means temporary e.g. pending a full determination of the case by a court
[145] "definitive" means full determination

In case the powers are exercised exclusively by an administrative authority, reasons for decisions shall be provided and there should be provision for judicial review[146]. An example of this would be the principle enforcement agency in the UK which is the Office of Fair Trading. The Office of Fair Trading liaises with their counterparts throughout Europe to ensure that complaints reported in one country - usually the 'home' country - are transmitted to the country where the complaint emanated.

3.6.7. Penalties under the UCDP

Art.13 of the UCPD regulates the applicable clauses in case of the infringements of the requirements of the national law. According to Art.13 of the UCPD;

> *"Member States shall lay down penalties for infringements of national provisions adopted in application of the UCPD and shall take all necessary measures to ensure that these are enforced. These penalties must be effective, proportionate and dissuasive."*

As understood from the article above; it is required that member states lay down penalties for infringements of the requirements of the national law, which implements the UCPD. This reflects provisions in certain existing Directives such as the Directive on Price Indications[147].

3.6.8. The Black List

Certain commercial practices across Europe are banned outright under the UCPD. A Black List of unfair practices has been drawn up in order to ensure that traders, marketing professionals and customers are clear about what is prohibited. The

[146] i.e. in the event of an unreasonable or improper failure to exercise powers on the 2005/29/EC of the European Parliament and of the Council of 11 May 205

[147] See Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers

commercial practices on the Black List are unfair in all circumstances and no case-by-case assessment against other provisions of the Directive is required.[148]

[148] According to the Black List it is provided that the following commercial practices shall be unfair under "misleading commercial practices";

- *Claiming to be a signatory to a code of conduct when the trader is not.*
- *Displaying a trust mark, quality mark or equivalent without having obtained the necessary authorization.*
- *Claiming that a code of conduct has an endorsement from a public or other body which it does not have.*
- *Claiming that a trader (including his commercial practices) or a product has been approved, endorsed or authorized by a public or private body when he/it has not or making such a claim without complying with the terms of the approval, endorsement or authorization.*
- *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).*
- *Making an invitation to purchase products at a specified price and then:*
  (a) Refusing to show the advertised item to consumers; or
  (b) Refusing to take orders for it or deliver it within a reasonable time; or
  (c) Demonstrating a defective sample of it, with the intention of promoting a different product (bait and switch
- *Falsely stating that a product will only be available for a very limited time, or that it will only be available on particular terms for a very limited time, in order to elicit an immediate decision and deprive consumers of sufficient opportunity or time to make an informed choice.*
- *Undertaking to provide after-sales service to consumers with whom the trader has communicated prior to a transaction in a language which is not an official language of the Member State where the trader is located and then making such service available only in another language without clearly disclosing this to the consumer before the consumer is committed to the transaction.*
- *Stating or otherwise creating the impression that a product can legally be sold when it cannot."*
- *Presenting rights given to consumers in law as a distinctive feature of the trader's offer.*
- *Using editorial content in the media to promote a product where a trader has paid for the promotion without making that clear in the content or by images or sounds clearly identifiable by the consumer (advertorial). This is without prejudice to Council Directive 89/552/EEC (1).*
- *Making a materially inaccurate claim concerning the nature and extent of the risk to the personal security of the consumer or his family if the consumer does not purchase the product.*
- *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.*
- *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.*
- *Claiming that the trader is about to cease trading or move premises when he is not.*
- *Claiming that products are able to facilitate winning in games of chance.*
- *Falsely claiming that a product is able to cure illnesses, dysfunction or malformations.*
- *Passing on materially inaccurate information on market conditions or on the possibility of finding the product with the intention of inducing the consumer to acquire the product at conditions less favorable than normal market conditions.*
- *Claiming in a commercial practice to offer a competition or prize promotion without awarding the prizes described or a reasonable equivalent.*
- *Describing a product as 'gratis', 'free', 'without charge' or similar if the consumer has to pay*

Black List contains the list of those commercial practices which must in all circumstances be regarded as unfair throughout the EU, in a sort of 'blacklist' of unfair practices, e.g. pyramid schemes, unsolicited supply or use of bait advertising (when the low-priced product is not available) or the use of advertorial (an advertisement written in the form of editorial copy). Furthermore, it should be noted that the list may only be modified at EU level, by revision of the Directive with the involvement of the European Parliament and the Council (representatives from Member States)[149].

The list of the commercial practices, which must in all circumstances be regarded as unfair, throughout the EU are divided into two sections which are "misleading commercial practices" and "aggressive commercial practices" under the Black List[150].

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anything other than the unavoidable cost of responding to the commercial practice and collecting or paying for delivery of the item.

- *Including in marketing material an invoice or similar document seeking payment which gives the consumer the impression that he has already ordered the marketed product when he has not.*
- *Falsely claiming or creating the impression that the trader is not acting for purposes relating to his trade, business, craft or profession, or falsely representing oneself as a consumer.*
- *Creating the false impression that after-sales service in relation to a product is available in a Member State other than the one in which the product is sold.*

[149] See the Recital 17 of the UCPD

[150] The Black List provides that the following commercial practices shall be unfair under "aggressive commercial practices";

- *Creating the impression that the consumer cannot leave the premises until a contract is formed.*
- *Conducting personal visits to the consumer's home ignoring the consumer's request to leave or not to return except in circumstances and to the extent justified, under national law, to enforce a contractual obligation.*
- *Making persistent and unwanted solicitations by telephone, fax, e-mail or other remote media except in circumstances and to the extent justified under national law to enforce a contractual obligation. This is without prejudice to Article 10 of Directive 97/7/EC and Directives 95/46/EC (1) and 2002/58/EC.*
- *Requiring a consumer who wishes to claim on an insurance policy to produce documents which could not reasonably be considered relevant as to whether the claim was valid, or failing systematically to respond to pertinent correspondence, in order to dissuade a consumer from exercising his contractual rights.*
- *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. This provision is without prejudice to Article 16 of Directive 89/552/EEC on television broadcasting.*
- *Demanding immediate or deferred payment for or the return or safekeeping of products supplied by the trader, but not solicited by the consumer except where the product is a substitute supplied in conformity with Article 7(3) of Directive 97/7/EC (inertia selling).*
- *Explicitly informing a consumer that if he does not buy the product or service, the trader's job or livelihood will be in jeopardy.*
- *Creating the false impression that the consumer has already won, will win, or will on doing a particular act win, a prize or other equivalent benefit, when in fact either:*

CHAPTER TWO

UNFAIR COMPETITION RULES UNDER THE TURKISH LEGAL SYSTEM IN THE LIGHT OF EUROPEAN LAW

1. UNFAIR COMPETITION IN TURKISH LAW

1.1. General

Trade and industry are considered as the milestones of all modern capitalist economic systems. Within this context elements such as price, service and quality (competition freedom) for goods/services belong to the public interest in an open competitive market and they are considered to be determining factors in the business competition for clients. Customers among this system, have the possibility to acquire better quality goods for a better price, which might be understood by the phrase "more for less". As a consequence of this, the freedom of competition requires legal protection in international or national levels[151]

Nevertheless, as occurs with any other recognized right, the right of competition may be abused. Within this context, we can consider as general cases of unfair competition in business practices such as palming off or passing off one's product as that of another, false advertising, imitation of a competitor's trademark and product disparagement, betrayal of trade secrets disloyalty of employees and abusing the rights of competition.[152] In the above mention cases, business' actors may seek to take advantage of their competitors. It has been stated by Poroy/Yasaman in this sense that 'Therefore, in order to preserve fairness and to protect freedom of competition from one side, and to prevent the abuse of the right to compete from the other side, some

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— there is no prize or other equivalent benefit, or

— taking any action in relation to claiming the prize or other equivalent benefit is subject to the consumer paying money or incurring a cost.

[151] POROY, Reha; *Ticari İşletme Hukuku*, 5. Bası, Istanbul, 2007, p.197

[152] KENDİGELEN, Abuzer, KAYA, Arslan, ÜLGEN, Hüseyin, HELVACI, Mehmet, NOMER, Füsun, TEOMAN, Ömer; *Ticari İşletme Hukuku*, Vedat Yayınevi, 2006, p.128

principles have been developed by lawmakers of different legal systems, generally referred to as the law of unfair competition.'[153]

Competition is actually brought by internal law and tribunal to the scenario in several industrialized countries with the objective of recognizing in such regulation a healthy and growing market, industrialized countries leading by this way, other nations in bringing the protection of these interests on international platforms. International agreements regarding the protection of intellectual property rights such as trade names and trademarks have during the last decades gained popularity and as a consequence of this, treaties among several States have been signed in this respect, sometimes even before internal regulation of these matters in internal law.

2. SOURCES OF TURKISH LAW RELATED TO UNFAIR COMPETITION

In Turkish law the prohibition of unfair competition and the consequence sanctions of such prohibitions are regulated in the Turkish Code of Obligations and in special laws at this effect dictated such as Law No.3577 dated June 14, 1989 "*Ithalatta* Anti-damping Law *(Haksiz Rekabetin Onlenmesi Hakkinda Kanun)*; Law No.4054, The Law regarding the Protection of Competition dated December 7,1994 *(Rekabetin Korunmasi Hakkinda Kanun)*; and Markalar Kanunu No.551 *(Trademark Law),* dated March 3, 1965.

2.1 Code of Obligations and the existing Dualism within the Commercial Code

As per Article 48 of the Turkish Code of Obligations unfair competition is prohibited in a very general way. This provision provides relief to the individual suffering as a consequence of its competitor's actions such as misrepresentation and other sanctions contrary to good faith principles.[154]

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[153] POROY Reha, YASAMAN Hamdi; *Ticari İşletme Hukuku*, İstanbul, 2004, p.460

[154] POROY, p.198; DOMANİÇ, Hayri; *Ticaret Hukukunun Genel Esasları*, Genişletilmiş 4. Bası, Istanbul, 1988, p.243; İMREGÜN, Oğuz; *Ticaret Hukukunun Genel İlkeleri*, İstanbul, 1989, p.109; AYHAN, Rıza; *Ticaret Hukukunun Genel Esasları*, Ankara, 1992, p.12

The inspiration of this provision is found under the Swiss Code of Obligations, later superseded by a Swiss Code dated 1943 as known as "Unfair Competition Code".[155] It can be understood within this context that in Swiss practice, the provisions of the Unfair Competition Code are not applicable to legal entities performing commercial activities but to all types of misuse of competition in an economic sense.[156]

The provisions of the Turkish Commercial Law on Unfair Competition, do not abolish Art.48 of the Code of Obligations[157] and therefore both prohibitions coexist in Turkish Law. As a consequence of this co existence, Art 48 of the Code of Obligations is applicable to case of unfair competition among non-merchants (i.e. among architects, doctors, hairdressers) and the provisions of the Commercial Code are applicable to those cases of unfair competition between merchants.

Further to this and as a consequence of the wording of Art. 48 (2), this provision should be jointly interpreted with Articles 56 and 57of the Commercial Code and the Turkish Supreme Court has expressed within the same sense[158]. Nevertheless, Arkan states about this co existence that due to the specialty of the provisions of the TCC, Art.48 of the Code of Obligations should be superseded[159]. Within this sense, he highlights the fact that the TCC should be considered as a "more special"[160] and "more recent"[161] code compared to the Code of Obligations. As a consequence of this the

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[155] EREN, Fikret; *Borçlar Hukuku: Genel Hükümler*, Cilt 1, İstanbul, 1998, p.398

[156] ÖZTEK, Selçuk; Haksız Rekabete İlişkin Yeni İsviçre Düzenlemesinin Öngördüğü Bazı Haksız Rekabet Halleri, Akipek Armağanı, Konya, 1991, p.417

[157] KOCAYUSUFPAŞAOĞLU, HATEMİ, SEROZAN, ARPACI; *Borçlar Hukukuna Giriş: Hukuki İşlem, Sözleşme,* İstanbul, 2008, p.216

[158] 11.HD, 15/5/89, E.2889, K.2929

[159] ARKAN, Sabih; *Ticari İşletme Hukuku*, Banka ve Ticaret Araştırma Enstitüsü, Ankara, 2004, p.297

[160] Making indirect reference to the principle originated in International Public Law and defined as *lex specialis derogat legi generali* (special law prevail on general law) and defined by Grotius as " what rules ought to be obseverd in such cases (i.e. where parts of a document are in conflict) . Among agreements which are equal…that should be given preference which is most specific and approaches most nearly to the subject in hand, for special provisions are ordinarily more effective than those that are general". GROTIUS Hugo, *De Jure belli ac pacis. Libri Tres.*Book II Sect XXIX. This principle has also been extensively recognized by international tribunals such as the European Court of Human Rights in the *Neumann* case, ECHR 1974 A No.17 (1974) p.13 (para 29) and the International Court of Justice in the case *Legality of the Threat or Use of Nuclear Weapons,* Reports 1996 p.13-14 (mimeo) para 25.

[161] Arkan makes reference to the principle *lex posteriori derogat priori* (more recent rules prevail on less recent rules) and recognized as an interpretation rule in International Law by BROWNLIE Ian, *Principles of Public International law* Oxford University Press, 6 Edition, 2003, p. 627-628.

author believes that as the subject is covered in more detail by the TCC, Art.48 of the Code of Obligations should no longer be referenced in matters of competition.

As per the Turkish Code of Obligations, an action should meet two criterion in order to comprise unfair competition. The first of these criterions states that in order to be considered as unfair the action should performed by a competitor in media such as newspaper announcements, advertisements, direct or indirect representations. Such representation should not reflect the truth of the advertiser's products and should be committed in bad faith. As per the second criterion the harmed competitor must lose or fear to lose its market clients as a result of the unfair competition act. It is worth noting that as per the Turkish Code of Obligations, there are no remedies in case the actions produce no result either on the costumers/market or on the person to whose product/services such actions are directed to.[162]

2.2. Unfair Competition Rules under the Turkish Commercial Code

2.2.1. Prohibited conducts within the scope of regulations under the Turkish Commercial Code

Art. 56 of the TCC provides the following definition of unfair competition: *"the misuse of competition in a financial sense, through misleading actions, untrue statements or any other type of action that is not in accordance with good faith principles."*[163] As may be understood from the referred article; the use of competition that misleads the consumer shall be considered as unfair competition. Both actions and inactions may be considered as unfair under the unfair competition parameters. Within this context it shall be considered as cause of unfair competition, the action of making false and misleading statements, regarding the origin of products and the failure of a seller to inform the consumer that its products are mislabeled. The main criterion remains therefore determining if the prohibited result has been achieved for the actions

[162] KOCAYUSUFPAŞAOĞLU, HATEMİ, SEROZAN, ARPACI; p.326
[163] TEOMAN, Ömer; Yaşayan Ticaret Hukuku Cilt I: Hukuki Mütalaalar Kitap 9: 1998-1999, Beta Yayınevi, 2000, p.26

or inactions such as the above mentioned and whether "competition (in an economic sense) has been misappropriated as a result of such actions.[164]

It should be noted that there are three elements to be considered as the main results of the unfair competition which as follows; i) economic competition (ii) competition's exploitation, (iii) Violation of the principle of good faith.[165]

It is generally understood that non economic benefit may result of unfair competition. Within this sense, in case the competitor is responsible for the "unfair competition" action or inaction does not obtain benefits as a result of such action or in case the subject matter has no economic value, it shall be understood that there has been no violation. As regards the second element, the competitor allegedly violating the law must have through that violation exploited competitor's right. Finally, it can be understood that as per the third element, the Code imposes requires the businessmen to operate in the market respecting the obligation in good faith.[166] As a consequence of this, all activities violating the other's good faith shall also be observed as not competitive. Practices constituting unfair competition are categorized under Art.57 of the TCC. In this part of our study; we will analyze these practices constituting unfair competition in the light of Art.57 of the TCC.

A. Disparagement

Pursuant to Art.57/1 of the TCC discretion others or their goods, their activities, or the products of their work, or their businesses by means of wrong, deceitful or uselessly offensive statements constitutes unfair competition.

The purpose of the disparage is to detract the competitor's reputation by way of denigrating. Disparage may be realized by means of making negative or untrue statements regarding other persons or their merchandise, their businesses or activities. Thereby, third parties are affected with negative statements against the competitor. In other words, it does not matter if the disparage is realized on purpose or not. Even the

[164] KARAHAN, Sami; Ticari İşletme Hukuku, Güncelleştirilmiş 8. Baskı, Mimoza Yayınları, 1998, p.181
[165] ARKAN; p.292
[166] KARAHAN, p.294

disparage is not realized on purpose, the one who makes negative or untrue statements to his competitor will be responsible on legal grounds.[167] For example, if a manufacturer or windshields advertised that its product is secure and made of unbreakable material, and if such advertisements are not true, misinforming the public constitutes unfair competition. As another example; a merchant who owns a liquid gas station had made a statement about his competitor conducting the same activities and declared that the competitor was stealing liquid gas from the bottles before selling to the clients. According to a court decision dated February 28, 1985[168]; since the competitor was affected negatively by denigrating, it is decided that this merchant constituted unfair competition against his competitor.[169] Furthermore; it should be stated that; if a statement which has been confirmed scientifically carries a risk to decrease or increase the requisition of the consumers, the one making the advertisement or the declaration to the public must make sure about the scientific consequences of the research as confirmed by the Swiss Federal Court in 1994.[170]

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[167] CAMCI, Ömer; *Haksız Rekabet Davaları*, İstanbul, 2002, p.52

[168] 11.HD, 28.02.1985, E.1984/6588, K.985

[169] DOĞANAY, İsmail; *Türk Ticaret Kanunu Şerhi*, Beta, 2004, p.353

[170] In 1989, a Swiss food scientist called Dr. Hans-Ulrich Hertel set out to research effects of consumption of food prepared in microwave ovens with the assistance of Professor Blanc, a technical advisor to the Federal Institute for Technology of Lausanne. Over the course of two months, eight subjects were fed a microwave irradiated macrobiotic diet while samples of their blood were taken for analyses. According to Hertel and Blanc, these tests revealed changes in the subjects' blood composition similar to those observed in the initial stages of cancer, thereby indicating a causal relationship between the consumption of microwave irradiated food and cancer. Hertel sent their findings without consulting to Blanc. Then, the Journal Franz Weber printed a special issue on Blanc and Hertel's revolutionary findings. In so doing, the Journal Franz Weber was continuing its crusade against microwave ovens were very harmful. On the cover of the issue containing Blanc and Hertel's report, an image of the Reaper holding out one hand towards a microwave oven appeared, with the caption, *"the danger of microwaves: scientific proof".* The journal then proceeded to present an account of Hertel and Blanc's study in the subsequent pages. Half of page three of the issue depicted a drawing of a microwave oven with the Reaper's head visible behind the glass window of the oven's door. This same picture, reduced in size, appears several times throughout the issue. Eventually, Hertel's article, along with its drawings, came to the attention of the Swiss Association of Manufacturers and Suppliers of Household Electrical Appliances (hereinafter referred to as "MHEA"). The MHEA immediately applied to the President of the Vevey District Court under the Federal Unfair Competition Act (hereinafter referred to as the "UCA") for an interim order prohibiting Mr. Franz Weber: *"From using ... the image of a man's skeleton or any other image suggesting the idea of death ... associated with the graphic, photographic, oral or written representation of a microwave oven, from stating .... that microwave ovens must be abolished and their use banned, from stating ... that scientific research proves what a hazard food that has been exposed to radiation in microwave oven is to health and backs up the Journal Franz Weber or from stating ... that microwave ovens must all be destroyed without exception because food is harmed by these dangerous appliances to such an extent that it causes, in those who consume it, a change in the blood count and leads to anemia and a pre-cancerous stage."* The president of the Vevey District Court dismissed the

B. To give information contrary to truth regarding the others

The second method of unfair competition regulated under Art.57/2 of the TCC is to misinform others regarding the character of the persons or their financial status. It is deemed as a type of diverge to give information contrary to truth regarding the morality or financial capacity of others.[171] The one making disparage against his competitor under the Articles 57/1 and 57/2 of the TCC regulating intends to divert the consumers regarding the goods in order to make them to supply such goods from himself instead of from the competitor.[172] Assume for example that Silver Beach is a company successfully engaged in time sharing vacations. Its competitor Bronze Beach, notifies the public that Silver Beach's holidays are uncomfortable, that it is unreliable and that it will go into bankruptcy, although Bronze Beach knows that these allegations are not true. Similar unfounded financial allegations can be said against competing banks that would then constitute an unfair trade practice.[173] Furthermore, it is held in a court decision that the journalist misinforming others regarding the financial status of a trader constitutes unfair competition according to Art.57/2.[174]

C. To give wrong or deceitful information

Pursuant to Art.57/3 of the TCC giving wrong or deceitful information regarding one's own situation, goods, products, commercial activities and commercial

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application. Then the MHEA filed an application under the UCA with the Commercial Court of the Canton of Berne seeking to have Hertel enjoined from (1) stating that food prepared in microwave ovens was a danger to health, and led to changes in the blood which were indicative of a pathological disorder or the beginning of a carcinogenic process and (2) from using in publications and public speeches on microwave ovens, the image of death. Upon hearing this and other testimony, the Court granted the injunction against Hertel, on pain of the penalties provided in Art.292 of the Criminal Code and Art.403 of the Code of Criminal Procedure of the Canton of Berne. The Court went on state that *"anyone claiming scientific freedom is therefore wholly free to expound his knowledge in the academic sphere but, where competition is concerned, he may not claim to have the truth on his side where the opinion he is putting forward is disputed. An opinion that has not been confirmed scientifically must in particular not e misused as a disguised form of positive or negative advertising of one's own work of others. In the present case, that is all the more true as the Commercial Court expressly left the applicant free to base his proposition on new scientific findings."* A. KAMPERMAN SANDERS, *"Unfair Competition Law and the European Court of Human Rights: The Case of Hertel v. Switzerland and Beyond"*, 2006, http://www.law.fordham.edu/publications/articles/200flspub6631.pdf, (12.02.2009)

[171] POROY/YASAMAN; p.460

[172] CAMCI, p.87

[173] POROY, YASAMAN; p.464

[174] TD 12.3.1971, E.1970/4448, K.1971/1896; ARKAN, p.294

affairs or acting in the same manner regarding the third parties and to polish them up among their competitors constitutes unfair competition.

The one who misinforms others regarding his own status or his own merchandise, business and finances; gains an unfair advantage and favorable position over competitors through such misstatements constitutes unfair competition under Art.57/3 of the TCC. Specially, misleading advertisings fall within the scope of this article.[175]

Misleading advertising may be defined as 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.[176] Furthermore, even the information given in the advertisement is true, the advertisement is deemed misleading as far as the person whom it is addressed being affected in a wrong way. However, it should be noted that, all the exaggerated advertisements cannot be categorized under the misleading advertisings. 'For example, if an advertisement made by a gasoline company states that "all drivers using this gasoline carry a tiger in their car", this does not deemed as a misleading advertising under the TCC.'[177] Nevertheless, in case a non-exclusive distributor makes advertising like he is the exclusive distributor or in case a trader owning only one business place use his trade name like he has more than one business places, these activities constitute misleading advertisement under Art.57/3 of the TCC.[178]

Moreover, a producer or seller can make comparative advertisement provided that they compare their goods and services with other goods and services having the same qualifications. It is also stated under Art.16/3 of the Turkish Consumer Protection Law that advertisement comparing the goods or services offered by a competitor meeting the same needs or intended for the same purpose is allowed.[179] It is also

[175] İNAL, Emrehan; Reklam Hukuku ve Aldatıcı Reklamlar, Beta Yayımevi, Istanbul, 2000, p.88
[176] Please see the Directive 84/450/EEC
[177] ARKAN, p.296
[178] İNAL, p.90, GÖLE, p.169, ARKAN, p.294
[179] Please see Art.16/3 of the Act No.4077 on Consumer Protection as Amended by Act. No 4822

regulated in EU legal system that comparative advertisement shall be permitted under some specific conditions.[180].

Additionally, Arkan states that a producer cannot make advertisement about his product by way of declaring that his product is good at least as another competitor's product. For example; "our cleanser is not Persil but as good at least as Persil". By this advertisement way, the producer intends to take some benefits of "Persil" name without paying any fee and making any effort. Therefore, these types of advertisements give rise to unfair competition.[181]

Furthermore, it is possible to make advertisement by way of using some superior words for the product such as "biggest" or "best" provided that it is in accordance with truth.[182] Nevertheless, if scientific information regarding the good is used in the advertisement, it should be conveyed to the consumer truly and completely. Otherwise this type of advertisement may constitute misleading advertisement as set fort above in Hertel Case.[183] Furthermore, it is held by the Turkish Supreme Court decision that the statement "DYO is the first in the paint market" notices the consumers that DYO is the best production in the market. Although DYO is the oldest mark and the one selling most in the market, the wording "first" is not very clear to be understood by the consumers in which sense it is the best mark. Therefore, it is decided by the Supreme Court that DYO constitutes unfair competition with this advertisement.[184]

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[180] According to the Directive 97/5/EC of European Parliament and of the Council of 6 October 1997 amending Directive 84/450/EEC concerning misleading advertising so as to include comparative advertising; comparative advertising shall, as far as the comparison is concerned, be permitted when the following conditions are met:(a) it is not misleading according to Articles 2 (2), 3 and 7 (1); (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

[181] ARKAN, p.296

[182] İNAL, p.104

[183] In this respect, please see the reference 170 of this paper.

[184] Y.11.HD. 22.12.1992, E.1991/4992, K.1992/11613

In order to avoid above advertisements which constitute unfair competition, Art.16/1 of the Turkish Consumer Protection Law states that it is essential the commercial advertisements and notices conform to the laws, principles adopted by the Board of Advertisement[185], general morality, public order, personal rights and true and are correct. According to the same article; no advertisement, notices or implied advertisement deceptive or misleading the consumer, or abusing his lack of experience or knowledge, threatening the life of the consumer and safety of his property, encouraging the acts of violence or inciting to commit crime, endangering public health, or abusing the elderly, children or disabled people shall be allowed.

D. To act as if one had obtained a distinction, degree or awards

The fourth method for unfair competition under Art.57/4 of the TCC is to misrepresent one's self as if one has been awarded certain titles, certificates, degrees, awards or special acknowledgements where in fact no such title, certificates, degrees, award nor acknowledgement has been acquired. It is stated by the referred article that acting as if one had obtained a distinction, degree or reward without having obtained the same and to try to create thus the impression that one has exceptional capacities or using false titles or professional names which are liable to create this impression constitutes unfair competition. The trader intends to create a better impression on the consumer by way of such advertisement. For example; an assistant professor that introduces himself as a professor to the people or a journalist pretending that he is an award winning constitutes unfair competition under Art.57/4.[186] It is also decided by the Supreme Court that the one using TSE mark (the quality certification provided by the Turkish Standard Institution) in his product who is not entitled to use such mark constitutes unfair competition.[187]

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[185] A Board of Advertisement vested with power to establish the principles to be complied with in commercial advertisements and notices, to monitor commercial advertisements and notices, and depending on the results of the monitoring activity, to issue precautionary suspension for the advertisements and notices inconsistent with the provisions of Art.16 of the Turkish Consumer Protection Law for a period of three months and/or suspension for the advertisements and notices shall be constituted. Please see Art.17 of the Act No.4077 on Consumer Protection as Amended by Act No.4822

[186] ARKAN, p.298, KARAHAN, p.186, POROY, p.285

[187] 11.HD.27.12.1982, E.5594/K.5674 (YKD. 1983, C.IX, S.7, s.1021 vd.)

E. To create confusion

Pursuant to Art.57/5 of the TCC trying to create confusion with the goods and products of the work, the activity or the commercial undertaking of another person or to have recourse the measures likely to create this confusion, particularly using names, titles, marks, signs and similar distinctive means legally used by another person, or selling or keeping for a reason other than personal need, goods giving rise to confusion, on purpose or not create unfair competition. As an example; although the plaintiff is the one having the exclusive right to sell Milangaz LPG, the defendant selling the same mark LPGs in the same district constitutes unfair competition according to Art.57/5 of the TCC.[188]

Additionally, it should be stated that palming off and passing off; to copy other person's merchandise or to imitate other person's commercial activities, as well as to use other person's trademarks, trade names, logos or etc. for the sale of merchandise will cause customer confusion as regard to the source of such merchandise.[189] For example, the use of the "Yale" trademark by a small business (locksmith) which fixes damaged keys can not be considered to create customer confusion over the registered "Yale" trademark owned by the large manufacturer of keys. On the other hand, the sale of "Lacoste" brand name T-shirts manufactured by an imitator of the original product may violate the law because customers will easily be confused about the origin of said t-shirts.

F. To incite the assistants of third parties to fail in their duty

Pursuant to Art.57/6 of the TCC; to assure or to promise to employees, agents or other assistants or third persons advantages to which they are not entitled with a view or in a manner to secure advantages for self or for others by inciting them to fail in their duty constitutes unfair competition.[190] In other words; to promise unfair incentives to the agents and employees of other persons for the purpose of acquiring trade secrets and confidential and proprietary information regarding their businesses

[188] Y.11.HD.15.10.1990 E.3316/K.6539
[189] ARKAN, p.298; KARAHAN, p.185; POROY, p.286
[190] ARKAN, p.300; KARAHAN, p.188

gives rise to unfair competition.[191] According to this article; it is important to assure or to promise to provide advantages to the persons set forth in the article which are not entitled to take advantages for their self or for others. For example; to enable a marketing company to supply defective goods to its clients or to hinder the activities of a factory by way of putting a machine out of order constitute unfair competition under Art.57/6 of the TCC.

G. To betray or to seize the trade secrets of third parties

According to Art.57/7 of the TCC; betraying or seizing the trade secrets or manufacturing know-how of the employer or his/her clients by way of abusing the employees, representatives or other assistants constitutes unfair competition. Any confidential business information providing an enterprise a competitive edge may be considered a trade secret. Trade secrets encompass manufacturing or industrial secrets and commercial secrets. The unauthorized use of such information by persons other than the holder is regarded as an unfair practice and a violation of the trade secret.[192] Depending on the legal system, the protection of trade secrets forms part of the general concept of protection against unfair competition or is based on specific provisions or case law on the protection of confidential information.[193]

The subject matter of trade secrets may be defined in broad terms and includes sales methods, distribution methods, consumer profiles, and advertising strategies, list of suppliers and clients, and manufacturing processes.[194]

H. To take an illicit advantage from trader or manufacturing secrets

It is stating under the Article 57/8 of the TCC that taking an illicit advantage from trading or manufacturing secrets obtained or learnt in a manner incompatible with good faith or divulging them to others constitutes unfair competition. In other words; to use information which has been acquired through an act that violates good faith

[191] KIRCA, İsmail; *Bilimsel Araştırma Sonuçlarının Yayımlanması*, Haksız Rekabet ve İfade Özgürlüğü: Moroğlu Armağanı, İstanbul, 1999, p.439
[192] ARKAN, p.305; KARAHAN, p.188
[193] In this respect, please see http://www.wipo.int, (01.10.2008)
[194] TURANBOY, Asuman; *Insider Muameleleri*, Ankara, 1990, p.186; YASAMAN, Hamdi, Menkul *Kıymetler Borsası Hukuku*, İstanbul, 1992, p.213

principle give rise to unfair competition. According to Arkan; even "incompatibility with good faith" is stated under Art.57/8; it is more important in practice whether the trader takes an illicit advantage from trade secrets of the competitor or not in order to apply this article. Therefore, in case an auditor, who obtained some trade secrets from his firm, transfers to another competitor firm with a high "transfer price" and uses these secrets in this firm, then this obviously constitutes unfair competition under Art.57/8 of the TCC.[195]

Furthermore; pursuant to Art.47(A)/1 of the Turkish Capital Market Law; to benefit to one's self owned property or to eliminate a loss as to damage equal opportunity among the participants operating in capital markets with the aim of gaining benefit for himself or for third parties by making use of non-public information which will be able to affect the values of capital market instruments is insider trading. Insider trading can be defined another category of unfair competition and the chairman and members of the Board of Directors, directors, internal auditors and other staff of the issuers, capital market institutions or of the subsidiary or carrying out their professions or duties, and the persons who are in a position to have information while carrying out their professions or duties, and the persons who are in a position to have information because of their direct or indirect relations with these shall be punished with a prison sentence of from two to five years and a heavy pecuniary fine for 10.000 Turkish Liras (hereinafter referred to as "TL") up to 25.000 TL.[196]

I. To issue certificates of good conduct or capacity, contrary to truth

As per Art.57/9; to issue certificates of good conduct or capacity which is contrary to truth so as to deceive persons of good faith constitutes unfair competition. In other words; to make misstatements of facts in a manner that will deceive good faith third parties gives rise unfair competition.[197] For example; an employee giving good recommendation letter to his unsuccessful employer who quits the company constitutes

[195] POROY, p.289; KARAHAN, p.187, ARKAN, p.300
[196] Please see Art.47 of the Turkish Capital Market Law, http://www.cmb.gov.tr, (12,10,2008)
[197] POROY, p.290; KARAHAN, p.188, ARKAN, p.301

unfair competition, since the next employee will trust such letter before hiring the employer.

J. To fail to comply with the conditions of business life

Pursuant to Art.57/10 of the TCC; to fail to comply with the conditions determined by laws, regulations, contracts and professional or local customs in the industry constitutes unfair competition. In other words; to fail to abide by the rules imposed by law, regulation or customary trade principles in that industry gives rise to unfair competition.[198] If a person who uses a trademark continuously, he will acquire a right on such trademark even if he does not duly register the same. The use of such trademark should be protected against persons subsequently registering that trademark in their name.[199]

For example; in Turkey, it is compulsory to make sale by the stores within the specific periods specified by the professional institutions. In other words; if it is specified by such institutions that the stores should make sale since January till at the end of February, then the stores can make sale only within this period. A store making sales in the middle of March constitutes unfair competition under Art.57/10 of the TCC. On the other hand; it is decided by the Turkish Supreme Court that in order to incorporate a course specialized on the computer education it is required by the Board of Education that the one intending to incorporate should grant permission from the Ministry in order to not to constitute unfair competition.[200]

2.2.2. Enforcement and Sanctions in Turkish Commercial Code

Articles 58 through 65 of the Commercial Code contain provisions regarding the sanctions imposed upon a violator of Articles 56 and 57.

As per Art.58 of the TCC;

[198] TEOMAN, p.38
[199] Ibid, p.42
[200] 11. HD, 15.10.1990, E.4644, K.5063

"Anyone who, through unfair competition, suffers injury as regards his customers, his credit, his professional reputation, his commercial undertaking, or his other economic interests or is exposed to such a danger may demand:

(a) the establishment of the existence of unfair competition;

(b) the prevention of unfair competition;

(c) the suppression of the material conditions resulting from unfair competition and, if unfair competition rests on untrue or deceitful statements, the ratification of these statements;

(d) the payment of moral damages in case of existence of the circumstances indicated in Art.49 of the Code of Obligations.

Subject to statute of limitations restrictions, a person who is the target of a competitor's actions that could constitute unfair competition under the TCC and/or the Code of Obligations can bring the following legal actions:

1. A Declatory Action or an Action for Ascertainment *(tespit davasi)* to determine whether or not the offensive actions indeed constitute unfair competition under Articles 56 and 57 of the TCC and/or under Art.48 of the Code of Obligations[201] .

2. An action for injunction or a prohibitory action *(Haksiz Rekabetin Men'i)* to preclude the competitor from continuing with its offending actions[202].

An action for material damages *(maddi zararin tazmini davasi)* to recover any damages suffered as a result of the unfair acts[203]. In order to succeed on a claim for damages, a plaintiff must establish that the defendant was at fault in the commission of the offensive acts, and that it suffered actual damages.[204]

[201] see Art.58/1(a) of the TCC
[202] See Art.58/(b) of the TCC
[203] See Art.58/1(d) of the TCC
[204] ARKAN, p.302; KARAHAN, p.190; POROY, 292

3. Any action for moral damages *(manevi tazminat davasi)* to recover any damages suffered as a result on the unfair acts[205]. In order to succeed on a claim for damages, a plaintiff must establish that the defendant's conduct was so outrageous and so intentional that its fault meets the criteria set forth in Art.49 of the Code of Obligations.[206]

4. An action to rectify *(Haksiz fiili durumunun ortadan kaldirilmasi)* to remove the effects of the actions that constitute unfair competition[207]. For example, one can demand that unauthorized copies of production plans be returned to their rightful owner.

Pursuant to Para.2 of Art.58 of the TCC; the judge may also order the payment of the value of advantages which defendant might secure through unfair competition, as damages in favor of the plaintiff and in accordance with the provision of paragraph (d) above. Moreover, Para.3 of Art.58 states that customers whose economic interests have been injured through unfair competition may also file actions indicated above.

The award rendered by the court can be, at the request of a party, published in a manner which the Court deems fit as regulated under Art.61 of the TCC. Additionally, criminal actions are also allowed under Art.64 of the TCC.

The Statute of Limitations for the foregoing civil actions is provided for in Art.62 of the TCC. These actions can be filed within one year from the date the potential plaintiff learns of the offensive act, but not more than three years from the data such acts have been committed.

If a plaintiff files an action against a defendant with the intention to unfairly compete with said defendant through such action, the plaintiff's itself will constitute "unfair constitution"

[205] See Art.58/1(e) of the TCC
[206] POROY, p.292; KARAHAN, p.190, ARKAN, p.302
[207] See Art.58/1(c) of the TCC

3. DRAFT TURKISH COMMERCIAL CODE

3.1. General

Following the signing of Association Agreement in 1996[208], Turkey was recognized as a candidate for accession at the Helsinki European Council in December 1999 and the standard package performance for the Candidate States was put on stage: the European Commission started to prepare an Accession Partnership document for Turkey, which was declared on 8 March 2001; the framework regulation that would constitute the legal basis for the Accession Partnership was adopted by the General Affairs Council on 26 February 2001; and Turkey, on her part, announced her own National Programme for the adoption of the EU *acquis* on 19 March 2001.[209] After adopting of the EU *acquise communitaire*, neediness to amend the current Turkish legislations arises in order to meet the harmonization with EU Law.[210]

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[208] The customs Union between Turkey and the EU, which has been operational since 1996, presents a unique example in the sense that Turkey is the first and only country entering into such integration without being a member of the Union. The other feature of the customs union is that it has gone well beyond the classical definition of a customs union, as a step identified by the prevailing integration theory. Specifically, the Customs Union between Turkey and the EU not only involves the abolition of all customs and duties, prohibition of all quantitative restrictions between the parties and implementation of a common customs tariff to the outside world: it also requires Turkey to harmonize its commercial and competition policies, including intellectual property laws, with those of the Union, and extends most of the EU's trade and competition rules to the Turkish economy; www.tbmm.gov.tr/ul_kom/kpk/pre1.doc, (20.01.2009)

[209] Turkey has been admitted as a full membership by the Council of Europe in August 1949 following the signature of the Treaty of London. Afterwards, Turkey made its first application to join the European Economic Community in 1959 shortly after its creation. Turkey is therefore the very first country to have applied to become a member of the EU. In 1963, an Association Agreement with the EEC is signed and this Agreement envisaged Turkey's full membership after three stages, namely preparation, transition and final stages. Following the signing of Association Agreement, Turkey applied for full membership of the EU in 1987. Afterwards, a Customs Union is established between Turkey and the EU in 1996. During the EU Council held in Helsinki in December 1999, Turkey is designated as a "*candidate State destined to join the Union on the basis of the same criteria as applied to other candidate States"*. Following the Helsinki Council, the Copenhagen EU Council decided in December 2002 that "*if the European Council in December 2004, on the basis of a report and a recommendation from the Commission, decides that Turkey fulfils the Copenhagen political criteria, the European Union will open accession negotiations with Turkey without delay*". On the 6th of October the EU Commission issued its regular Progress Report on Turkey. It pointed out in this Report; that Turkey sufficiently fulfils the Copenhagen political criteria; and that it recommends starting accession negotiations without undue delays. Finally, on 17 December 2004, the EU Council decided to start accession negotiations with Turkey on 3 October 2005. CAKIR, Armagan Emre; *Turkey's Adoption of the Acquis Communitaire: An Undervalued Acquintance*, http://cide.univ.szczecin.pl/mec3/chap14.pdf, 22.01.2009

[210] KARLUK, Rıdvan; *Avrupa Birliği ve Türkiye*, Beta Yayınları, İstanbul 2002, p.463

The TCC was adopted in 1956, inspired by arguably the best codes of its age and since then, it was only sporadically updated. As the TCC has become updated and increasingly inadequate in the meeting the current needs in company law, the Turkish legislator has prepared a Draft Commercial Code (hereinafter referred to as the "Draft Code") to replace the TCC currently in effect in order to harmonize the commercial regulations with EU legal system. An overall effort to modernize the TCC has been in progress for the past five years, and finally, the relevant Commission of the Ministry of Justice presented the Draft Code for public opinion in late February 2005. The Draft Code, currently awaiting legislative approval, puts forth a series of developments in the different areas of commercial law, bringing Turkey and EU closer.[211] The Turkish commercial legal system is undergoing one of its biggest revisions in history. Intensive work has been put in place scholars, academicians, commentators, think-tanks and governmental officials to replace the TCC.[212]

The Draft Code aims to regulate commercial relations in line with the recent changes in the local and global business environment as well as technological and legal developments including the EU legislation.[213] The Commission has paid particular focus to electronic transactions, consumer protection, minority shareholders' rights and corporate governance.[214]

3.2. Provisions regarding the Unfair Competition

Preserving the characteristics of the TCC, the Draft Code is orientated to harmonize the Turkish Enterprise Law with European Union Law.[215] Main points regarding this reform refer to accounting principles for enterprises, commercial books commercial registry, unfair competition and further to agency contract.

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[211] TEKİNALP, Gülören/TEKİNALP, Ünal; Avrupa Birliği Hukuku, 2. Baskı, Beta Yayınları, İstanbul, 2000, p.398

[212] BOZBEL, Savaş; "Mukayeseli Hukukta ve Türk Hukukunda Karşılaştırmalı Reklam Hukuku", Seçkin Yayınevi, Ankara 2006, p.83

[213] http://www.tbmm.gov.tr/d23/1/1-0324.pdf, (11.01.2009)

[214] ODMAN BOZTOSUN, Ayşe; ÜNAL, Akın; "Türk Ticaret Kanunu Tasarısındaki Ticaret Unvanına, İşletme Adına ve Haksız Rekabete İlişkin Hükümlerin Değerlendirmesi", *Yeditepe Universitesi Hukuk Fakültesi Dergisi*, Cilt II, Sayı 1, Yıl 2005, p.383

[215] Ibid, p.384

The Draft Code introduces some major changes to provisions regarding unfair competition based on the amendments to the Federal Unfair Competition Law Statute[216] of December 19, 1986 which has been in force sine March 01, 1988.[217] It aims to ensure an honest and uncorrupted competition environment to the benefit of all market players. The Draft Code widens the scope for determining unfair competition through assessing the influence of an action not only to suppliers and the competitors, but to the economy as a whole and the customers. Misleading, insulting, libeling statements sales techniques imperative to competition, actions that may lead a person to cancel or violate the good faith principle. The Draft Code, among others, sets out a non-exhaustive list of actions that constitute unfair competition. These include misleading customers about the fair price of a product limiting consumers' freedom of choice by employing aggressive techniques, and dishonesty in installment sales.

In this part of our study, the provisions related to unfair competition regulated under the Draft Code will be briefly presented. Afterwards, Art. 55/5 will be detailed through a comparative way between the Draft Code and EU regulations.

3.3. Definition of the Unfair Competition

According to Art.54 of the Draft Code;

[216] Under Swiss Legal system, unfair trade practices are regulated by different sources of law. Firstly, the basis acts of unfair competition and the principles eliminating them are the objects of the Federal Unfair Competition Law Statute of December 19, 1986 which has been in force since March 01, 1988. The main objective of the Federal Unfair Competition Law was to guarantee the free interplay of competitors in Switzerland. The Statute is divided into five chapters. The first chapter defines the aim of the Statute. The second chapter stipulates the principle of fair competition and introduces a catalogue of various detailed rules concerning examples of unfair trade practices and also fixes procedural rules. Chapter three regulates the indication of retail prices while the criminal rules are dealt with in chapter four. The fifth chapter concerns the abrogation of federal law. The Law has a tri-dimensional and hybrid nature as it aims at: (1) Protecting and regulating the market place; (2) Regulating the behavior of competitors; and (3) Protecting consumers; CAMPBELL, Dennis/COTTER, Susan; *Unfair Trading Practices: The Comparative Law Yearbook of International Business Special Issue*, Kluwer Law International, 1997, p.279

[217] ÜNAL, ODMAN BOZTOSUN, p.401

"ARTICLE 54.-(1) The purpose of the articles set forth below related to unfair competition is to ensure fair and undistorted competition in the interest of all concerned.
(2) Any behavior or business practice that is deceptive or that in any other way infringes the principle of good faith and which affects the relationship between competitors or between suppliers and customers shall be deemed unfair and lawful."

As per Art.54 above, first of all, the definition of unfair competition has been drafted with a modern view. The Draft Code defines its concept by mentioning "true and fair competition". This definition shall be regarded as a bridge between two regimes: Unfair competition one side and competition law on the other.[218]

As may be understood from above, the purpose of the principles regarding the unfair competition is to ensure fair and undistorted competition of all concerned. This provision of the Draft Code differs from the TCC with this clause regarding the protection of *the interests of all concerned.*[219] Pursuant to the interpretation of the legal grounds of the Draft Code, the wording of *"all concerned"* refers all participants of the competition law; economy, consumer and public.[220] By this way, unfair competition rules will start to apply not only to the competitors in the market but also to all participants of the competition law under the Draft Code. Furthermore, it may be also interpreted that the basic principle of unfair competition is the *good faith* principle. 'According to the legal grounds of Swiss Federal Law against Unfair Competition; actions and commercial transactions against the good faith principle are harmful to the functional competition rules and prevents to get the expected results'.[221]

[218] Ibid, p.402
[219] BOZBEL, p.85
[220] MOROĞLU, Erdoğan; *Türk Ticaret Kanunu Tasarısı: Değerlendirme ve Öneriler*, 5. Baskı, Vedat Kitapçılık, İstanbul, 2007, p.50
[221] CALBOLLI, Irene; *Recent Developments in the Law of Comparative Advertising in Italy, - Towards an Effective Enforcement of the Principles of Directive 97/55 Under the New Regime*, II C, 2002, p.415

Parallel to the Swiss Federal Law; the Draft Code considers unfair any behavior or business practice against the principle of good faith. Furthermore, European countries highlight the "good morals"[222] and the "professional correction"[223] or the "dishonest customs"[224] in order to understand the unfair competition. Although these expressions may seem different in a substantial perspective, we can find in all of them under the notion of unfairness.

In order to analyze the notion of good faith to determine if an act shall be tolerable or not, the ethical and economical criteria should be taken into consideration as follows:

(i) The moral aspect: A particular relationship, as set forth above, connects all participants, competitors or client, in the economic struggle. They constitute some type of community where we can find contradictory feelings of solidarity and rivalry and some obligations result of such situation, such as the obligation to maintain the required trust for the economic exchanges and to maintain ethic in the business relations.[225] Since the interest of each of the participants have a certain commercial morale which is ruled by the competition, it is not surprising that the economic actors have adopted- based in a strictly private plan- the commercial customs, deontology rules.

(ii) The economic approach: The evolution of the concept of competition requires currently the need to be protected. Despite the moral appreciation, we should consider the effects that behaviors shall have on the competition game and consider if such behavior by means of its acts distort the normal results of competition (or it is an attempt to the competition itself) acting in an unfair way. As per this functional aspect

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[222] In Germany *cf.* the first article of the law against unfair competition (UWG) dated on June 7, 1909: "Wer im geschaftlichem Verkehre ze Zwecken des Wettbewerbes Handlungen vornimmt, die gegen die guten Sitten versotesen, kann auf Unterlassung and Schadenersatz in Anspruch genommen werden".

[223] In Italie, *cf.* Art. 2598. 3 of the Civil Code dated on March 16, 1942 where we find the wording "principie della conrrettezza professionale".

[224] See for France R KRASSER *La represssion de la concurrence d''loyale dans le Etats membres de la Communaiut" Economique Européene,* t. IV: France Paris 1972 N 85ss and the quoted jurisprudence. This expression is also the used one in article 10 *bis*. 2 of Stockholm Convention dated on July 14, 1967: "It shall be considered as an unfair competition act all competition act against the honest customs in industrial and commercial matters.

[225] ODMAN BOZTOSUN, ÜNAL; p.404

of the notion of good faith it is postulated that none participants of the competition abuse of his economic freedom and limit its behaviors to the "normal competition behaviors".[226]

3.4. The protected interests in the field of Unfair Competition

When the regulations regarding unfair competition under the Turkish Code of Obligations were only applicable to the relations among the competitors, the unfair character was based in the attack to the right to the personality.[227] This subjective approach has not survived the evolution of competition law which currently also comprises a social, functional dimension. Within this sense the unfair character as currently understood is based on the violation of the objective right to competition of the abusive use of the economic freedom[228]. Article 54/1 of the Draft Code regulating the scope and purposes of the articles related to unfair competition reflects this evolution. It clearly states that the objective of the relevant articles of the Draft Code is to guarantee all parties' interests, a fair and true competition. The general clause regulated in article 54/2 of such Code identifies the act of unfair competition as an illicit act and qualifies the unfairness under the rules of good faith.

It should be stated that the unfair competition law in Turkish legal system will reach an evolution stage with the enforcement of the Draft Code. In its wider interpretation, it is focused to protect, not only the private interests of all participants in the economic life but also the public interest of all habitants of an efficient and functional market economy. As stated in the legal grounds of the Draft Code, the three dimension described below, implies the equivalence the economy, consumers and community' interests which are not contradictory and that comparative advertisement can mislead the clients, harming a competitor at the same time [229]

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[226] İbid, p. 39-45
[227] ARKAN, p.287
[228] See in respect of such evolution Troller Kamen *Das Internationale Privatrecht der Delikts-obligationen. Ein Beitrag zur Auseinandersetzung mit den neuren amerikanischen kollisionsrechtlichen Theorien,* Bale/Sttugart 1973.
[229] Türk Ticaret Kanunu Tasarısı Genel Gerekçesi, http://www.tbmm.gov.tr/d23/1/1-0324.pdf, (11.01.2009)

3.4.1. The competitors

'The interests of the competitors have historically been the first protected interest within the context of a conception based on the protection of the interest of the harmed economic personality.[230] Although it is evident that all behavior rules on the competitor's behaviors also protect the clients' interests, it may not be useless to make a distinction between this particular categories from those acts that affect the interests of a competitor company.'[231]

3.4.2. The clients

The evaluation of a behavior is also done by taking into consideration the interests of the economic actors which determine the demand on the market. As recipients of the competitors' efforts, the consumers have an interest in being able to make an informed decision among the options which suits better their needs.[232] All clients are taken into consideration, even when they are located as intermediates among the producer and the final consumer. 'The protection of the consumers responds to consideration of social politic aimed to protect in the market the weakest party. The economic politics concerns imply recognition of the protagonist role of the consumers' associations in their confrontation with the businesses. Therefore, it is advisable to keep the attention on the behaviors of such associations as there may exercise economic power abuse, especially through boycott.'[233] Therefore, it is worth noting that from an economic perspective the struggle against unfair competition is not neutral.

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[230] DANTHE, François Jerome; *Le Droit International Prive Suisse de la Concurrence Deloyale*, Librairie Droz, Genéve, 1998, p. 19-33

[231] Türk Ticaret Kanunu Tasarısı Genel Gerekçesi, http://www.tbmm.gov.tr/d23/1/1-0324.pdf, (11.01.2009)

[232] BOZBEL, p.86

[233] DANTHE, p. 19-33

3.4.3. The community

Competition is one of the elements of a market economy which is considered as the best system to satisfy our economic needs. However, we can also recognize in competition a public interest in preserving a "fair competition which is not distorted"[234]. This superior interest of the community should not be confused with the interest of some big circles of society.

The legislator's intention while regulating provisions regarding the unfair competition was to create a dynamic action. Currently, the protection of an efficient competition resides mainly (indirectly) in civil actions of individuals or associations. The struggle against unfair competition responds to the sphere of private law and its objectives consist in structural politics.

3.5. Actions Causing Unfair Competition under the Article 55

Competition law and the regime concerning unfair competition are two disciplines, which are continuously treated with a modern view in European and Swiss Law systems.[235] The new legal regime regulated under the Draft Code concerning unfair competition demonstrates the connection between these legal regimes and the competition law. Other dimensions of the reform shall be mentioned as the enumeration of several versions of unfair competition and further more efficient rules for the compensation of damages arising from unfair competition.

Actions listed below which infringe the principle of good faith are deemed to be unfair competition under Art.55 of the Draft Code. Even though the TCC has been regulating the actions, which are deemed to be unfair competition, under 10 (ten) clauses, the number of those actions will be increased to 6 (six) clauses and 22 (twenty

[234] Art. 1 of the Swiss Law. See also Message of 18 May, 1983 in support to the Federal Law against unfair competition, 151.2, 152.7, and 242.3.
[235] BODDEWYN, Jean J.; *Comparison Advertising: Advantages and Disadvantages for consumers, competitors, media, industry and the marketplace in Unfair Advertising and Comparative Advertising*, Brussel, 1998, p.38

two) sub-clauses by the Draft Code. Therefore, it should be stated that the scope of the unfair competition actions is intended to be enlarged by the Draft Code. 'On the other hand, the Draft Code widens the scope for determining unfair competition through assessing the influence of an action not only to suppliers and the competitors, but to the economy as a whole and the customers.'[236] As may be seen under below clauses and sub-clauses, preserving the characteristics of the TCC, the provisions related to unfair competition under the Draft Code are orientated to harmonize the Turkish Law with EU Law especially with the UCPD.

> **ARTICLE 55** *(1) Actions set forth below shall be deemed unfair competition which infringes the principle of good faith:*
>
> *a) Unfair advertising and sales methods and other unlawful behavior and specially;*
>
> 1. *to disparages another person, his goods, his works, his services, his prices or his business circumstances by incorrect, misleading or needlessly injurious statements,*
> 2. *to make incorrect or misleading statements in respect of himself, his undertaking, his trade name, his goods, his works, his services, his prices, his stock or his business circumstances or to favor third party by such statements,*
> 3. *to act as if one had obtained a distinction, degree or reward without having obtained the same and to try to create thus the impression that one has exceptional capacities or using false titles or professional names which are liable to create this impression.*
> 4. *to take steps that are such as to cause confusion with the goods, works, services or businesses of others,*
> 5. *to compare in an incorrect, misleading, needlessly injurious or imitative manner his person, his goods, his works, his services or his prices with those of a competitor or to favor a third party to the detriment of its competitors by such comparison,*
> 6. *to repeatedly offer a selection of goods, works or services below cost price and to make particular mention of such offer in his advertising, thus to*

[236] ÜNAL, ODMAN BOZTOSUN; p.105

mislead the customers as to his own capabilities or those of his competitors; deception shall be presumed where the selling price is lower than the cost price for comparable purchases of goods, works or services of the same type; where the defendant is able to establish the effective cost price, that price shall be decisive for the judgment,

7. *to mislead the customers, by means of gifts, as to the effective value of the offer,*
8. *to impair the customer's freedom of decision by using particularly aggressive sales methods,*
9. *to mislead the customers by obscuring the quality, quantity, purpose, utility or danger of goods, works or services,*
10. *to omit in public advertising in respect of hire purchase sales or assimilated legal transactions to clearly state his trade name, to give clear information on the cash selling price or the overall selling price or to give exact figures, in Turkish Liras and in percent per annum, of the additional price resulting from payment by installments,*
11. *to omit in public advertising in respect of small loans to clearly state his trade name, to give clear information on the amount of the loan or on the maximum total amount to be reimbursed or to give exact figures, in Turkish Liras and in percent per annum, of the maximum charges for interest,*
12. *to offer or conclude, within the framework of his professional activities, a sale by installments, a sale with prior payments or a small loan contract using contractual forms containing incomplete or incorrect statements as to the subject of the contract, the price, the conditions of payment, the duration of the contract, the customer's right to cancel or denounce the contract or his right to pay the balance at an earlier date,*

b) Inducement to breach or termination of contract

1. *to induce a customer to break a contract in order to conclude a contract with him,*
2. *to seek to obtain advantage for himself or for someone else by affording or offering to employees, agents or other ancillaries of a third party benefits to*

which they are not legally entitled in order to induce those persons to act contrary to their duty in accomplishing their service or professional tasks,

3. *to induce employees, agents or ancillaries to betray or pry into the manufacturing or trading secrets of their employer or principal,*
4. *to induce a purchaser or borrower who has concluded a sale by installments, a sale with prior payments or a small loan contract to revoke the contract, or a purchaser who has concluded a contract for sale with prior payments to denounce such sale, in order himself to conclude such a contract with that person.*

c) Exploitation of the achievements of others particularly,

1. *without authorization, to exploit results of work entrusted to him such as tenders, calculations or plans,*
2. *to exploit the results of work of another, such as tenders, calculations or plans, although he must know that they have been handed to him or made available without authorization,*
3. *by means of technical reproduction processes and without a corresponding effort of his own, to take the marketable results of work of another person and to exploit them as such.*

d) Violation of manufacturing or trading secrets; particularly to exploit or disclose manufacturing or trading secrets discovered or obtained undue knowledge in some other manner.

e) Non-compliance with working conditions; particularly not to comply with the statutory or contractual working conditions that are also required of his competitors or which are customary in the trade or locality

f) Use of abusive conditions of business; particularly to make use of preformulated general conditions that, to detriment of a contracting party, misleadingly,

1. *depart considerably from the statutory provisions that apply either directly or by analogy, or*
2. *prescribe a distribution of rights and obligations in serious contradiction with the nature of the contract*

3.6. Regulations regarding the Comparative Advertisement under the Draft Code

We can define comparative advertising as such advertising where one of the competitors advertises the products by using comparison between its products or goods to other's actor in the market products or goods. The party whose products are compared to is usually the market leader in a particular business or sector and the aim of such comparison is to increase the advertiser's sale. Normally, by the use of comparative advertising the advertiser suggests that its products or services are of the same or superior quality to the compared one, denigrating in many opportunities the competitor's products.[237]

By the use of comparative advertising, advertisers objectively demonstrate the merits of their products to the public[238]. The use of comparative advertising is understood to improve the quality of information available to consumers and by this way to enable them to make well founded and more informed decisions regarding the choice between competing products/services as the merits of the products/ services has to be demonstrated [239] Upon the information provided by the business, the consumer are considered to be capable of making more efficient and informed choices.

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[237] Although being a kind of advertising with a long history, comparative advertising as legal term is a young phenomenon. It was firstly regulated in 1970 and before that date it was considered as question only relevant to competitors and not to consumers or the community. In this respect, before the specific regulations it was understood that the rules of competition law provided adequate protection in this subject. However the absence of specific regulation on this matter leaded to the practical prohibition. As a consequence of this, comparison advertising was generally regarded as an illegal market practice. In was firstly in the American jurisprudence that it is realized that comparative advertising is a complex, difficult and very special activity. The comparative advertisement has been well accepted and recognized in the USA. However, it should be noted that the Europe was significantly divided in this point of view during the Seventies. For a long time, most of the European countries were reluctant to this type of advertising as it was considered as per se an unfair market practice and too risky and dangerous. However this method was prohibited by general rules of unfair competition law, and there was no specific regulation on this subject. Within this context 'The UK has a relatively liberal regime permitting comparative advertising in most cases but in many continental countries all comparative advertising, even if true, has been classed as unfair competition or automatically misleading'. JOHNSON, Howard; *New EU Directive on Comparative Advertising*, Tolley's Communication Law Vol:3 Number:2, 1998, p.66

[238] BODDEWYN, Jean J., *Comparison Advertising: A Worldwide Study*, New York, 1978, p.67

[239] MISKOLCZI-BODNAR, Péter; "Definition of Comparative Advertisement", European Integration Studies, Volume 3, Number 1, 2004, p.25

Comparative advertisement is regulated under Article 55/1(a)-5 of the Draft Code. According to this Article:

> **ARTICLE 55** *(1) Actions set forth below shall be deemed unfair competition which infringes the principle of good faith:*
> *a) Unfair advertising and sales methods and other unlawful behavior and specially;*
> ……..
> 5. *to compare in an incorrect, misleading, needlessly injurious or imitative manner his person, his goods, his works, his services or his prices with those of a competitor or to favor a third party to the detriment of its competitors by such comparison,*

This provision which was first regulated under the Swiss Unfair Competition Code[240] and the Directive 97/55/EC amending Directive 84/450/EEC concerning misleading advertising is a new regulation in our legal system. Comparative advertising is a type of advertising where one of the competitors advertises the products by using comparison between its products or goods to other's actor in the market products or goods. For example; "Cheaper and more quality than Supermarket X", "Our cleanser is not (X) that you know. Ours is cheaper, more effective and more environmentalist than (X)", "Ours is cheaper and healthier than any others'…". As may be seen from the above examples; comparative advertisement may be made by way of both declaring the name of the competitor or not. It should be stated that the comparative advertisement is not contradictory to law unless it is unrealistic and puffery.[241]

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[240] Under the Swiss legal system, unfair trade practices are regulated by different sources of law. Firstly, the basic acts of unfair competition and the principles eliminating them are the objects of the Federal Unfair Competition Law Statute of December 19, 1986 which has been in force since March 01, 1988. The main objective of the Federal Unfair Competition Law was to guarantee the free interplay of competitors in Switzerland. This Statute is divided into five chapters. The first chapter defines the aim of the Statute. The second chapter stipulates the principle of fair competition and introduces a catalogue of various detailed rules concerning examples of unfair trade practices and also fixes procedural rules. Chapter three regulates the indication of retail trade practices and also fixes procedural rules. Chapter three regulates the indication of retail prices, while the criminal rules are dealt with in chapter four. The fifth chapter concerns the abrogation of federal law. CAMPBELL/COTTER; p.279

[241] Please see "Türk Ticaret Kanunu Tasarısı Genel Gerekçesi" p.20, http://www2.tbmm.gov.tr/d23/1/1-0324.pdf, (18.12.2008)

According to the legal grounds of the Draft Code; comparison should be made between the advertiser or the person of whom the advertiser wishes to make into an advantageous position and the competitor or the competitors. The subjects of the comparison are persons (personalities), goods, business products, activities and prices. As regards to the comparison, if the statements, declarations and the elements that are taken into consideration due to the comparison are made by way of any false designation of not true (i.e. if they are false and misleading) or in case they exploits the competitor's reputation or its products, or causes misleading representation/introduction, suppressing the predominant characteristics; such statement shall constitute a breach of good faith principle under the Article 55/1(a-5) of the Draft Code. In this respect it may be seen that, the referred provision contains three types of comparative advertisings: (i) False comparative advertisements, (ii) misleading comparative advertisements and (iii) comparative advertisements exploiting the competitor.[242]

(i) Advertisements which are made by way of any false designation of origin, false or misleading description of fact, or false or misleading representation constitute false comparative advertisements. Puffery advertisement shall be deemed as false advertisement under the specific circumstances of the case. For example; as stated under the legal grounds of the Draft Code, if an advertisement states that the voice coming out of car X driving with speed of 260 kilometers per hour is not the sound of engine but the sound of the radio and if this statement is not true, this shall constitute a false statement and contradict to the law. In case the advertisements such as "Sole on the hill" do not reflect the truth, they should be considered as false comparative advertisings.[243]

(ii) Potential misleading nature of the comparative advertisement is the main danger for consumers. As regulated under Article 2(2) of Article 84/450/EC and parallel to the regulations under the Draft Code, an advertisement is deemed misleading if 'in any way, including its representation, it deceives or is likely to deceive the

[242] Ibid, p.21
[243] Ibid, p.22

persons to whom it is addressed or whom it reaches and if, by reason of deceptive nature, it is likely to affect their economic behavior or, for those reasons, injures or is likely to injure a competitor. Whether a comparative advertisement is misleading or not, depends on the understanding of the relevant public. The standard is an average consumer who is reasonably well informed. Hence, a comparative advertisement would be misleading, therefore forbidden, if certain part of the relevant public - consisted reasonably well informed consumers – both under the Directive 84/450/EC and the Draft Code.[244]

(iii) There is also the possibility that comparative advertisement could constitute exploitation where the registered trademark is well known. As decided by the Swiss Federal Court; an advertiser who compares his product with a well known trade mark owned by his competitor constitutes unfair competition.[245]

In the light of foregoing information, it also should be stated that a correct comparative advertisement which is not misleading and does not create confusion between the advertiser and its competitor does not constitute unfair competition under the EU regulations and the Draft Code.

3.6.1. Legality Criteria of the Comparative Advertisement under the Draft Code

Even though the comparative advertisement is allowed under the Draft Code, it should be also stated that the legality criteria of the comparative advertisement practices are listed in Art.55/1(a-5) of the Draft Code. According to this article; comparative advertisements failing to comply with those criteria listed in the referred article will constitute unfair competition and not be allowed. The criteria regulated under the Article 55/1(a-5) may be listed as follows:

[244] İNAL, p.105; BOZBEL, p.93
[245] BOZBEL; p.93

- the characters of the products to be compared should be same or similar *(comparability),*
- statements used in the advertisement should not be misleading *(not to be misleading),*
- the competitors should not be denigrated needlessly *(prohibition of needless denigration),*
- the comparative advertisement should not be exploitative where the other trade mark is well known *(prohibition of exploitation)*

A- Comparability

The notion of comparability emphasizes that the products to be compared in this type of advertisement have to be same or similar. Even though this requirement has not been explicitly determined in a provision, it should be noted that the similar products can only be compared to each other.[246] The comparison of dissimilar or different products, not serving the same purpose or need, will be considered as unfair competition. In this context, it is also stated under Article 11 of the Regulation on the Principles regarding the Commercial Advertising and Announcements that the products or the services compared has to be similar or they have to be serving the same need. This provision of the regulation is compatible with the Article 3(a)[247] of EC Directive numbered 84/450 and the concept of Comparability should not be construed strictly.[248]

In the light of foregoing information, there should be a comparison of goods or services in order for the comparative advertisement to be realized. This element has already been realized in comparison between products and services (i.e. medicine and

[246] Ibid, p.93

[247] According to this Article: "In determining whether advertising is misleading, account shall be taken of all its features, and in particular of any information it contains concerning: (a) 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 and services; ..." http://ec.europa.eu/consumers/cons_int/safe_shop/mis_adv/index_en.htm, (21.02.2009)

[248] KÖHLER, Helmut/LETTL, Tobias; *Tobias, Das gelende europaische Lauterkeitsrecht. Der Vorschlag für eine EG-Richtline über Unlautere Geschafspraktiken und die UWG Reform*, WRP, 2003, p.358

therapy methods), a product and another product combination (accessorized and rigged automobiles) or another product and a combination of products and services (i.e. furniture and installing the furniture). Nevermore, a comparison between the competitor's or the advertisement owner's personal matters or matters related to his business may be deemed contradictory to law.[249]

Additionally, the products or services which are subject to comparison should have as main aim to cover the same need in the consumer. Therefore it shall not be relevant if the compared products or services differ or not in size or amount (i.e the comparison of the brand products by the seller) or if they belong to the same products' category (such may be the case i.e of comparison of automobiles) or if they are completely different (comparison of oil and electric as energy resources and railways and airways as alternative transportation). The consumer's need to be satisfied by the specific product or service or the goal of the product/service itself shall be determined taking into consideration the consumers' needs in the same segment. Therefore, it is not required to determine the intended use in a general manner. This intended use or need can be constituted or individualized by the advertisement owner. Therefore, "the same" purpose or need should not be construed strictly, other wise the scope of application of comparable advertisement would be narrower. Within this context, since a comparison may has as object any type of product of goods, it would not be right to restrict comparison with a specific product.[250]

In terms of comparability, the same functionality should not be expected for products and services. At this point, substitutability which is recognized and developed in German Law may be determinative criterion.[251]

The Swiss Federal Court stated in its decision in the case "Imholz/Hotelplan" that the comparison of two products consisting in a one week all inclusive holiday package including flight, accommodation and transfer costs but differing in departure

[249] BOZBEL; p.113
[250] Please see "Türk Ticaret Kanunu Tasarısı Genel Gerekçesi" p.20, http://www2.tbmm.gov.tr/d23/1/1-0324.pdf, (18.12.2008)
[251] BOZBEL; p.114

time, date and schedule which caused cutbacks on the duration of accommodation shall be considered as illegal. In another decision, the same tribunal stated that the comparison in the advertisement know as "the biggest overseas school of Switzerland" does not fulfill the requirements of fair competition as the schools compared in such advertisement are both schools providing an opportunity for college and technical training schools and vocational commercial schools, being as a consequence of this, their curriculums and diplomas different.

Not only the same or similar products can be compared, but also the prices of these products can be subject to comparison. In price comparisons, the price of a similar product of the competitor is provided in the advertisement. Furthermore, the delivery and payment terms should also be considered as included in the cost since they are relevant with the cost.[252] Within this context, in case the terms of the final price of the product including those terms regarding the payment are not clearly determined in the advertisement, in a way that would clarify all possible doubts, the comparison would be considered misleading.[253]

When the prices of two products are compared, it does not necessarily mean that they are of the same quality. An average consumer also acknowledges that the products that are compared on basis of cost do not have the same quality.[254] Furthermore, the comparison of two products of different quality on the basis of their cost may constitute useful information for consumers with low budgets. On this account, a comparison between a well known brand and an unknown brand does not constitute a contradiction to law. It may be sufficient for these kinds of comparisons not be misleading and to be objective.

[252] FIRTH, Alison / LEA, Gary / CORNFORD, Peter / LINGREN, Kristin L.; *Trade Marks: Law and Practice*, Jordans Publication, 2005, p.118
[253] BOZBEL; p.115
[254]Please Swiss Federal Law on Unfair Competition of December 19, 1986 http://www.wipo.int/clea/docs_new/pdf/en/ch/ch016en.pdf

The principle of objectivity of the cost comparison causes requires that information on the advertisements to be true. Therefore, declaring that a competitor's prices are different than the real prices constitutes a breach of the objectivity principle itself. The knowledge of this misinformation by the owner of the advertisement shall not be a relevant element to be taken into consideration.

As per the objectivity principle, the veracity of the attributions and price at the time of the advertisement of the presented products and services shall be evaluated. Within this context, if the prices or the quality of the product used in the comparison differ from the presented one, the advertisement will lack of objectivity and therefore be considered as misleading.[255] We can state as a consequence of this that the updated prices of the competition should be included in the comparison.[256] In other words, advertisements including the invalid or non-updated prices in a comparative way shall be considered misleading.[257]

Briefly, it should be stated that information included in advertisement or a circumstance where information about price is not complete or missing should not create a belief that (i) the price is lower that in reality, (ii) the price determination depends on circumstance on which it in reality does not, (iii) the price includes product delivery, performances, labor or service for which it is common to pay separately, (iv) the price was or will be raised, lowered or changed if it is not the case, (v) the relation between price and utility of advertised product and price and utility of product which is comparable is not described as it is in reality.

B- Not to be misleading

There are three conditions for the comparative advertisement required by the Draft Code in order not to cause unfair competition; (i) the truthfulness of the

[255] İNAL, p.102; BODDEWYN, p.131-133
[256] WRONA, S. James; *False Advertising and Consumer Standing Under Section 43(a) of the Lanham Act: Board Consumer Protection Legislation or a Narrow Pro-Competitive Measure*, Rutgers Law Review, 1995, p.48
[257] GÖLE, p.123

declarations and puffery in the advertisement, (ii) not to be false or misleading (iii) not to cause confusion.

(i) The first condition for the comparative advertisement required by the Draft Code is the truthfulness of the declarations and messages in the advertisement. According to the rules regulated under the Draft Code; the declarations that are used in the advertisement have to be true in terms of both the advertisement owner and the competitor. In the event that the information and the declarations used in the comparative advertisement are incorrect, then this advertisement shall be considered unfair advertising.[258]

It should be noted that while the truthfulness of the advertisement is being inspected, the element of puffery should also be taken into account. A puffery situation or case can be defined as such when the product or services' characteristics are presented in an exaggerated manner and consequently it becomes evident that such advertisement shall not be seriously considered. This may be the case of advertisements declaring that "*the consumers using 'Yudum' sunflower oil in meals will fly"*, or a "*Murat 124 (an old Turkish car) beats a Porche when filled up with FullForce Gas*".[259]

The Board of Advertisement (hereinafter referred to as the "Board") generally considers in its decisions ill-advisedly found pufferies and declarations within the boundaries of reasonable compliment as contradictory to law. Within this context, the Board considered as illegal an advertisement titled *"Here, there… Turkcell is everywhere!"* from "Turkcell İletişim Hizmetleri A.Ş''. In such advertisement images of some natural beauties of Turkey were being used in the advertisement and it was assumed that Turkcell had a range to cover all of these places when it did not have. Another Board decision in this concern is the one issued regarding the advertisement of "Kitymilk" a chocolate produced by "Ülker Gıda San. Ve Tic. A.Ş". The Board considered that such advertisement abusing the children (main target of the product) to believe that after consuming the product, they were able to do what they saw in the

[258] BOZBEL, p.100
[259] Please see www.tbmm.gov.tr/ul_kom/kpk, (13.02.2009)

advertisement. The Board considered that such advertisement negatively affects the developing young minds and that it is contradictory to Article 16[260] of the Law No.4077 on Consumer Protection Law as amended by the Act. No.4822 (hereinafter referred to as the "Law No.4077").

On the contrary, the Swiss Federal Court found declarations in advertisements such as "We guarantee Switzerland's lowest prices", "Super Discount" or "up to 40% discount on child clothing" truthful and such articles were not considered by this tribunal as puffery. According to the Federal Court, in comparative advertisement, those individuals or legal entities making declarations about the qualities of their products/services, should state in forehand that such declarations reflect their products/services reality and prove their sayings is those cases where their veracity is not clear.[261]

(ii) The misleading characteristic of an advertisement can be a consequence of both, a true declaration or a false claim. Within this sense, comparison of insignificant and minor parts of products used in comparative advertisement may also be considered as misleading.[262] In order to be considered as a legal advertisement, comparative advertisement shall use factors which would have a direct impact on the consumer's decision to buy. Therefore, comparison of secondary and insignificant aspects would constitute an unfair competition act.

A truthful comparative advertisement can mislead the respondents as a result of the manner of presentation of the products/services and as a result of the inverted

[260] According to Article 16 of the Law No.4077; "It is essential that commercial advertisements and notices conform to the laws, principles adopted by the Board of Advertisement, general morality, public order, and personal rights and are true and correct. No advertisement, notices or implied advertisement deceptive or misleading the consumer, or abusing his lack of experience or knowledge, threatening the life of the consumer and safety of his property, encouraging the acts of violence or inciting to commit crime, endangering public health, or abusing elderly, children or disabled people shall be allowed. Advertisement comparing the goods or services offered by a competitor meting the same needs or intended for the same purpose is allowed. It is incumbent upon the advertisement or announcement. Advertisers, advertising or media companies have to comply with the provisions of this Article. www.tbmm.gov.tr/ul_kom/kpk, (13.02.2009)

[261] Please see the Case of Swiss Federal Court numbered SMI 1983 376, BOZBEL, p.118

[262] İNAL, p.105; BOZBEL, p.117, GÖLE, p.63

normal meaning of such presentation.[263] This would be the case of the use of a word or expression having more than one meaning. In such a case if the advertisement suggesting the use of an expression with a different meaning than the expected one by the customers or the audience, then this advertisement shall be considered as an unfair competition.[264] Within this context, the Federal Court of Switzerland stated in one of its decisions that the phrase "biggest" in "Switzerland's biggest School" didn't make reference to the amount of students as the consumers would have expected, but on the contrary to the school's revenue. As a result; such advertisement was considered as misleading and contradictory to law. As a consequence of the above, we can state that when the advertiser is not legally bound to provide detailed information in the advertisement, his lapse in this respect about some of the information may be the cause for the misleading consideration of such advertisement.[265]

Although products' natural aspects or qualities' description are frequently found in all kind of advertisements, such advertisements may also be considered as misleading by the tribunals. Within this context, it is worth noting that descriptions of features and developments as news, if existent in all competitors or similar products, shall be considered as misleading. In an advertisement of Citroen declaring that *"2 years guarantee for any type of vehicles"* has been found misleading by the Board since it was contradictory to Article 7/d of the Regulation Advertisements and Announcements stating that "An Advertisement can not include guarantees that do not provide the buyer, more than his legal guarantee rights prescribed by law".[266]

C- The Prohibition of Needlessly Disparagement

[263] CRASWELL, Richard; *Interpreting Deceptive Advertising,* Boston University Law Review, Vol: 65(4), 1985, p.697
[264] PITOFSKY, Robert; *Beyond Nader: Consumer Protection and the Regulation of Advertising*, Harvard Law Review, Vol: 90(4), 1977, p.677
[265] GÜRZUMAR, A.; Türkiye, *İsviçre ve AT Ülkelerinde Reklamcılık Alanında Tüketicinin Korunması Amacıyla Uyulması Gereken Hukuk Kuralları*, Ankara Barosu Dergisi, Yıl:48, S.3, Mayıs 1991, p.350
[266] BOZBEL, p.119; İNAL, p.107

It is regulated under the Art.55/1(a-1) that to disparage another person, his goods, his works, his services, his prices or his business circumstances by incorrect, misleading or needlessly injurious statements constitutes unfair competition.

Disparagement may be found in comparative advertisements which are both tangible and personal. In case a competitor's products are shown in an advertisement as having low quality with a disparage way, then the referred advertisement shall be considered as inessential disparagement which is unfair and contrary to law as a consequence of such illegality. Additionally, it should also be stated that it does not matter if those statements disparaging the competitor are real or not.[267]

Among the targeted public, disparagement usually decrease the value of a determined product.[268] As stated above such disparagement may be based in both real or unreal facts and value judgments. However, an advertisement that merely compares the products' advantages and disadvantages shall not be considered as disparagement of the competitor's product.[269] Therefore, the advertisement should include some additional objects more than highlighting the advantages and good parts of the advertiser's product in order to cause disparagement. The comparison object of the advertisement should transform in some aspects the comparison into a condescending non-objective commercial.

The important element to determine in disparagement cases is whether the expressions used in the advertisement, contribute to the disclosure of the consumers and serve as a consequence of this to improve the transparency of the market by the means of less incisive expressions. The negative evaluations involving the truth but within the boundaries of criticism should not be contradictory to the law. Therefore, objectively declared scientific research reports revealing the competition's deficiencies should not constitute disparagement.[270]

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[267] BOZBEL; p.120
[268] Please see "Türk Ticaret Kanunu Tasarısı Genel Gerekçesi" p.20, http://www2.tbmm.gov.tr/d23/1/1-0324.pdf, (18.12.2008)
[269] İNAL; p.110
[270] BOZBEL; p.121

We can conclude therefore that untruthful value judgments shall always be considered as contradictory to the law. However and advertisement may also contain sense of humor and irony. Within this context such elements should be evaluated and it shall be determined if the consumers would take these ironies and comic expressions serious before deciding that the advertisement involves disparagement.

It is stated under the legal grounds of the Draft Code that a disparagement is unfair and contradictory to the law only if it is considered as needless or unnecessary.[271] Within this context, the criticism of the competitions products can involve justifiable grounds. The direct, but necessary, reference to competitors' products in case of a discovery or technique shall be considered as based on a justifiable ground. However the products' association in these cases is required to be neutral and not to harm the competition.[272] The prohibition of needless disparagement serves to the protection of the competition. As a consequence of such prohibition, no one is required to bear disparagement in the competitors' advertisements.

It should be stated that not all criticism in advertisement constitutes disparagement. However, the boundaries of the criticism shall be in every case firmly and clearly established. In order to do so, the criticism should be objective, necessary and proportionate.[273] Further to the objectivism as described above, the criticism should be based on true facts and arise from provable events and data. Within disparagement cases and unfair competition regulations, although the advertiser is allowed to present its product as superior to the rest, it may not present the competitor's product as deficient.[274]

In addition to the above mention characteristics, the criticism in advertisement in order to be considered as legal and therefore not to constitute a breach of the unfair

[271] Please see "Türk Ticaret Kanunu Tasarısı Genel Gerekçesi" p.20, http://www2.tbmm.gov.tr/d23/1/1-0324.pdf, (18.12.2008)
[272] ODMAN BOZTOSUN/ÜNAL; p.386
[273] BOZBEL, p.120; İNAL, p.109
[274] GÜRZUMAR, p.331

competition regulation must be proportionate. This principle suggests that the associated competition and its products must be done in the less harmful possible way.

It has been stated by the German Courts[275], that the use of expressions such as "are you still bound up with the bottle?" when comparing mineral water to drainage water are "unfaithful expression which may have a high cost". Within this sense the court stated that the expression "don't you feel that some toilet papers are a little hard?" accompanied by a hedgehog image in a price comparison, constitutes a case of needless disparagement.[276]

D- Prohibition of the exploitation

It is regulated under the Article 55/1(a-5) that an advertiser comparing in an incorrect, misleading, needlessly injurious or imitative manner his person, his goods, his works, his services or his prices with those of a competitor or to favor a third party to the detriment of its competitors by such comparison constitutes unfair competition.[277] As may be understood from the article above; a comparative advertisement which takes advantage of the competition's and its products' popularity shall be considered as an unfair competition act. However, not all "exploitation" shall be considered as an unfair element. In this respect, in order to be considered as a law breach, the exploitation must be needless and it should not be based on a justifiable ground. In order to be considered as lawful, the exploitation, used in the comparative advertisement, must be necessary, objective and proportionate, and must stress the resemblances and similarities with the rival competition. Exploitations beyond the above mentioned limits should be deemed "needless".[278]

The Federal Court of Switzerland, in the decision issued in the "Bico-Flex/LattoFlex", found that Bio-Flex, a new product in the market, have exploited the popularity of LattoFlex unfairly. Furthermore the Swiss tribunal has stated that the aim

[275] OLG Jena GRUR-RR 2003, 254
[276] OLG Frankfurt GRUR-RR 2005, 137, 138, BOZBEL; p.127
[277] İNAL, p.110
[278] BOZBEL, p.128

of Bico Flex advertisement is taking advantage of LattoFlex's popularity and their place in the market for the sake of its own product. Therefore the presentation of Bico Flex as a cheaper and more endurable alternative to LattoFlex has been considered as contrary to the unfair competition regulations.[279]

3.6.2. Average Consumer Criteria

Under the EU legal system; in order to understand when we shall consider a consumer as an average consumer, the particular group of consumers to which the commercial practice is directed should be taken into consideration, as this group shall be considered the benchmark.[280] The ECJ refers to the "average consumer" in its case-law[281]. According to the interpretation of the ECJ; the average consumer is an individual who is "reasonably well-informed and reasonably observant and circumspect", taking into account social, cultural and linguistic factors.[282] As per the UCPD, in accordance with the principle of personality, and in order to permit the application of the protections in a effective way, this Directive takes as a benchmark the average consumer, who is reasonably observant and circumspect, considering factors such as social, cultural and linguistic as interpreted by the ECJ. Nevertheless, the Directive also contains provisions which aim is preventing the exploitation of consumers particularly vulnerable to unfair commercial practices.

From the Turkish law perspective; neither in the Turkish Commercial Code nor in the Draft Code can we find provisions where the consumer has been taken as determinative criterion for considering an advertisement as misleading. The only clause regarding this criterion is stated under Article 5 of the Advertisement Regulation which

[279] Please see "Türk Ticaret Kanunu Tasarısı Genel Gerekçesi" p.20, http://www2.tbmm.gov.tr/d23/1/1-0324.pdf, (18.12.2008)
[280] FIRTH/LEA/CORNFORD/LINGREN, p.193
[281] Please see the Case C-315/92, Verband Sozialer Wettberwerb v.Clinique Laboratories SNC and Estée Lauder Cosmetics GmbH (1994) ECR I-317; Case-210/96, Gut Springheide GmbH v. Oberkreisdirektor des Kreises Stenfurt (1998) ECR I-4657
[282] MANIATIS, Spyros; Trade Marks in Europe: A Practical Jurispruedence, Sweet&Maxwell Publications, 2006, p.149

states that advertisement should be made in accordance to the "average viewer's level of perception".[283]

It can be stated within this context that a solution for this lack of regulation would be to take into consideration "consumers' average knowledge level of and attention'' as the criterion.[284] Therefore, the consequent decision about the misleading effect of this specific advertisement on the consumers may be the most consistent solution. The knowledge and perception of the average consumer shall not be higher than that of the rest of members of the community. It is worth noting that these individuals' interests and knowledge are not particular and do not differ from the rest. The average consumer normally does not rely on third parties' experience and consequent opinions and frequently they lack of what it is understood as technical information .As a consequence of this, we may not expect from the average consumer a detailed evaluation of every term read or heard in the advertisements.

The above mentioned criterion, as takes into consideration the average viewer, relieves the advertiser from the need to consider the perception of those consumers with a lower lever of knowledge.[285] However, if the owner of the advertisement knowingly makes untrue and misleading claims and acts upon realizing that this will mislead most of the viewers which the advertisement addresses, the result will naturally be different.[286]

As regards the definition of the expression "average level of knowledge and attention", it is worth noting that the term "average" makes reference, within this context, to both knowledge and attention.[287] A viewer with an "Average knowledge" represents therefore the level of knowledge expected from the ordinary consumer by the advertisement owner. This would be the case for instance of a consumer that

[283] GÖLE, p.76; İNAL, p.115; ARKAN, p.298; POROY/YASAMAN, p.210; İMREGÜN, p.83
[284]BLAKENEY, Michael; ANTONS, Christoph,; HEATH, Christopher; *Intellectual Property Harmonization Within ASEAN and APEC*, Max-Planck-Institut für Auslandisches und Internationales Patent, Uhreber-und Wettbewerbsrecht, Kluwer Law International, 2004, p.51
[285] CAMPBELL/COTTER, p.26
[286] BOZBEL, p.118; İNAL, p.110
[287] GÖLE, p.125

obtains a free mobile phone as a consequence of a GSM agreement signed with a company. In this case, the average consumer acknowledges that the received mobile phone is not free of charge but monthly financed with the GSM agreement's fixed fee.[288]

For the evaluation of the "average attention", the type of products/services should be taken into consideration. Within this context, a consumer with an average knowledge do not spare time controlling products with a low price and normally aimed to cover daily needs. On the contrary, when the price of the product is higher the consumer will monitor the advertisement with great attention. However the consumer's evaluation will not be focused on the advertisement shallowly, but on the product and upon receiving further information will give his final decision.

In order to determine if an advertisement shall be considered as true, the target segment(s) should be taken into consideration along with the "consumers with average attention and knowledge'' criterion. In some cases it is unfeasible to use this criterion considering the respondents of the advertisement. Every advertisement targets different individuals and as a consequence of this, a certain group of member of such target individuals group with an average knowledge and attention shall be taken into consideration (i.e specialists, kids, youngsters, the retired, immigrants, the elderly, the unemployed, or graduates…). In case such group consists of members in need of special care (children, patients) the conditions should be stricter. For this reason, in cases like these, the respondent group's level of perception and factors effecting this perception should be examined.

(iii) It is worth noting that confusion in advertisement has not been regulated by 55/1 (a-5) but by 55/1 (a-4) which states that taking steps that are such as to cause confusion with the goods, works, services or businesses of others constitutes unfair competition.

[288] İNAL, p.121; GÖLE, p.76; İNAL, p.115; ARKAN, p.298; POROY/YASAMAN; p.212; İMREGÜN, p.85

Within the context of comparative advertisement, precautions shall be taken in order to avoid advertisement which is aimed to erase the limits between an advertiser's product and "third party's merchandise, business products, actions or business'' which shall constitute a case of unfair competition. In order to determine the existence of comparison as described above, the danger of confusion shall be sufficient. Therefore, in this matter, the comparison instruments mainly consist of the competition itself, its marks, and products as regulated under the UCPD.

CONCLUSION

Free competition and free operation of a business is and has always been essential elements for the operation of the market system in all systems considered as free enterprise systems. By the way of competition the traders have the possibility to create incentives for businesses and as a consequence to earn customer loyalty by offering, at reasonable prices, quality goods. In the normal course of business, the traders usually tempt customers away from each others through the freedom of compete. If such trader achieves to tempt away enough customers away from competitors, these competitors may be forced to shut down or move. In this context, the purpose of an unfair competition regulation is penalizing a business from unfairly profiting at a competition's expense and not penalizing a business merely for being successful in the market place.

Unfair competition due to the above mentioned importance for the correct operation of the system has been regulated in different levels. Although we may find differences, most of these levels, as we have seen in this work, follow the same principles. The final harmonization in this subject is intended with the UCPD, recently adopted in the Community level.

We have noticed that most of the regulations are drafted in the interest of all market participants and they mostly regulate the entire field of advertising, sales promotions, special sales, price indications, direct marketing through modern forms of communication, business secrets, slavish imitation, and breach of the law among others. It can conclude therefore that under the subject of unfair competition, the

consumers and competitors have one common goal: to prevent a distortion of competition through unfair acts or practices

The first international regulation on Unfair Competition dates of 1883. It was through the Paris Convention for the Protection of Industrial Property, that the members of the International Community made the first efforts in order to help citizens of one country obtain protection in other countries for their intellectual creations. This International regulation led to the entering in force of TRIPS which may be concluded that, because of the close relationship of the law of unfair competition to intangible property rights, on several occasions to Art.10bis of the Paris Convention and thus to specific unfair competition law principles. Nevertheless, these sporadic mentions of unfair practices law do not lend themselves to be interpreted as an international regulation of the legal protection against unfair competition. The developments in industrial property were proved with the WIPO repeatedly. Therefore, it must be paid attention what WIPO has again increasingly concerned itself with unfair competition law.

As regards the Community level, it should be noted that despite differences, all countries in Europe have set up mechanisms based on the principle of fairness in order to control activities related to commerce. It is general belief in these States that the market should act in a fair way towards the interests of all participants and therefore that some rules should be agreed in order to secure such fairness. The judicial practice of the ECJ is of particular for both primary and secondary Community law. The interpretations of the directives that are in force are also monitored by the ECJ. Furthermore, the ECJ also checks national regulations are compliance with Articles 28 and 49 of the EC Treaty. National regulations regarding the unfair competition law can be submitted to the ECJ by some different ways.

The Court bases most on its decisions on unfair competition law on Art.28 of the EC Treaty (formerly Art.30), which states *"Quantitative restrictions" on imports and all measures having equivalent effects shall be prohibited between Member States."* Frequently, it also reviews the national regulations on unfair competition law from the point of view of the freedom of services under Art.49 of the Treaty. National

unfair competition law regulations (e.g. on advertising services) are also increasingly reviewed by the ECJ from the point of view of the freedom of services, Art.49 of the EC Treaty.

Under the Community level we found several directives on the topic of Unfair Competition. The Television Directive was implemented word for word in most Member States containing amongst other things regulations on (television) advertising, sponsoring etc which, in the view of most Member States, concern aspects of unfair competition law. The referred Directive covers all aspects of television activity originated within the EU. The Directive 2003/33/EC of the European Parliament and the Council of 26 May 2003 on the approximation of the laws, regulations and the administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products[289] makes Directive 98/43/EC[290] , previously annulled by the ECJ.[291] The prohibition on television advertising and sponsoring of tobacco products is extended to printed media and information society (Article 3), radio advertising and sponsorship (Art.4) and sponsorship of events (Art.5).Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the Protection of Consumers in respect of Distance Contracts[292] regulates the civil-law consumer protection in case of contracts concluded in distance sales. This Directive regulates specially the right to withdraw. Directive 2000/31/EC on Electronic Commerce regulates three topics-contracts concluded by electronic means, the liability of intermediary service providers and the regulation of "commercial communication". The Directive's scope of application can be defined as all "commercial communications" in electronic commerce.

Directive 84/450/EEC was for a long time the most important regulation in the field of unfair competition law. The purpose of the referred Directive is to protect consumers, traders, businesses, professionals, and in the public in general, against misleading advertising and the unfair consequences thereof; and to establish the

[289] OJ L 152.20.6.2003, p. 16.
[290] OJ Nr L 213 30.7.1998, p.9
[291] Case C-376/98 Federal Republic of Germany v. European Parliament and Counsel and Case C-74/99, The *Queen v Secretary for Health ex parte Imperial Tobbaco Limited (2000)* ECR I-8599
[292] OJ L 144, 4.6. 1997, p.19

conditions under which comparative advertising is permitted. In other words; its aim is to "set out minimum objective criteria that can be used to determine whether advertising is misleading". Since some Member States had already achieved the minimum level of protection the Directive has not been implemented expressly in all Member States.

Lastly, with the UCDP the Member States intended to overcome the obstacle to the development of the internal market within Europe. The UCDP clarifies and simplifies the process of defining an unfair commercial practice by replacing the multitude of rules in various countries with a common legislation. It provides both consumers and traders with a single European reference point, reassuring them of their rights and making it clear which commercial practices are –and are not- allowed.

Under the Turkish legal system, analyzed in the second chapter of this study, the regime regarding unfair competition as an attempt to the correct and fair functioning of the market is currently regulated under the Code of Obligations, the Turkish Commercial Code, and other several special laws on the matter such as Law No.3577 dated June 14, 1989 "Ithalatta Haksiz Rekabetin Onlenmesi Hakkinda Kanun (Anti-damping Law); Law No.4054, dated December 7,1994 "Rekabetin Korunmasi Hakkinda Kanun" (The Law regarding the Protection of Competition) among others.

The prohibition of unfair competition, and therefore of those conducts considered as the necessary cause of the unfairness, is determined in a general sense, in Art 48 of the Turkish Code of Obligations. The above mentioned provision provides relief to those individuals suffering of competitors' actions such as misinterpretation and other conducts considered as contrary to the principle of good faith. Nevertheless, and as a consequence of the lack of specialty in the provisions of the Code of Obligation, the Turkish legislator provides a more detail regulation on the subject in the Turkish Commercial Code. The two above mentioned regimes, however, currently coexist and judges and other legal actors apply one or the other according to the person or persons (merchant or non merchant) subject to the unfair conduct. Furthermore, and

due to the generality of this provision, Art. 48 of the Code of Obligations and the provisions of the Turkish Commercial Code are frequently interpreted in a joint way.

As per Art 56 of the TCC Unfair definition may be defined as *"the misuse of competition in a financial sense, through misleading actions, untrue statements or any other type of action that is not in accordance with good faith principles."* Further to this general definition, Art 57 provides us with an enumeration of the conducts which shall be considered as constituting practices of unfair definition. Within this sense, disparagement, the provision of fake information about competitors, the provision of fake information about the owns products or service, simulating having obtained distinctions, degrees or awards, creating confusion, inciting the assistants of third parties to fail in their duty, betraying or seizing third parties' trade secrets, taking illicit advantage from trader or manufacturing secrets, issuing certificates of good conduct or capacity which are contrary to truth and failing to comply the conditions imposed by business life, shall be considered as conducts constituting unfair competition. The enforcement and sanctions of the above mentioned conducts is regulated in Articles 58 to 65 of the TCC.

Further to the EU *acquise communitaire,* and the consequent need to amend and harmonize the Turkish legislation with the EU law, Turkey has immersed itself in a regulation procedure which main object is the Turkish Commercial Code. Within this context, a Draft Commercial Code has been prepared to replace the current Commercial Code and introduce modernization in almost all aspects of commercial law as currently understood in Turkey. Unfair competition has been one of the areas subject to study and therefore the new Turkish Commercial Code will introduce a detailed regime in this respect inspired in the EU regulation. As per the provisions of the Draft Code, the influence of actions assessing an influence, not only among suppliers and competitors, but also to the economy as a whole shall be under consideration. The Draft Code provides the legal actors with a non-exhaustive list of actions that constitute unfair competition such as misleading customers about the fair price of a product limiting consumers' freedom of choice by employing aggressive techniques, and dishonesty in installment sales.

Art.54 of the Draft introduces one of, in our opinion, the most revolutionary amendments in the unfair competition regime as states that the purpose of the unfair competition regime *is to ensure fair and undistorted competition in the interest of all concerned.* This wording acts as a breach among the competition and the unfair competition regimes, previously understood as completely independent from each other. Furthermore, as stated above, the protected interests to be taken into consideration shall be all the concerned participants in the competition game such as the economy as a system, the consumer and the general public.[293] The new regime is based as a consequence, and as stated in the legal grounds of the Draft, in the three dimensions; competitors, clients, community. This tripartite dimension implies the equivalence of the economy, consumers and community' interests in the consideration of the unfairness of the conducts.

The conducts regulated for the operational protection of the recognized rights, are listed under Art. 55 of the Draft Code. It is worth noting in this respect that although these conducts are regulated under 10 (ten) clauses in the current TCC, the conducts as regulated in the Draft code will increase and therefore they will be regulated in 6 (six) clauses and 22 (twenty two) sub-clauses, entitling the individual or legal entity with further legal actions for the correct protection of its rights. By the introduction of the above mentioned clauses and sub-clauses, which on the other hand preserve the main characteristics of the actions as regulated by the current TCC, the provisions related to unfair competition under the Draft Code are orientated to harmonize the Turkish Law with Swiss Unfair Competition Code and the EU Law especially with the UCPD.

As one of the conducts listed for the operational protection of the recognized rights; comparative advertisement is regulated under Article 55/1(a)-5 of the Draft Code. This provision inspired in the Swiss Unfair Competition Code and in Directives 97/55/EC and 84/450/EEC from the EU level is completely new in Turkish legal

[293] MOROĞLU, Erdoğan; *Türk Ticaret Kanunu Tasarısı: Değerlendirme ve Öneriler*, 5. Baskı, Vedat Kitapçılık, İstanbul, 2007, p.50

system. It is worth noting that comparative advertisement, which may declare the name of the competitor or not, is not illegal *per se*, unless, is considered as unrealistic and puffery. Within this context and according to the legislator intention as stated in the legal grounds of the Draft Code, comparison in this type of advertisement should be made between the advertiser or the person of whom the advertiser wishes to make into an advantageous position and the competitor or the competitors. As per Art 55/1 (a)-5 of the Draft Code, three conducts fall under the scope of unfair comparative advertisement: (i) False comparative advertisements, (ii) misleading comparative advertisements and (iii) comparative advertisements exploiting the competitor. The above mentioned provision provides an enumeration of the criteria which shall be taken into consideration in order to determine the legality of advertisements using comparison as the main method. Within this context, as stated by this article, the characters of the products to be compared should be same or similar *(comparability),* the statements used in the advertisement should not be misleading *(not to be misleading),* the competitors should not be denigrated needlessly *(prohibition of needless denigration)* and the comparative advertisement should not be exploitative where the other trade mark is well known *(prohibition of exploitation).*

It should be concluded that, although the number of conducts defined within the borders of unfair competition regulated under the current TCC will be increased and enlarged by the Draft Code, to regulate this subject under a special unfair competition code would be, in our opinion, a more efficient way as being applied under the Swiss legal system.

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Annex 1: ABSTRACT

GENERAL KNOWLEDGE

Name and Surname	**: Çağlar Gezer**
Field	**: European Union Level**
Supervisor	**: Ass. Prof. Tamer Pekdinçer**

Keywords	**: European Community Law, Unfair Competition Law, Turkish Law**

ABSTRACT

Fundamental principle of freedom of commerce and industry gives companies rise the freedom of competition and this freedom may sometimes cause unfair commercial practices between the companies. Despite differences, all countries in Europe have set up mechanisms based on the principle of fairness in order to control activities related to commerce. It is generally believed that the market should act in a fair way towards the interests of all participants and therefore that some rules should be agreed in order to secure such fairness.

In order to combine a high level of consumer protection with freeing up international trade in all countries, some regulations are entered into force in the European Union Law. This thesis introduces a comprehensive outline of unfair competition law in the European Union and Turkey under two chapters by way of focusing on regulations and directives.

Annex 2: ÖZET

GENEL BİLGİLER

İsim ve Soyadı : **Çağlar Gezer**

Anabilim Dalı : **Avrupa Birliği Hukuku**

Tez Danışmanı : **Doç. Dr. Tamer Pekdinçer**

Anahtar Kelimeler : **Avrupa Topluluğu Hukuku, Haksız Rekabet Hukuku, Türk Hukuku**

ÖZET

Serbest sanayi ve ticaret kuralı şirketlere rekabet serbestisi sağlamakta ve bu serbesti zaman zaman şirketler arasında haksız rekabete yol açabilmektedir. Farklı olmalarına rağmen, tüm Avrupa ülkeleri, ticari faaliyetleri kontrol altında tutabilmek amacıyla, doğruluk kuralı üzerine kurulu mekanizmalar geliştirmiştir. İştirakçilerin, menfaatleri doğrultusunda dürüst bir şekilde hareket etmeleri gerektiği kabul edildiğinden, bu dürüstlüğü sağlayabilmek amacıyla bazı kurallar konusunda anlaşmaya varılmalıdır.

Ülkeler arasında uluslararası ticaret serbestisi ve tüketicinin en üst düzeyde korunması amacıyla, Avrupa Birliği Hukuku kapsamında bazı hukuki düzenlemeler yapılmıştır. Bu tez ile yönetmelikler ve yönergeler üzerine odaklanılarak, Avrupa Birliği ve Türkiye'de haksız rekabet hukukunun uygulamasına ilişkin olarak, iki bölüm altında kapsamlı bir çalışma sunulmaktadır.