

OVERVIEW TURKEY

I – INTRODUCTION

The need of a specific regulation about the subject ‘product liability’ which refers to the liability of manufacturers and suppliers for personal injury and damage to property caused by a defective product had been claiming by practitioners and academia for years in Turkey. Then, on 23/2/1995, the Consumer Protection Act (TKHK) which provides legal protection for weak consumers against economically strong manufacturers was passed. After eight years on 2003 , eventually, the Code of Conduct on producer’s liability for the damage caused by defective product¹, to a large extent the translation of the European Directive 85/374/EEC on liability for defective products, was added to TKHK as an explanation of implementation of the rules therein.

Therefore, the explanations about the liability regime in Turkey can be divided into two parts.

1) Before the TKHK containing : - contractual liability, - tortious (fault-based) liability, - strict liability 2) After THKH.

The negligence of the parliament to legislation on the subject has established a conversion on the decisions of the Court of Appeal (Yargitay) from traditional fault based tortuous liability to strict liability.

II – THE PRODUCT LIABILITY REGIME

- **BEFORE THE CONSUMER PROTECTION ACT**

A. CONTRACT

The Turkish law on the sale of goods is covered in Art.194 ff of the Code of the Obligations (BK). The main legal basis for claiming damages in contract are Art.194 ff and Art.359 ff BK. This requires breach of a contractual duty. The most relevant breach of a contractual duty with respect to product liability is delivery of a "defective" product.

1. *Privity of contract*

Regarding the manufacturer’s contractual liability, for claims under the scope of Contract Law, both of the provisions placed in the Article 194 and the other articles of the Turkish

¹ The Code of Conduct on the damages caused by defective Product

Code of Obligations², about “the recovery for defective product/warranty”; that is a statement made by the seller of goods as a part of the contract of sale, by which he promises or undertakes to guarantee certain facts concerning the character, quality or title of the goods and that they are or should be as he then represents them and if there is a “job contract” between the manufacturer and the damaged consumer there are the provisions to be applied in the Article 359 and the other articles of the Turkish Code of Obligations³.

As it is known the provisions about the contractual liability are not limited by the principal and secondary obligations or the obligations assisting the principal obligations. Modern law literature consists of both “the performance of interest” and “the protected interest”⁴. The protected interest states the entire interests of the creditor’s assets and personal assets. Because of this, the protective obligations stated next to the contractual obligations and their depending secondary obligations but it is an independent concept. They exist either before and during contract established or during the performance of the obligation. Consequently, obligations’ legal base is not parties’ minds but law. Mentioned obligations have protective effect on third parties and this is based upon the Article 2 of The Civil Code.

For the third party who is damaged by the defective product different provisions can be applied. It is admitted that pursuant to the Article 111 of The Turkish Code of Obligations about contract of protective effect to the third party and the liability of the created confidence formats render the possibility of manufacturer’s contractual liability⁵

2. Defective product

If a product is defective, according to art.205/II BK seller is also responsible for the defects occurred because of the delivering the defective product. Without looking for manufacturer’s negligence he is directly liable for the defect. A defective product is a product that does not suppose to have objective problems and defects. The goods will be called defective whether they are not suitable for the purpose agreed to, and recognized by, the seller, or they are unsuitable for the ordinary use to which products of such kind are normally put. There are pecuniary and legal defects.

According to the Turkish Consumer Protection Law, defective product occurs when there are pecuniary, legal or economic absences that cause loss of value on the product⁶.

The purchaser of a defective product may sue the seller for the breach of contract in failing to supply a product that conforms to the contract (including its implied conditions).

²Detailed information is in KARAHASAN, “Türk Borçlar Hukuku”, Year: 1992, V. 4. p. 112 ff

³Detailed information is in KARAHASAN, The Law of the Construction-Award of Cocontract, Year: 1979, p. 134 ff.

⁴EREN, F., The Turkish Law of Obligations General Provisions, V: I, Ankara-1991, p. 46.

⁵ÖZSUNAY, a.g.m., p. 123; ÖZTAN, a.g.e., p. 51 ff

See also, Yargıtay General Assembly of Law E.1992/13-213 K.1992/315 T.06.05.1992

⁶Article 4 of the Turkish Consumer Protection Law.

3. *Fault requirement*

A failure to do something that a reasonable seller would do or doing something that a reasonable seller would not do. Fault in the sense of carelessness does not give rise to contractual liability for defective products, unless the defendant's failure to conform to the standards of the reasonable seller was a breach of a duty of care owed to the claimant, which has caused damage to him. Normally it is easier to sue for breach of contract, but of course this is possible when a contract exists. In principle seller is liable if he has fault, though, law states that fault is a presumption. If the seller proves that he has no fault there is no liability⁷.

4. *Limitation period*

The standard limitation period for contractual claims is generally two years (five years for certain immovable property⁸).

B. TORT

Producer/manufacturer can be held liable under the provision of the Article 41 of the Code of Obligations (Borçlar Kanunu – BK.). As a general fault-based tortious liability, Art 41 of Code of Obligations, is the most governing law for the cases where a personal injury or damage to property occurs due to a defective product or any form of negligence.

Art 41 of the Code of Obligations refers to: “ who caused damage unlawfully to anyone else both by his own intentional act and by his negligence and carelessness should indemnify that damage.”

Because there are no provisions particularly about product liability this general statement therefore can be interpreted for the benefit of consumer.⁹

The Turkish Court Of Appeal (*Yargıtay*) has identified the liability of the producer of a defective product which causes damage as a breach of tort law with several cases.¹⁰ The court indicates that producers have a liability based on the law for their production in terms of BK.41. A factory is directly liable for the damage caused by a defect at the production or fitting to all those who buy the product. These decisions are thought as good examples of implementation of negligence in product liability disputes. However these provisions are not enough to solve the complicated cases and this situation increases the importance of the ‘judge law’.¹¹

⁷ OĞUZMAN, p. 311

⁸ BK 126 ff

⁹ TANDOĞAN, “Üçüncü Şahsın Zararının Tazmini” p.50; ÖZTAN, “İmalatçının Sorumluluğu” p.211/212

¹⁰ The Court of Appeal E.2000/517 K.2000/3328 T.11.4.2000, General Assembly of Law E.2002/4-114 K.2002/84 T.13.02.2002, 11. Law Chamber E.1979/3398 K.1979/4053 T.20.09.1979, 11.Law Chamber E.1974/1603 K.1974/1537 T.06.05.1994, 4. Law Chamber E.2000/1199 K.2000/3287 T.20.04.2000

¹¹ ÖZSUNAY, “Türk Hukukunda Gerçek Bir Boşluk ‘Yapımcının Sorumluluğu’” Batider 1979 nr:1-4 p.133

Yargıtay holds that the injustice here is an objective injustice and adds that the consumer knows the brand of the product and trusts its reputation. In this way the court interprets it as a breach of trust.

Besides this, referring to doctrine and *Yargıtay* decisions it shall be considered that the manufacturer shall be held liable to everyone for the defect at his product which he put into circulation. All those objective attributed damage caused by defective product shall be recovered by the producer/manufacturer.¹²

The producer shall also be held liable, in cases that he sells his product via an agency, under guarantee provisions refer to BK.194.¹³

Refer to the definition of the tortuous act, claimants shall prove that there is a damage, a defect and a causal relationship between the damage and the defect at the product. As a rule, the law and the courts put the burden of proof on the claimant's shoulders apart from a particular decision that the court changed the party of the burden of proof and put it on the producer's shoulder¹⁴. Because the source-law of the Turkish obligations law is Swiss law and the German *Bundesgerichtshof's* decisions are used as another intellectual resource in *Yargıtay* decisions, the present implementation of the laws used at product liability disputes tends to be interpreted on this way.

If the manufacturer does not prove that he has taken all the necessary and reasonable care to avoid the defect and the risks arise from the defect, he is to be held liable for the damage when the risk becomes true. In this situation, for the claimant, it is enough to prove that the damage caused by the defective product occurred in 'producer's organization and risk area'. This indicates the liability for risk.

The liability of the producer for the defective product may arise from a breach of the duty of care or from an administrative or organisational fault.

Referring to the provision of BK.55, the liability regime for the damage caused by a fault of producer's employees is strict liability in Turkish law.

The producer shall also be held liable for his negligence at warnings, information and acknowledgements, under the scope of 'general duty of care', if damage exists.

¹² KARAHASAN, "Sorumluluk Hukuku" p.228

¹³ 11. Law Chamber E.1979/3398 K.1979/4053 T.20.09.1979

¹⁴ 4. Law Chamber E.1994/6256 K.1995/2596 T.27.03.1995

All those duties which are implemented after putting the product into circulation such as warnings, recalls, monitoring, etc. are considered under the scope of general duty of care as well.¹⁵

Subject of the duty of care under the provisions of the tort law and the court decisions is all those cause a damage by own act or by his negligence and carelessness. (such as producer/manufacturer, seller, agency, service provider)¹⁶

C – STRICT LIABILITY

Strict product liability refers to one of the theories under which a plaintiff can proceed when bringing an action based upon an injury caused by a product. In a strict product liability action, a plaintiff can recover damages without showing that the manufacturer or a seller of a product was negligent.

Pursuant to Article 55 of BK, manufacturer or producer could have been liable because of his employees' actions. This is called respondent superior; employer's liability. In Turkish law, an employer is held liable for the wrongful acts of his servant or employee committed during performance of services for the employer. Furthermore according to an idea, manufacturer's liability can be incorporated by making use of the Article 58 of BK. Also regarding the article 58 of BK, "manufactured goods" can be understood as "product"¹⁷. For "the manufacturers as the owner of the product" to create strict liability is an important solution to the protection of the damaged people. By this interpretation, manufacturer's carrying out of the liability of the "breach of objective care" principal, in practice will bring the protection as if the damaged people have because of the "danger liability". In the Article 100 of BK vicarious liability is prepared. It is a legal liability imposed on one person for torts or crimes committed by another (usually an employeebut sometimes an independent contractor or agent), although the person made vicariously liable is not personally at fault. An employer is vicariously liable for torts committed by his employees when he has authorized or ratified them or when the tort was committed in the course of the employees' work. Pursuant to Article 58 of BK, "a building's or another work's owner is liable because of that work's abuse or miss conservation. According to this owner, has the right of recourse against the people liable to him. This article is used for manufacturers or producers too because there is no regulation made separately for

¹⁵ KARAHASAN, "Sorumluluk Hukuku" p.230

¹⁶ See the Yargıtay decision E.2000/517 K.2000/3328 T.11.4.2000 for producer, 11. Law Chamber E.1979/3398 K.1979/4053 T.20.09.1979 for agency, 11 Law Chamber E.1974/1603 K.1974/1537 T.06.05.1994 for seller and 4. Law Chamber E.2000/1199 K.2000/3287 T.20.04.2000 for service provider

¹⁷ ÖZSUNAY, a.g.m., p. 134/135; TANDOĞAN, strict liability p. 15 and Danger Liability, BATIDER, December 1979, c. I, s. 2, p. 320/321; ÖZTAN p. 189 ff; 208 ff.

them. Directly between manufacturer and consumer independent contractual obligations are based upon this regulation¹⁸.

Yargıtay prefers to estimate manufacturer's liability usually in the field of fault/ negligence.

II. PRODUCT LIABILITY REGIME

• AFTER THE CONSUMER PROTECTION ACT

As it is mentioned above the need of a consumer protection act in Turkish law had been claimed by all practitioners and academia. With the new act the definitions for 'the defective product and services' have been made, the liability for product and the subject of the liability have been designated and also limitation periods have been fixed. Besides these the new law also creates some new provisions for those who are liable for the defective product and expands the sphere of the liability. The act did not satisfy those who had been criticizing the previous situation when it was first put into application on 23.2.1995. The amendments to the Consumer Protection Act on 14.3.2003 and the publishing of the 'Code Of Conduct On The Liability For The Damage Caused By Defective Product' (Code of Conduct)(6) on 13.6.2003 have created a good balance and an effective protection for the victims of product liability disputes. Despite the fact that there has been no high court decisions solved by new regulations so far, it can be said that Turkey has taken an important step in means of the adaptation the EU directives on product liability and consumer protection.

A - The New Consumer Protection Law ¹⁹

1) General

The Consumer Law is amended by Law No. 4822 (the "New Law"), primarily as a result of the efforts to harmonize Turkish Legislation with European Union ("EU") law. The New Law has enlarged the definition of "goods" for the purpose of the Consumer Law to cover electronic products, and added distance-selling contracts (concluded through electronic means) into the scope of the Consumer Law. Pursuant to the New Law, the concept of goods also includes any intangible assets designed for use in an electronic environment, such as audiovisual products. In other words, all rights provided for consumers under the Consumer Law also applies to all online transactions effective from 14 June 2003.

2) The Scope of the Consumer Law has been Enlarged

¹⁸ OĞUZMAN, p.241

¹⁹ ÇAKMAK Ortak Avukat Bürosu – Publications "Amendments to the Turkish Consumer Protection Law"

The New Law extended the definition of defective goods and services. If the goods have an explicit defect, then it is enough for the consumer to notify the seller by any means within thirty days. If the defect arose while using the goods, then the period of liability for the defect is two years from the date of delivery of such good to the consumer. If the subject matter good is immovable property used as a domicile or for holiday purposes, then this period extends to five years. For defective goods, the Consumer Law gives the consumer the option to either (i) withdraw from the contract, (ii) request that the goods be exchanged with the one which is not defective, (iii) request a price decrease equal to the defect ratio, or (iv) request a free repair. The consumer may also request compensation in addition to the alternative rights stated above. The consumer's right to demand compensation has been regulated in parallel with EU Directive No. 85/374.

A creditor who provided a loan to the purchaser of the good bearing the trademark of such affiliation that the creditor and the seller belong to, or sold such good under an exclusive purchase agreement, shall also be liable for any defect of the good in question. By this provision, which regulates the liability of the affiliated creditor, the chain of liability has been extended in favor of the consumer.

In addition, the rights of consumers receiving defective services have also been regulated. The consumer has the obligation to notify the service provider concerning the explicit defect in service within thirty days. In this case, the consumer has the right to either (i) terminate the contract, or (ii) request the service be re-performed, or (iii) request a decrease in price proportionate to the defect. The consumer may, in addition, request compensation for damages arising from the defective service. If the consumer had the service performed with knowledge of the defect in question, then these rights may not be exercised.

3) Unfair Provisions in a Contract

The New Law states that unilateral contract provisions inserted in a contract without negotiation with the consumer and which distort the contractual balance against the consumer, and which violate the principle of good faith, are considered unfair and are not binding on a consumer. The New Law also expressly states that provisions of "form contracts", such as credit card application forms, are assumed to be "non-negotiated contracts". With this provision, consumers are protected against form contracts unilaterally prepared by sellers and imposed on consumers.

Additionally, in order to protect the consumer and in parallel with EU Directive No. 93/13, in case of a dispute concerning the unfairness of a standard term, the burden to prove that a particular provision is not unfair rests with the seller.

4) Purchases with Installment Payments

Pursuant to the New Law, consumer contracts stipulating the payment of the purchase price in installments must include (i) both the consumer's and the seller's full addresses, (ii) the price of the goods in Turkish Liras including the applicable customs, (iii) the total sales price, (iv) the amount of interest, (v) the annual rate of interest, (vi) the amount of the installment payments, and (vii) the legal consequences upon the default of the consumer. In the event that future installments are to be secured by a promissory note, then a separate promissory note must be drawn for each such installment and such promissory notes must be drawn in the name of the seller and not as a bearer instrument.

5) Distance Selling Contracts

The New Law defines a distance selling contract as any contract concerning the delivery of goods or performance of services concluded in a written, audiovisual, telephonic and electronic environment or by using other means of communication without physically meeting the customer. The New Law provides that before the conclusion of a distance selling contract, the consumer must be provided with certain information, and the contract may not be concluded before the consumer confirms in writing that she has received such information.

The New Law is similar in many respects to its counterpart in the EU, namely the Distance Selling Directive 97/7/EC. For instance, Article 9/A of the Consumer Law defines distance selling contracts in the same manner as Article 2 of the EU Distance Selling Directive. Furthermore, both the New Law and the EU Distance Selling Directive provide that before the conclusion of a distance selling contract, the consumer must be provided with certain information, and the contract may not be concluded before the consumer confirms in writing that she has received such information. Also, the seller must execute the order within a maximum of 30 days from the day following the day on which the consumer forwarded his order to the seller. However, under the Consumer Law, this duration may be extended for a maximum of ten days provided that the consumer is given advance written notification.

There are, however, a number of differences between the distance selling provisions of the New Law and the EU Distance Selling Directive. For example, pursuant to the New Law, the seller must prove that the goods or services were not defective when delivered. However, the question of defective goods is not separately regulated under the Distance Selling Directive. In EU law, this issue is governed by the Product Liability Directive 85/374/EEC, pursuant to which the injured person must prove the actual damage, the defect in the product as well as the causal relationship between damage and defect. In other words, the distance selling provisions of the New Law regarding the burden of proof are more favorable to consumers compared to the EU Distance Selling and Product Liability Directives.

6) Consumer Loans

The New Law stipulates that consumer loan contracts must be concluded in writing and a copy of such contract must be given to the consumer. Also, the loan conditions may not be altered against the consumer during the contract term. Pursuant to the New Law, a consumer loan contract must include at least (i) the amount of the loan, (ii) the total amount of debt including the interest and other terms, (iii) the annual rate of interest, (iv) the payment dates, (v) the requested guaranties, (vi) the interest rate of default (not to exceed 30% annually), (vii) the consequences of the default of the debtor, (viii) the terms regarding the payment of the debt before the due dates, and (ix) the clarification regarding the applicable rate of foreign exchange in the event the loan is provided in foreign currency.

7) Credit Cards

Disputes between banks and consumers concerning credit card transactions have been added into the scope of the Consumer Law. Certain rights are provided under the New Law in favor of consumers in order to protect them in such transactions.

A loan transaction in which a consumer benefits through purchasing goods or services by a credit card or through withdrawing cash from an existing account is subject to certain provisions applicable to consumer loans. For example, a periodic statement of account sent to the consumer by the bank is considered equivalent to the payment plan of a consumer loan. If a consumer does not pay the minimum payment amount stated in the periodic statement, she shall only pay the default interest, no other obligation can be charged to her.

A creditor must notify the consumer thirty days before an increase in the rate of interest. Such interest rate shall not be applied retroactively. If the consumer pays all the debt at the latest within sixty days from the notification date and ceases benefiting from such loan, the increased rate of interest shall not be applicable to her. If goods or services are purchased by a credit card, the seller or provider cannot request any payment from the consumer as commission or other similar fees in addition to the purchase price

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8) Warranty Certificates

The New Law provides that the manufacturers or importers of certain products are required to provide a warranty certificate with their products, and that the warranty period must be at least two years from the delivery of the products to the purchaser. Such warranty period was previously one year.

Pursuant to the New Law, a warranty certificate covers the defects of a product during the warranty period. During such period, the seller is required to repair the product free of charge, even if certain parts of the product must be replaced. In addition to the right of the purchaser

to request that the seller repair a defect in the product, the New Law allows a purchaser to (i) withdraw from the sales contract and demand the return of the purchase price, (ii) demand replacement of the product, or (iii) demand the refund of a portion of the purchase price in the event the purchaser cannot use the product regularly as a result of frequent defects, the seller exceeds the maximum time period allowed for the repair of the product, or it is impossible to repair the product in question.

If the purchaser has caused the defect in the product by not using the product in accordance with the “user instructions” that accompany the product, then the purchaser may not benefit from the rights described above

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9) After-Sales Services

The scope of after-sales services has been extended to include imported industrial goods whereas the previous provision of the Consumer Law provided such obligation only for industrial goods sold in Turkey. The New Law requires the seller to employ sufficient technical personnel and to store spare parts in an amount to be determined by the Ministry of Industry and Commerce (the “Ministry”).

An importer is also required to provide maintenance and repair services for the goods that have been imported by a previous importer, provided that the said goods are still within the utilization term. When determining the goods for which maintenance and repair services shall be supplied, the Ministry must obtain the opinion of the Turkish Standards Institute.

10) Consumer Complaints Arbitration Committee (the “Committee”)

The New Law makes it mandatory to submit disputes with a value lower than five hundred million TL (approximately US\$ 350 as of the date hereof) to the Committee. The decisions of the Committee become final upon review by the Consumer Court. In disputes with a value higher than five hundred million TL, the Committee’s decision may be used as evidence before the Consumer Court.

11) Miscellaneous

The New Law also provides that:

- Commercial advertising must be honest and accurate in consideration of moral and personal rights, and in accordance with the rules determined by the Advertisement Board.
- The marketing, importation and exportation of goods that appear like food products but are actually not is prohibited as they may endanger the health and security of consumers. For example, the production of a strawberry-shaped eraser with a strawberry flavor is prohibited as it may be dangerous for children.

- The New Law grants the Ministry the authority to supervise price stickers. It is now mandatory to indicate the country of production instead of the country of origin. For example, if a French wine is also produced in Turkey after obtaining the necessary licenses, Turkey must be indicated as the country of production while France must be identified as the country of origin. Goods priced by the Council of Ministers, or any other public entity or a professional organization, cannot be sold at a higher price. Furthermore, if the sticker price and the price at the register are different then the lower price shall be applied.
- The obligation to prepare an Instruction Manual in Turkish for industrial goods has been envisaged for imported industrial goods. The Ministry shall determine the minimum content of such instruction manuals and stickers by obtaining the opinion of the Turkish Standards Institute.

B – The Code of Conduct on the Liability for the Damage Caused by Defective Product:

a- Product

Art.4.c. : “Product means that the movables which are subject to trade; the immovable which is used with domicile and holiday purposes; the non-material products which are prepared to use in electronic environment such as software, sound and display.”

As a difference in Turkish Law the definition of the product also comprises the immovable which are used as seasonal holiday houses. Refer to the statement ‘all movables which are subject to sale(trade) the provision includes agricultural products as well.

b -Producer

Art.4.d. : “Producer means that including public juristic persons, the manufacturer of a finished products who put them into circulation or the producer of any raw material or the manufacturer of a component part and any person who, by putting distinguishing feature, his name and trade mark on the product presents himself as its producer or person who imports a product for sale.”

The manufacturer/producer of the product or a component or the raw material or the importer of the product or the own-branding is considered as producer.

c- Defect

Refer to Article 5 of Code of Conduct, “a product is defective if it does not provide the safety one is entitled to expect, taking all the circumstances into account, including:

(a) the presentation of the product

(b) the use to which it could reasonably be expected that the product would be put

(c) the time when the product was put into circulation

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

Different types of defect are not defined by the Code of Conduct as same as the EU Product Liability Directive. Code of Conduct does not protect only the parties of contract or sale but also the third persons who damaged by the defective product are taken in the protection area of regulation. We can thus say that the definition of the defect is based on the criteria being not safety rather than being not appropriate for the purpose of the use.²⁰

With the statement, ‘a product is defective it does not provide the safety one is entitled to expect’ the Code of Conduct cites about ‘one’, the indefinite person, on who the law is not subjectified. Despite the fact that the subjective safety expectation is not taken into account by identifying the defect, it is not clearly mentioned who are the subject of the Code of Conduct, because in art.4 the injured party has been defined as; the consumer who is injured or damaged by the defective product which is put into circulation. The reason of this vague situation about identifying the subject of the regulation is because it was published as a code of conduct about implementation of the Consumer Protection Act rather than a new separate act.

d- Proof of defect, damage and causation

Art.6.2. : “The injured person shall be required to prove the damage, the defect and the causal relationship between defect and the damage.”

According to Article 6.2, the claimant needs to prove the damage he suffered, the defect at the product and the causal relationship between the defect and the damage.

²⁰ F. ERLÜLE, “Avrupa Topluluğu Konsey Yönergesi Çerçevesinde Yapımcının Sorumluluğu” PhD Thesis. p.104-107

Refer to the general rule on the burden of proof, article 6 of the Turkish Civil Code (Medeni Kanun – MK.), the injured party shall prove his claim. However *Yargıtay* and the academia tend to change the party of burden of proof for the product liability disputes.²¹

Because there may not always be an exact technical explanation to why a product is unsafe or defective and the special problems arise from where it cannot be ascertained which of several generic products did in fact cause the damage, it is sometimes really difficult to prove the defect in the complex production process for the injured party. This is why the new consumer law considers the *prima facie* proof or showing that the product does not provide the safety that one is entitled to expect. Moreover it is advised to change the party of burden of proof at complex problems.

e- Damage

Art.6.1. : Where a defective product causes a death, injury or damage on a product producer/manufacturer is to be liable to compensate the damage of the injured person without the need to be proved his fault.

From the statement in the article it is not clear whether the defective product itself is under the scope of the Code of Conduct, neither is the damage to property not ordinarily intended for private use. The product was defined as the movables, which are subject to trade by art.4.c, however, it should always be thought that the Code of Conduct is a part of the Consumer Protection Act which comprises liability for the goods bought with consuming purpose.

It is mentioned that the producer is to be liable to compensate the damage of the injured person. Refer to art 4 of the Consumer Protection Act the producer/manufacturer is liable for all damage caused by defective product. This expression covers the (other) pure economic loss and pain and suffering as well in Turkish law. Because there is not a particular exclusion of other economic loss it can be considered under the scope of the regulation (the new consumer law).

f- Defences

The article 7 of the Code of Conduct provides a number of defences in line with the EC Directive 85/374 :

1. The producer shall not be liable as a result of this Directive if he proves:

²¹ The Court of Appeal 4. Civil Law Chamber E. 1994/6256 K. 1995/2596 T.27.3.1995.

(a) that he did not put the product into circulation;

There is no explanation for the ‘putting into circulation’ in the Code of Conduct, neither in the ‘Explanation Memorandum’ of the Directive. It is considered that the product has been put into circulation when the producer put it into supply chain, or with other words, when he takes out the product, which is an ended product, from his production environment with his own will.

(b) that the product was neither manufactured by him for sale or in the course of his business;

Private non-profit activities are excluded from product liability by this defence

(c) That, having regard to the all circumstances, it is probable that the defect which caused the damage did not exist at the time when the product put into circulation;

In appropriate storage or labelling by the supplier, post-marketing contamination, faulty repair by third persons or consumers can be evaluated under this defence provision.

(d) That the defect is due to compliance of the product with mandatory regulations issued by the public authorities;

(e) That the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of the defect to be discovered.

The statement of the art, the other term for this defence, indicates the accessible knowledge at the time when the product was put into circulation. This provision considers that the technical and the scientific knowledge at the time when the product put into circulation enables to discover the existence of the defect and sees this as *prima facie* evidence. Then, it is producer’s liability to prove that he could not have discovered the defect.²²

2. The producer/manufacturer of a component, that the defect is attributable to the design of the product in which the component has been fitted or to the instructions given by the producer/manufacturer of the product, shall not be liable for the defect of the product.

²² F. ERLÜLE, p.156-174

Because this is a new regulation in Turkish law there has not been a high court decision about the subject. Having regard of importance of this defence provision it can be said that application of these rules by the courts of justice is a big concern among those involved with law and particularly with European comparative law and liability law.

g- Limitation period

Art.9 : The limitation period of three years from the day on which the plaintiff became aware, or should have become aware, of the damage, the defect and the identity of the producer shall be applied to proceedings for recovery of damages as provided in this directive.

Art.10 : The rights conferred upon the injured person pursuant to this Directive shall be extinguished upon the expiry of a period of 10 years from the date on which the producer put into circulation the actual product which caused the damage.

In line with the Directive 85/374 the Code of Conduct provides two different limitation periods. First one is a limitation period of 3 years which is mentioned in art.9 for the claims arise from the damage caused by the defective product from the day on which the plaintiff become or should have become aware of the damage, the defect and the identity of the manufacturer. However the limitation period in the same meaning has been fixed as 2 years in art.4 of the THKHK. Because the act (the law) is on a higher level than a code of conduct in “norms hierarchy system”, a provision of a code of conduct should not be in violation of an act. This situation would cause problems on implementation in the future.

The second limitation of 10 years extinguishes all the rights conferred upon the injured person to this Code of Conduct with its expiry.

III. PRACTICE AND PROCEDURE

A. PRE-TRIAL OR PRE-ACTION DISCOVERY

As there is no directly established regular system of product liability in Turkish law the practice format is formed according to The Code of Obligations and The Consumer Protection Law. As there is no exactly described transactions it will not be easy to talk about a traditional performance of pre-trial or pre-action discovery. However, The Turkish Consumer Protection Law has made good located rules that will effect both manufacturer and consumer.

The products and services presented to the consumer must be in accordance with the technical arrangements and standards published in the Official Gazette by relevant ministries. These relevant ministries have the duty to audit or to make officials to audit.

For consumer education pursuant to the Consumer Council's advice ministry declare the arrangements and rules. The Consumer Council is incorporated to make researches to discuss and solve the problems of the consumers. In order to follow international consumer rights the best precautions about the performance of this law the consumer council need occurred.

The Ministry is assigned to the duty of constituting at least one consumer problems arbitrator board against the disputes occurred in the enforcement of this law. In these boards at least one reporter is charged to prepare and present the principal files about disputes. In which the dispute's value is under the limit of five hundred million Turkish lira it is compulsory to apply arbitrator boards. In these disputes parties are bound by the decisions made by the board. Parties can object to the consumer court in fifteen days. The objection does not stop the performance of the board's decision. If it is requested judge can stop the performance of this decision by precaution. After the objections to boards' decisions the court's decision is conclusive.

The decisions of the board made about the disputes valued over five hundred eighty million Turkish lira can be asserted as evidence in the consumer courts.

B. EXPERT OPINIONS

In a case, the judge or the parties have the right to apply for expert opinion. Pursuant to the Code of Civil Procedure there are some positions that a judge is enforced to have the expert opinion (BK. 199, BK 380/II etc.). If there is not any legal judgement in the law to enforce the judge, judge can apply for the expert opinion whether if he does not have special and technical information needed about the state in the case. The judge decides if it is necessary to apply for expert or not. It is not possible to apply for the expert opinion about jurisprudence/law.

One of the parties can apply for expert opinion to prove his plea or defense. If the judge admits this request, the party has to pay expert expences. The parties can object to the expert report in its objection period which is a week after the notice.

Judge can always decide to have the expert opinion of its own motion.

"The expert report does not bind the judge" principal means that the judge always discret freely. If he thinks that it is necessary he can ask for an annex report too. Yargıtay has an opinion in practice the judge's discretion is limited by the expert report. The judge can not be enforced to apply for the expert report in every case. It is also admitted by Turkish doctrine that either it is necessary to apply for the expert opinion or in expert opinion's evaluation; the

judge's discretion has to be free and the judge can always make his judgement against the expert report if he shows his reasons upon which the judgement is based.

C. TRIAL ON PRELIMINARY ISSUES

The disputes occurred in the field of the performance of this law is solved in the consumer courts. The jurisdiction areas of the consumer courts are settled by The Supreme Council of the Judges and Public Prosecutors.

D. FEE ARRANGEMENTS AND LEGAL COSTS

According to the consumer courts, consumers, consumer organisations and the actions opened by the Ministry are exempted from all the tolls and charges. The actions of the consumer organisations' expert witness fees relating to the Article 25 of the TCPL will be paid from the special allocation by The Ministry. If the case is solved against defendant, expert witness fees will be paid regarding Collection of the Money Owed to the State Law and it will be recorded as the private income to the budget.

The cases in the consumer courts are proceeded pursuant to the Code of Civil Procedure.

The consumer cases can be opened in the consumer's residence court.

The consumers buying the defective products have the right to appeal because of the monetary and moral loss.

E. CRIMINAL PROVISIONS

Every monetary punishment in this law is administrative. Against these punishments in seven days it is possible to object as from the notification date in the authorised administrative tribunals. The objection will not stop the proceeding and if there is no necessity it will be solved as soon as possible by reviewing the documents. The decisions made by the administrative tribunal are final.

The administrative monetary punishments of this law have criminal limitation period of one year. This period starts when the action's execution date.

If there are permanent or repeated violations, limitation period will start on the day of the last violation. If it is applied to the exercised jurisdiction against to the decision of the court will vacate the running of the statute of limitation.

Punishments will be noticed to the relevant people by the authority in seven days.