Ankara Avrupa Çalışmaları Dergisi Cilt:16, No:2 (Yıl: 2017), s. 171-198

THE CONCEPT OF PRE-CONTRACTUAL DUTIES AND A COMPARISON BETWEEN THE DRAFT COMMON FRAME OF REFERENCE, ENGLISH AND TURKISH LEGAL SYSTEMS

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Abstract

It is necessary to reveal some information in order to conclude a healthy contract during the phase of negotiation. Accordingly, a relationship basing on mutual trust needs to be formed between parties. The duties regarding this relationship have been named as "pre-contractual duties" or "culpa in contrahendo" under legal scholarship. If any party fails to fulfill this trust some liabilities may occur, depending on the legal system we are operating in. There are different approaches from different legal systems. This paper aims to compare the outcome of the study of the European scholars, the Draft Common Frame of Reference, a common law state the United Kingdom and a civil law state Turkey and point out the main differences in approaches to pre-contractual duties.

Keywords: *Pre-Contractual Duties, Draft Common Frame of Reference, Turkish Contract Law, English Contract Law, Comparative Law*

Sözleşme Öncesi Sorumluluk Kavramı ve Karşılaştırmalı Ortak Ölçüt Çerçevesi Taslağı, İngiliz ve Türk Hukuku

Özet

Sağlıklı bir sözleşmenin kurulabilmesi için, görüşme safhasında taraflar arasında karşılıklı güvene dayalı bir ilişki kurulması gerekmektedir. Bu süreçte doğan yükümlülüklere hukuk doktrininin de "sözleşme öncesi sorumluluk" ya da "culpa in contrahendo" adı verilmektedir. Eğer taraflardan biri bu söz konusu yükümlülükleri yerine getirmezse, işlemin yapıldığı hukuk sistemine göre bir takım sorumluluklar doğabilir. Farklı hukuk sistemleri bu duruma farklı yaklaşmaktadır. Bu çalışma, Avrupalı bazı akademisyenlerin ortak çalışmasının sonucu olan Ortak

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Makalenin gönderilme tarihi: 27 Eylül 2016, Kabul edilme tarihi: 17 Temmuz 2017

Ölçüt Çerçevesi Taslağı "Draft Common Frame of Reference", bir Anglo-Sakson hukuk sistemi ülkesi olan Birleşik Krallık ve Kıta Avrupası hukuk sistemi ülkesi olan Türkiye'nin sözleşme öncesi sorumluluk kavramına nasıl yaklaştığını incelemek amacıyla yapılmıştır.

Anahtar Kelimeler: *Sözleşme Öncesi Sorumluluk, Ortak Ölçüt Çerçevesi Taslağı, Türk Sözleşme Hukuku, İngiliz Sözleşme Hukuku, Karşılaştırmalı Hukuk*

Introduction

We can talk about a process that usually happens between the parties of a contract, a process of negotiation with regard to the content, conditions, obligations and duties that will be set forth under the written contract. This negotiation process can last for a short or long period of time depending on the nature of the contract[1] and during this process a relationship based on mutual trust would be formed between the parties.

In accordance with this mutual trust, certain related interests between parties starts to get revealed. However, if any party fails to fulfill this trust, according to some legal systems, liabilities may occur. This concept has been defined as "*pre-contractual duties*" or "*culpa in contrahendo*" under the legal scholarship.

Pre-contractual duties have been regulated differently by different legal regimes. Even within the European Union ("**EU**") Member States, there are differences. We can observe that mostly civil law countries, which constitute most of the EU Member States, recognize the concept of pre-contractual duties, on the other hand, the common law countries, such as the United Kingdom do not mention these liabilities at all.

Accordingly, we can identify different types of legal regimes concerning pre-contractual duties within the EU. We can divide these regimes into four groups:

- **Tort:** According to this group, the pre-contractual duties arise due to the obligation not to violate a person's rights or causing damage by not paying attention to the duty of care. It could be said that here with this view of the regime of *pre-contractual duties*, the specifics of the pre-contractual relations have been disregarded and only the general duty of care has been accepted as the basis. For example, we see this type of understanding in the legal systems of France, Spain and Portugal.

[1] Cem Baygın, "Culpa in Contrahendo Sorumluluğu ve Amerikan Hukuku'ndaki Uygulaması", *Atatürk Üniversitesi Erzincan Hukuk Fakültesi Dergisi* IV (2000): 1.

- **Contractual:** Here, different from the understanding of tort as a regime to regulate pre-contractual duties, the pre-contractual relations are being regarded as a specific type of relation, an extension of the contractual obligations. The contract that is to be concluded and the pre-contractual duties form an entirety. Therefore, the party who has liabilities for the contract also has liabilities for the pre-contractual negotiations. This type of understanding could be seen under the legal system of Germany and Austria.

- **Independent Transaction:** This type of understanding does not rely pre-contractual duties to contractual duties but regards it as a transaction independent from the contract. This, for instance can be seen in the Greek legal system.

- **No liability:** This understanding could be seen in the common law systems because these systems do not accept pre-contractual duties as a legal concept. Even though pre-contractual duties have not been accepted as a part of the legal system in common law systems, there are several other institutions that may help to protect the party who has suffered losses[2]. English legal system could be regarded as an example.

Besides, some systems mix some of the views together, like in the Italian system. Furthermore, some systems may have clear provisions on pre-contractual duties, but some may just rely on legal precedent. Some systems may have extensive obligations but some have no obligations at all[3]. Clearly, we can see different approaches. In addition, under Turkish legal system, the nature of this concept is still highly debated.

Following this small introduction of the pre-contractual duties, this paper primarily aims to compare the different types of legal regimes, namely supranational, civil and common law systems, and their way of shaping the concept of pre-contractual liabilities. The paper will compare two different legal systems, namely the United Kingdom and Turkey and the Draft Common Frame of Reference ("**DCFR**"), a project of European scholars, aiming to create model rules to govern private law at the European level[4].

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2 Bénédicte Fauvarque-Cosson and Denis Mazeaud, ed., *European Contract Law: Materials for a Common Frame of Reference: Terminology, Guiding Principles, Model Rules* (Munich: European Law Publishers, 2008),187.

3 Ibid., 185-186.

4 There is not a clear division between public law and private law and what can EU regulate and not at the European level. However, it is a certainty that theFounding Treaties have to confer certain competence to EU. Contrary to the common understanding that EU can not regulate private law matters, it has regulated certain fragments that are considered under private law scholarship, such as the labour laws, competition laws or company laws. Even

The paper will introduce the pre-contractual liabilities as a legal concept in the first chapter and then proceed with the regime created under the DCFR. In the third chapter the paper will analyze the English and in pursuit, Turkish legal systems. These different legal systems have been selected as representatives of European legal system (DCFR), a common law legal system (English law) and a civil law legal system (Turkish law).

The methodology of this paper would follow the legal analysis and comparison of the relevant guidelines and codes and not the concept itself. In order to have an effective organization of such comparison, the examination will be divided into three main titles by taking the DCFR as the main view point. It should be noted that the marketing (which includes consumer protection rules) and pre-contractual duties have been drafted under the same chapter of the DCFR (Book II, Chapter 3), therefore this research also involves research on marketing, information duties and consumer protection to have a more comprehensive comparison of laws. However, since the national laws have a different legislative organization than the DCFR, the research has been divided as Consumer Protection, which has been subdivided as Information Duties and Marketing; the Negotiation and Confidentiality Duties and the Breach of Pre-Contractual Duties, for better understanding and coherence.

The last chapter will try to point out the main differences, by looking from a broader perspective.

I. Concept of "Pre-Contractual Duties"

In general, the pre-contractual phase can be defined as the process of negotiation that leads to the conclusion (or non-conclusion) of a contract. From this phase, some legal consequences may arise. Although the process is imaginable, the way that every legal system looks into this phase can influence the rules on offer and acceptance[5].

Most of the states that work with market-economy accept certain freedoms, such as freedom of contract, freedom of competition, freedom of association. These freedoms would ensure the functioning of the system. Pre-contractual duties come as an extension of the freedom of contract[6].

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though there is a will among scholars to have more harmonization on different private law matters, the fragmentation between the national laws create an obstacle for further harmonization, and this article would also be considered as a proof of such diversion. The DCFR project was another work of the supporters of further harmonization.

5 Sjef Van Erp, "The Pre-Contractual Duties", in *Towards European Civil Code*, ed. Arthur Hartkamp et. al., Revised and Expanded 2nd ed. (The Hague: Kluwer Law International, 1998): 202.

6 Ibid.,203.

For the first time, the term *"pre-contractual duties"* has been analyzed by the German scholar Rudolf von Jhering[7] in his academic paper published in 1861[8]. He stated that although there is no contract between the parties at the stage of negotiations, there is some sort of legal relationship and in case a party commits fault during the negotiations, that respective party will be liable of damages[9].

In almost every legal system that accepts the freedom to enter into contract, there is also a freedom to decide its content. In almost every legal system there is an offer and an acceptance which ensures the certainty of the start of the contract[10].

Once the parties decide to enter into a contract, there is a duty to perform and enforce the contract in good faith when the contract comes into existence. For instance, in certain specific conditions, some highly relevant information may be needed to be disclosed to the other party by one party in order to ensure the conclusion of a contract. Therefore, act in good faith may be extended to this period where a contract does not exist in certain. But as mentioned earlier, different legal systems give different relevance to this act in good faith during the pre-contractual phase and demand respect in different levels.

This differentiation between the legal systems within the EU makes it harder to harmonize the concept of pre-contractual duties. Although there have been certain attempts, such as publication of papers from the European institutions, there is still no harmonizing rule at the European level. This would be also due to the fact that the current Treaty structure does not allow EU to harmonize every fragment of private law. However, there have been several attempts to harmonize certain parts of private law, including the contract law by different means.

The European Commission prepared a paper on European Contract Law in 1999 and confirmed freedom of negotiation without obligation to conclude a contract. According to the paper called Principles of European Contract Law ("**PECL**")[11], if one party is acting in bad faith entered and continued the negotiations, they will be liable for the losses of the other

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[7] Fauvarque-Cosson and Mazeaud ed., *European Contract Law*, 185; Süleyman Yalman, *Türk-İsviçre Hukukunda Sözleşme Görüşmelerinden Doğan Sorumluluk* (Ankara: SeçkinYayınları, 2006),15.

[8] Von Jhering, "Culpa in Contrahendo oder Schadensersatz beinichtingen oder nicht zur Perfection gelangten Vertragen" *Jahrbücherfür die Dogmatik des heutigenrömischen und deutschen Privatrechts* IV(1861): 1.

[9] Ibid.as cited in Fauvarque-Cosson and Mazeaud ed., *European Contract Law*,185.

[10] It should be mentioned that there are differences between legal systems in what constitutes an offer or an acceptance. Van Erp, "The Pre-Contractual Duties", 204.

[11] The Principles of European Contract Law 2002 (Parts I, II and III) [http://www.jus.uio.no/lm/eu.contract.principles.parts.1.to.3.2002/] accessed September 2016.

party[12]. Remedy for breach of confidentiality during negotiations includes compensation for loss suffered and benefit received by the other party[13].

Also the European Court of Justice ("**ECJ**") ruled on the pre-contractual duties in theC-334/00 *Tacconi v Wagner* (2002) case[14] that was sent for preliminary ruling. ECJ ruled that the pre-contractual liability is a non-contractual obligation that arises out of tort, delict or quasi-delict[15].

To sum up, it could still be that the legal nature of pre-contractual duties heavily depends on the national legal systems. The following chapters will try to look further into the regime decided under the DCFR, and compare it to the two different types of legal systems, English and Turkish law.

II. The Draft Common Frame of Reference

In 1996, a group of academics[16] gathered in Trento that wanted to create a map of European Private Law granted by the European Commission, also decided to dedicate a questionnaire on pre-contractual duties. In 1997, the questionnaire was sent to national reporters from EU member states, except Belgium and Luxembourg, and on 2001 the answers were received. All these

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[12] Principles of European Contract Law, **Article 2:301- Negotiations Contrary to Good Faith:**
(1) A party is free to negotiate and is not liable for failure to reach an agreement.
(2) However, a party who has negotiated or broken off negotiations contrary to good faith and fair dealing is liable for the losses caused to the other party.
(3) It is contrary to good faith and fair dealing, in particular, for a party to enter into or continue negotiations with no real intention of reaching an agreement with the other party."

[13] Principles of European Contract Law, **Article 2:302 - Breach of Confidentiality:**
"If confidential information is given by one party in the course of negotiations, the other party is under a duty not to disclose that information or use it for its own purposes whether or not a contract is subsequently concluded. The remedy for breach of this duty may include compensation for loss suffered and restitution of the benefit received by the other party."

[14] Judgment of 17 September 2002, *Tacconi*, Case C-334/00,ECLI:EU:C:2002:499.

[15] Ibid.para. 27: "In the light of all the foregoing, the answer to the first question must be that, in circumstances such as those of the main proceedings, characterised by the absence of obligations freely assumed by one party towards another on the occasion of negotiations with a view to the formation of a contract and by a possible breach of rules of law, in particular the rule which requires the parties to act in good faith in such negotiations, an action founded on the pre-contractual liability of the defendant is a matter relating to tort, delict or quasi-delict within the meaning of Article 5(3) of the Brussels Convention."

[16]The full list of people that have contributed to the DCFR and the funding entities can be found on the pages 39-46 of the DCFR: [http://ec.europa.eu/justice/contract/files/european-private-law_en.pdf] accessed September 2016.

reports were compiled by the end of 2005. The final report was published in 2009.

The DCFR is being treated as a soft-law (non-binding) instrument consists of principles, guidelines and commentary that aim to provide a more coherent approach to European Contract law to facilitate the division between the EU and national legislations. The main aim behind the project was to provide a baseline for EU legislators for a possible European Civil Code legislation that might be drafted in the future[17]. Currently, this framework is highly referenced among the European scholars working on private law.

The questionnaire was intended, *inter alia*, to cover all types of cases dealing with liability for conduct during the pre-contractual stage. In most of these cases, the parties were failed to have a contract, as a result of breakdown in the negotiations. The original questionnaire had 19 cases, but in the end the final compilation of the pre-contractual liability questionnaires had 13 cases. These cases were created in order to identify how the response to each case study in each country would differ[18].

As a result, there has been a section added on the pre-contractual duties under the DCFR in order to harmonize the different legal understandings between different Member States of the EU.

The draft regulations regarding the pre-contractual duties have been placed under the Book II which deals with contracts and obligations. DCFR follows the pattern of pre-contractual stage, formation of the contract, right of withdrawal, representation, grounds of invalidity, interpretation, contents and effects, performance, remedies for non-performance, plurality of debtors and creditors, change of parties, set-off and merger, and prescription under the Book II[19]. DCFR follows the pattern created by the PECL[20]. The pre-contractual duties have been placed under Chapter 3.

This section will analyze the DCFR by following the scheme mentioned at the Introduction.

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[17] European Parliament, EU Competence in Private Law: The Treaty Framework for a European private law and challenges for coherence, January 2015. [http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/545711/EPRS_IDA(2015)545711_REV1_EN.pdf] accessed September 2016.

[18] Martijn Hesselink and John Cartwright eds., *Pre-Contractual Liability in European Private Law*, (Cambridge: Cambridge University Press, 2008), 1-17.

[19] Christian von Bar and Eric Clive, *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR) Full Edition. Vol. I* (Munich: European Law Publishers, 2009),16.

[20] Ibid.

A. Consumer Protection

In the first two sections of the Chapter 3 of Book II, we see that the DCFR talks about rules which could be found mostly under the Consumer Protection Laws of the national legal systems. These two sections are the Information Duties which mostly deals with the information that has to be released before the conclusion of the contract and the marketing of the goods, other assets or services.

1. Information Duties

According to the very first article of the DCFR (Article II.-3:101), each party to the contract has the duty to disclose to the other party relevant factual and legal information that could be reasonably expected. Even though this article does not demand a full-disclosure of every piece of information, the relevant information has to be disclosed in order for the parties to get into a contract, fully-informed[21].

However, this article is only applied on businesses when they enter into a contract that is about the supply of goods, other assets or services, which creates a limitation on the scope of application of the respective article[22].

The "information the other person can reasonably expect to be disclosed" can deviate from normal standards of quality or performance. It is also relevant to disclose information that is not regarding the good, other asset or service itself but the circumstances that may be relevant. For instance, deriving from the example that has been given under the commentary of the DCFR[23], if the business is selling a car that is normal quality but there is a new model coming within few weeks that will replace the concerning car, this information must be disclosed to the buyer[24].

It is also important that the relevant legal information to be disclosed. For instance, if the buyer plans to use the good for a purpose that is not allowed by law, the legal information has to be disclosed, if the seller is aware of the non-legal situation[25].

The DCFR Article II.-3:103 sets forth the duty to provide information when concluding a contract with a consumer who is at a particular

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[21] Ibid.,200-201.
[22] Ibid.
[23] The DCFR publicational so contains the commentary together with the guidelines. Please see Von Bar and Clive, *DCFR.*
[24] Ibid.,202.
[25] Ibid.

disadvantage. Accordingly, if the consumer is at a particular disadvantage, because of the ***(i)*** technical medium used for contracting;***(ii)*** physical distance between the business and the consumer; or ***(iii)*** the nature of the transaction, the business has the duty to provide clear information about the main characteristics of the good, other assets or the services to be supplied, the price, the address and the identity of the business, the terms of the contract, the rights and obligations of both contracting parties and any available right of withdrawal or redress procedures. From the letter of the law it could be understood that the circumstances that has been listed is not limited to what has been set forth. In addition, it could be claimed that this article is mainly about the internet sales, e-commerce or sales through telephone.

Pursuant to DCFR Article II.-3: 108, the address and identity of the business has to include the following: ***(i)*** the name of the business; ***(ii)*** the registration number in any official registerand the name of that register; ***(iii)*** the geographical address of the business; and ***(iv)*** contact details[26].

When talking about e-commerce, which is a part of this mentioned article, DCFR Article II.-3:105 states the duties of the business with regard to conclusion of the contract. Accordingly, the following matters has to be informed to the other party before they make or accept an offer: ***(i)*** the technical steps to be taken in order to conclude the contract; ***(ii)*** whether or not a contract document will be filed by the business and whether it will be accessible; ***(iii)*** the technical means for identifying and correcting input errors before the other party makes or accepts an offer; ***(iv)*** the languages offered for the conclusion of the contract; and ***(v)*** any contract terms used.

This article has been limited in two ways: It only applies to businesses and it does not apply to electronic mail communication or other kind of individual communication[27]. Other kind of individual communication has been regulated under the DCFR Article II.-3:104, with the term called "real time distance communication."

The business that intends to conclude a contract through electronic means without individual communication has the duty to make available the other party appropriate, effective and accessible technical means to identify and correct the input errors before accepting the offer.

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[26] There are further information clauses that have been regulated under the same Article; however, paragraph (2) specifically indicates this information would be sufficient for the purposes of Article II.-3:103.

[27] Von Bar and Clive, *DCFR*,222.

As mentioned above, the DCFR also regulates the real time distance communication, meaning direct and immediate communication of such a type that one party can interrupt the other in the course of the communication. This article includes telephone and electronic means of communication but again, not electronic mail communication. The latter has been regulated under a different article, within the following section of the DCFR.

DCFR Article II.-3:104 states that the businesses initiating real time distance communication, has a duty to provide at the outset explicit information on its name and the commercial purpose of the contact. In case the business fails to comply with this duty, the consumer has the right to withdraw from the contract.

The information that has to be provided as per to this section, has to be clear and precise, expressed in clear and intelligible language (DCFR Article II.-3: 106). This also applies to the marketing regulations that will be explained in the following subchapter.

2. Marketing

The DCFR also regulates marketing of goods, other assets and services under Article II.-3:102. This article applies again only to businesses, and it is only about the marketing of goods, other assets and services[28].

As per this article, the business has the duty not give misleading information to the consumers. Information can be misleading if it includes misrepresentation of the product and its material fact that an average consumer could expect. It is expected that the average consumer assumes that they are sufficiently informed on a decision whether to conclude a contract or not.

The commercial communication creates a situation where the consumer thinks that they have all the necessary information to conclude a contract. Thus, the business has to include all the relevant information to the communication that is needed for the consumer to conclude a contract[29].

Whether or not a contract is concluded in the end of the negotiations, a business which has failed to comply with any duty imposed by these articles (marketing and information duties) is liable for any loss caused to the other party to the transaction by such failure (DCFR Article II.-3:109(3)).

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[28] Ibid.,205.
[29] Ibid.,207.

Another article under the DCFR is the one about the goods that has been delivered to the consumer without any request. This article is for to protect the consumers from unwanted marketing techniques, the unsolicited delivery of the goods, other assets or services[30].

DCFR Article II.3:401 states that in case a consumer receives an unsolicited delivery, ***(i)*** no contract arises from the consumer's failure to respond or from any other action or inaction by the consumer in relation to the goods and services; and ***(ii)*** no non-contractual obligation arises from the consumer's acquisition, retention, rejection or use of the goods or receipt of benefit from the services.

This article will not apply if the case is a ***(i)*** benevolent intervention in another's affairs; or ***(ii)*** there is unjustified enrichment (DCFR Article II.-3:401(2)), which in our opinion a logical regulation.

B. Negotiation and Confidentiality Duties

It could be claimed that the most important article with regard to pre-contractual duties under DCFR is the Article II.3:301, which deals with the negotiations phase and principle of good faith.

According to this respective Article:

> "(1) A person is free to negotiate and is not liable for failure to reach an agreement.
>
> (2) A person who is engaged in negotiations has a duty to negotiate in accordance with good faith and fair dealing and not to break off negotiations contrary to good faith and fair dealing. This duty may not be excluded or limited by contract.
>
> (3) A person who is in breach of the duty is liable for any loss caused to the other party by the breach.
>
> (4) It is contrary to good faith and fair dealing, in particular, for a person to enter into or continue negotiations with no real intention of reaching an agreement with the other party."

If we go paragraph by paragraph, the paragraph (1) sets the freedom to get into negotiations without having a clear mind on whether or not to conclude the contract. A party may break off negotiations without explaining their reasons. This is rather a general paragraph that confirms the extension of the freedom of contract.

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[30]Ibid., 257-258.

Paragraph (2) sets forth the good faith principle by stating that the negotiations should be conducted in good faith. It has been also stated that this duty may not be excluded or limited by the contract itself. In case of a breach of good faith and fair dealing during the pre-contractual period, liability of damages will occur as per paragraph (3).

Paragraph (3) states that the party that is in breach of their duty to negotiate in good faith and fair dealing will be liable for any kind of losses, not only material losses. The losses for which the person who acted contrary to good faith and fair dealing is liable include expenses incurred, work done and loss on transactions made in reliance of the expected contract[31].

The breach of good faith could occur when entering into the negotiations or continuing the negotiations which has been stated under paragraph (4), and it could also include breaking off negotiations.

When it comes to confidentiality, the DCFR does not claim that there is a general duty of keeping all the information received during negotiations as confidential. But in case one party intends to keep the information provided confidential, this respective party have to declare that the respective information is secret and cannot be used by third persons. Though, DCFR Article II.-3:302 also states that even in the absence of such declaration, if the other party knows or could reasonably expect that the information is confidential, the party that know this information is under the duty not the disclose information to third parties.

In case of a breach of confidential duty, the other party may ask for the compensation of damages incurred.

C. Breach of Pre-Contractual Duties

Besides the special provisions set forth under preceding sections of the Chapter 3 of DCFR, breach of pre-contractual duties will make the person liable for the damages (DCFR Article II.-3:501).

Here the term “loss” includes both economic and non-economic losses. For instance, “economic loss” involves loss of income or profit and non-economic loss cause pain and suffering of a person[32].

III. English Contract Law

English contract law is a part of common law system, which is a system that is being used by mostly English speaking countries such as Australia,

[31]Ibid., 248.
[32]Ibid.,262.

Canada, India and the United States. Common law differentiates substantially from the rest of the European legal systems when it comes to the pre-contractual duties. Traditionally, English law does not accept the good faith principle that can be found under Civil Law systems. English law traditionally gives parties freedom to negotiate without having the risk of pre-contractual duty[33].

This chapter will focus on the English system and try to point out the main regulations.

A. Consumer Protection

Within the English legal system there are few consumer protection acts dealing with different issues rather than just one general regulation. Therefore, few of these acts will be examined below.

1. Information Duties

In the United Kingdom, in order to comply with the EU legislation, Consumer Contracts Act was accepted in 2013. The Act, namely, Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013[34] ("**Consumer Contracts Regulations**") defines the "consumer" as an individual, acting for purposes which are wholly or mainly outside that individual's trade, business, craft or profession; and the "trader" as a person acting for purposes relating to that person's trade, business, craft or profession, whether acting personally or through another person acting in the trader's name or on the trader's behalf (Consumer Contracts Regulations Article 4).

This Act deals with the information that has to be shared with the consumer party, by dividing the relationship into few categories, such as information to be provided before making an on-premises contract, information to be provided before making an off-premises contract, information to be provided before making a distance contract, requirements for distance contracts concluded by electronic means or telephone calls to conclude a distance contract.

As per Article 8 of the respective regulations, if the consumers reasonably expect to know the relevant information prior to the contract, this

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[33] Mathias Reimann and Reinhard Zimmermann ed., *The Oxford Handbook of Comparative Law* (New York: Oxford University Press, 2006),917.

[34] 2013 No. 3134 The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013, [http://www.legislation.gov.uk/uksi/2013/3134/pdfs/uksi_20133134_en.pdf], accessed September 2016.

information should be made available by the business. This is a general article that sets the frame for more specific articles that are regulated further within the Regulations.

The Consumer Contracts Regulations divides the relationship between the trader and the consumer in three ways, which are "on-premises contracts", "off-premises contracts" and "distance contracts". Off-premises contracts are,***(i)*** a contract concluded in the simultaneous physical presence of the trader and the consumer, in a place which is not the business premises of the trader; ***(ii)*** a contract for which an offer was made by the consumer in the simultaneous physical presence of the trader and the consumer, in a place which is not the business premises of the trader; ***(iii)*** a contract concluded on the business premises of the trader or through any means of distance communication immediately after the consumer was personally and individually addressed in a place which is not the business premises of the trader in the simultaneous physical presence of the trader and the consumer; or ***(iv)*** a contract concluded during an excursion organized by the trader with the aim or effect of promoting and selling goods or services to the consumer (Consumer Contracts Regulations Article 5).

A "distance contract" is a contract concluded between a trader and a consumer under an organized distance sales or service-provision scheme without the physical presence of the trader and the consumer, by using one or more means of distance communication up to and including the time at which the contract is concluded (Consumer Contracts Regulations Article 5).

And finally, "on-premises contracts" defined as the contracts that are not off-premises or distance contracts (Consumer Contracts Regulations Article 5).

Accordingly, the information duties for each contract are changing. There are different Schedules within the Consumer Contracts Regulations that sets forth the information duties for on-premises[35] and off-premises contracts[36].

[35] **Schedule 1-Information relating to on-premises contracts:** "(a) the main characteristics of the goods or services, to the extent appropriate to the medium of communication and to the goods or services; (b) the identity of the trader (such as the trader's trading name), the geographical address at which the trader is established and the trader's telephone number; (c) the total price of the goods or services inclusive of taxes, or where the nature of the goods or services is such that the price cannot reasonably be calculated in advance, the manner in which the price is to be calculated; (d) where applicable, all additional delivery charges or, where those charges cannot reasonably be calculated in advance, the fact that such additional charges may be payable; (e) where applicable, the arrangements for

payment, delivery, performance, and the time by which the trader undertakes to deliver the goods or to perform the service; (f) where applicable, the trader's complaint handling policy; (g) in the case of a sales contract, a reminder that the trader is under a legal duty to supply goods that are in conformity with the contract; (h) where applicable, the existence and the conditions of after-sales services and commercial guarantees; (i) the duration of the contract, where applicable, or, if the contract is of indeterminate duration or is to be extended automatically, the conditions for terminating the contract; (j) where applicable, the functionality, including applicable technical protection measures, of digital content; (k) where applicable, any relevant compatibility of digital content with hardware and software that the trader is aware of or can reasonably be expected to have been aware of."

[36] **Schedule 2-Information relating to off-premises contracts**: "(a) the main characteristics of the goods or services, to the extent appropriate to the medium of communication and to the goods or services; (b) the identity of the trader (such as the trader's trading name); (c) the geographical address at which the trader is established and, where available, the trader's telephone number, fax number and e-mail address, to enable the consumer to contact the trader quickly and communicate efficiently; (d) where the trader is acting on behalf of another trader, the geographical address and identity of that other trader; (e) if different from the address provided in accordance with paragraph (c), the geographical address of the place of business of the trader, and, where the trader acts on behalf of another trader, the geographical address of the place of business of that other trader, where the consumer can address any complaints; (f) the total price of the goods or services inclusive of taxes, or where the nature of the goods or services is such that the price cannot reasonably be calculated in advance, the manner in which the price is to be calculated; (g) where applicable, all additional delivery charges and any other costs or, where those charges cannot reasonably be calculated in advance, the fact that such additional charges may be payable; (h) in the case of a contract of indeterminate duration or a contract containing a subscription, the total costs per billing period or (where such contracts are charged at a fixed rate) the total monthly costs; (i) the cost of using the means of distance communication for the conclusion of the contract where that cost is calculated other than at the basic rate; (j) the arrangements for payment, delivery, performance, and the time by which the trader undertakes to deliver the goods or to perform the services; (k) where applicable, the trader's complaint handling policy; (l) where a right to cancel exists, the conditions, time limit and procedures for exercising that right in accordance with regulations 27 to 38; (m) where applicable, that the consumer will have to bear the cost of returning the goods in case of cancellation and, for distance contracts, if the goods, by their nature, cannot normally be returned by post, the cost of returning the goods; (n) that, if the consumer exercises the right to cancel after having made a request in accordance with regulation 36(1), the consumer is to be liable to pay the trader reasonable costs in accordance with regulation 36(4); (o) where under regulation 28, 36 or 37 there is no right to cancel or the right to cancel may be lost, the information that the consumer will not benefit from a right to cancel, or the circumstances under which the consumer loses the right to cancel; (p) in the case of a sales contract, a reminder that the trader is under a legal duty to supply goods that are in conformity with the contract; (q) where applicable, the existence and the conditions of after-sale customer assistance, after sales services and commercial guarantees; (r) the existence of relevant codes of conduct, as defined in regulation 5(3)(b) of the Consumer Protection from Unfair Trading Regulations 2008, and how copies of them can be obtained, where applicable; (s) the duration of the contract, where applicable, or, if the contract is of indeterminate duration or is to be extended automatically, the conditions for terminating the contract; (t) where applicable, the

When it comes to distance contracts, the information that has to be provided for off-premises contracts (Schedule 2) also applies herein (Consumer Contracts Regulations Article 13(1a)). Furthermore, if the right to cancel exists, this should also be informed to the consumer (Consumer Contracts Regulations Article 13(1b)).

If a distance contract has been concluded through electronic means, and if there is an obligation to pay, the trader has to make this information available in a prominent and clear manner (Consumer Contracts Regulations Article 14(3)). The trader must also make it clear what types of payments are being accepted, in case the commerce is being done through a website (Consumer Contracts Regulations Article 14(6)).

Deriving from the EU regulations[37], in case the contract is going to be concluded through electronic means, the trader has to provide the information with regard to technical steps that has to be followed in order to conclude the contract. This provision has been laid down under The Electronic Commerce (EC Directive) Regulations 2002[38] ("**E-Commerce Directive**"), Article 9.

If the distance contract is being concluded through a telephone call, the trader must disclose ***(i)*** the trader's identity; ***(ii)*** where applicable, the identity of the person on whose behalf the trader makes the call; and ***(iii)*** the commercial purpose of the call, at the beginning of the conversation (E - Commerce Regulations Article 15).

2. Marketing

The Marketing of the Products under the English Law has been regulated by the Consumer Protection from Unfair Trading Regulations 2008

minimum duration of the consumer's obligations under the contract; (u) where applicable, the existence and the conditions of deposits or other financial guarantees to be paid or provided by the consumer at the request of the trader; (v) where applicable, the functionality, including applicable technical protection measures, of digital content; (w) where applicable, any relevant compatibility of digital content with hardware and software that the trader is aware of or can reasonably be expected to have been aware of; (x) where applicable, the possibility of having recourse to an out-of-court complaint and redress mechanism, to which the trader is subject, and the methods for having access to it."

[37] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0031:en:HTML] accessed September 2016

[38] 2002 No. 2013 The Electronic Commerce (EC Directive) Regulations 2002,[http://www.legislation.gov.uk/uksi/2002/2013/pdfs/uksi_20022013_en.pdf] accessed September 2016

("**Unfair Trading Regulations**"). According to Unfair Trading Regulations Article 5(2), a commercial practice is a "misleading action" ***(i)*** if it contains false information and is therefore untruthful in relation to any of the matters in paragraph (4)[39] or if it or its overall presentation in any way deceives or is likely to deceive the average consumer in relation to any of the matters in that paragraph, even if the information is factually correct; and ***(ii)*** it causes or is likely to cause the average consumer to take a transactional decision he would not have taken otherwise. This paragraph deals with mainly the marketing of the product which is about the content of the product itself. The Article 5(3), defines the commercial practice concerning the marketing of a product (including comparative advertising) that creates confusion with any other products, trademarks, trade names or other distinguishing elements of a competitor, as a misleading action.

What is different in English Law is that the misleading action has been described as an offence (Unfair Trading Regulations Article 9), which is not the case in Civil Law systems. The result of this action may even be a fine or imprisonment for a term not exceeding two years (Unfair Trading Regulations Article 13).

It is also an offence to claim payment for unsolicited goods or services under the English law and the consumer can treat these goods as a gift.

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[39] Unfair Trading Regulations Article 5(4): "The matters referred to in paragraph (2)(a) are— (a) the existence or nature of the product; (b) the main characteristics of the product (as defined in paragraph 5); (c) the extent of the trader's commitments; (d) the motives for the commercial practice; (e) the nature of the sales process; (f) any statement or symbol relating to direct or indirect sponsorship or approval of the trader or the product; (g) the price or the manner in which the price is calculated; (h) the existence of a specific price advantage; (i) the need for a service, part, replacement or repair; (j) the nature, attributes and rights of the trader (as defined in paragraph 6); (k) the consumer's rights or the risks he may face."

Article 5 (5): "In paragraph (4)(b), the "main characteristics of the product" include— (a) availability of the product; (b) benefits of the product; (c) risks of the product; (d) execution of the product; (e) composition of the product; (f) accessories of the product; (g) after-sale customer assistance concerning the product; (h) the handling of complaints about the product; (i) the method and date of manufacture of the product; (j) the method and date of provision of the product; (k) delivery of the product; (l) fitness for purpose of the product; (m) usage of the product; (n) quantity of the product; (o) specification of the product; (p) geographical or commercial origin of the product; (q) results to be expected from use of the product; and (r) results and material features of tests or checks carried out on the product."

Article 5(6): "In paragraph (4)(j), the "nature, attributes and rights" as far as concern the trader include the trader's— (a) identity; (b) assets; (c) qualifications; (d) status; (e) approval; (f) affiliations or connections; (g) ownership of industrial, commercial or intellectual property rights; and 5 (h) awards and distinctions."

Article 27A of the Unfair Trading Regulations, which was inserted to these Regulations by the Consumer Contracts Regulations 2013, states under Paragraph (4) that "In the case of an unsolicited supply of goods, the consumer may, as between the consumer and the trader, use, deal with or dispose of the goods as if they were an unconditional gift to the consumer."

B. Negotiation and Confidentiality Duties

English law as a Common Law system mostly diverges from the Civil Law countries at this point. Under English Law, there is no specific duty that has been imposed on the parties to enter into or continue negotiations in good faith.

The leading case under English law regarding the principle of good faith is the House of Lords case *Walford v. Miles [1992] AC 128, HL*[40]. In this case the House of Lords states that the English law does not accept the principle to negotiate in good faith. This case concerns the two parties who entered into negotiations about the acquisition of a company. The owners of the company sell the company to a third party, even though there was an agreement between the parties that the sellers would not negotiate with third parties.

According this decision, this kind of "lock-in" agreements[41] are unenforceable because of two reasons: First, they are quite uncertain to be enforced, because they are kind of "agreements to agree". And second, duty to negotiate in good faith is repugnant to the competing nature of the parties of the negotiations[42].

This case has been criticized on few grounds ever since 1992, the year that the decision was made. The latest case law from the United Kingdom somehow started to soften this approach. In *Petromec v Petroleo Brasiliero [2005] EWCA Civ 891*[43], it has been decided that the obligation to negotiate in good faith can be a binding principle, if it is a part of a wider contract that is in nature binding under English law.

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[40] Walford and Others v Miles and Another House Of Lords [1992] AC 128, [https://uk.practicallaw.thomsonreuters.com/D-009-7961?__lrTS=20170413120121402&transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1] accessed September 2016.

[41] Which could be defined as agreeing upon a party cannot negotiate with a third party for the same purposes, for a certain period of time.

[42] Ewan McKendrick, *Contract Law: Texts, Cases and Materials*, 5th ed. (United States: Oxford University Press, 2012),501.

[43] Petromec Inc and others v Petroleo Brasileiro SA Petrobas and others [2005] All ER (D) 209 (Jul) [http://lexisweb.co.uk/cases/2005/july/petromec-inc-and-others-v-petroleo-brasileiro-sa-petrobas-and-others] accessed September 2016.

To sum up, it could be said that the English law does not accept the principle to negotiate in good faith, but sometimes agrees to this principle if the source is somehow identifiable, like it has been agreed for a certain time period or a part of a wider binding contract. However, this kind of approach has only been emerging recently.

When it comes to confidentiality, the parties may claim damages when there is a breach of confidentiality. The damages may also include the other party's profits derived from the use of this information. Pursuant to the case-law decided under the *Peter Pan Manufacturing Corp. v. Corsets Silhouette Ltd. [1964] 1 WLR 96*[44]:

> "A trader who receives confidential information and makes no use thereof, is not thereby debarred from making use of that knowledge when it is no longer secret. [..]
>
> The successful plaintiffs having elected to take an account of profits:
>
> Held that they were entitled to an order in the form of an account of the profits made by the defendants from the sale of the offending goods, and not merely an account the additional profit made by the defendants as a consequence of their use of confidential information."

C. Breach of Pre-Contractual Duties

As mentioned above, English Law does not accept the general principle to negotiate in good faith and no specific laws for pre-contractual duties, therefore there is no general remedy mechanism that covers all the pre-contractual duties. The English law mostly tries to find solutions to specific problems.

There are specific provisions that constitute the breach of consumer protection laws, and when it comes to misleading marketing, imprisonment may even arise. Furthermore, there are cases with regard to use of confidential information and English law accepts the compensation of damages and also the payment of profit made. In case of misrepresentation or other types of situations that may arise during the pre-contractual period, we can talk about law of deceit and negligent misstatement. If a party believes that they enter into a contract due to misinformation or unfair pressure, they have the right to cancel the contract. In case any damages occurred or losses suffered, compensation may be demanded[45].

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[44] Peter Pan Manufacturing Corporation v. Corsets Silhouette Limited, Reports of Patent, Design and Trade Mark Cases, 16th May 1963, [http://rpc.oxfordjournals.org/content/80/3/45.full.pdf+html], accessed September 2016.

[45] Michael Furmston and G J Tholhurst, *Contract Formation: Law and Practice*, (New York: Oxford University Press, 2010),381-382.

However, it could be claimed that English Law does not generally accept a principle of good faith during negotiations but starting to change its mind.

However, the future of the good faith principle is still uncertain. Other common law countries, such as the United States already introduced the principle of good faith, even though it is limited only to the performance and enforcement[46]. This might be the case in English law as well[47].

The other type of institution that has been accepted by the common law countries, but limited considerably by the English courts, is the institutions of promissory and proprietary estoppel[48].

IV. Turkish Contract Law

Turkish Republic has been chosen as the representative of the civil law countries of this study. However, it should be mentioned that even within the civil law systems there might be differences in approaches to pre-contractual duties.

Turkey is a particular case because as in the process of entering into EU, Turkey has aligned significant amount of its laws with the EU legislation and therefore, its laws show similarities with the laws of the rest of the EU Member States which has a civil law background. For instance, the Consumer Protection Laws follow mostly the EU-practices. However, more general codes like the Turkish Civil Code (*Türk Medeni Kanunu*) and Law of Obligations (*Türk Borçlar Kanunu*) follow the Swiss Civil Code.

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[46] Section 1-203 of the Uniform Commercial Code: "Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement.", Section 205 of the Restatement (Second) of Contracts: "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.". Sylviane Colombo, "The Present Differences Between the Civil Law and Common Law Worlds with Regard to Culpa in Contrahendo", *Tilburg Foreign Law Review* 2 (1993): 343-344

[47] Furmston, Michael, *Cheshire, Fifoot&Furmston's Law of Contract,* 15thed, (New York: Oxford University Press, 2007),32-33.

[48] "As to the types of estoppel recognized in common law and equity, at common law estoppel by representation provides a defence against a party seeking to deny representation of fact which it has previously made. Equity recognizes promissory estoppel and proprietary estoppel, both varieties preventing a party which has made a promise from acting inconsistently with that prior promise; proprietary estoppel concerns promises made by an owner of land, promissory estoppel any other type of promise (including promise made by a prospective purchaser of land). The two varieties of equitable estoppel, being promissory based, are clearly of the greatest relevance to a discussion on the idea of promise within contract law." Martin Hogg, *Promises and Contract Law: Comparative Perspectives,* (United States: Cambridge University Press, 2011),181.

It is interesting that Turkish law has no clear obligation to negotiate in good faith, but as a civil law state and follower of the Germanic approach to private law, it could be seen that Turkish doctrine and court decisions has been converged on the principle that there is a duty to negotiate in good faith.

The details of the approach of the Turkish legal system will be explained below.

A. Consumer Protection

The rules regarding consumer protection under the Turkish legal system has been regulated by the Consumer Protection Code (*Tüketicinin Korunması Hakkında Kanun*) dated 7 November 2013 numbered 6502[49]. The term "consumer" has been defined as a person or a legal entity that is acting with a non-commercial or non-vocational purpose.

1. Information Duties

The Turkish Consumer Protection Code does not regulate general information duties to the consumer during the pre-contractual period, even though it states explicitly that the consumer should be informed regarding the product and the label of the product should carry certain information, like the origin, type, sales price of the product (The Regulations on Labels, Tariffs and Price Lists[50], Article 1).

However, Consumer Protection Code has a different type of regulating the pre-contractual information duties. Even though it does not regulate the information that has to be provided before the contract formation, it regulates the case of a breach. It states that in case a good or a service does not comply with the characteristics of the good or service that the parties agreed upon before the sales, this good or a service will be considered as a defective good or a defective service.

According to Article 8(2) of the Consumer Protection Code, in case a good does not carry one or more characteristics that have been stated on its package, its user's manual, internet portal or at the advertisements, it will be treated as a defective good. There are three choices that a consumer can choose when dealt with a defective good, he can either,***(i)*** return the product and cancel the contract; ***(ii)*** keep the product but demand a discount from its sales price; ***(iii)*** ask for the reparation of the product from the seller; or ***(iv)*** if possible, ask for a replacement of the product.

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[49] Turkish Official Gazette Date: 28 November 2013, No. 28835.
[50] Turkish Official Gazette Date: 13 June 2003, No. 25137.

According to Article 13(2) of the Consumer Protection Code, in case a service does not comply with the characteristics written on the internet portal or on the advertisements, the service will be treated as a defective service.

Pursuant to Consumer Protection Code Article 15(1), in case the consumer receives a defective service, the consumer may ***(i)*** ask for the service to be given again; ***(ii)*** ask for the reparation of the product produced as a consequence of the service received; ***(iii)*** ask for a discount from the sales price in proportion with the defect occurred; or ***(iv)***cancel the contract.

To sum up, the Consumer Protection Code does not regulate the information duties during the pre-contractual stage, but sets forth certain elective rights to the consumer, in case the good or the service does not comply with the characteristics informed by the seller before the contract.

The Consumer Protection Law also regulates certain types of consumer contracts such as Consumer Loan Contracts or Mortgage Contracts. It also regulates "distance contracts" and "off-premises" contracts, as seen under English law.

Off-premises contracts are defined as contracts that are concluded ***(i)*** outside the premises of the business, with the physical presence of the parties; ***(ii)*** within the premises of one of the parties or with distance communication, following the negotiations done outside of the premises with the physical presence of the parties; or ***(iii)*** during a trip that the seller takes the consumers to introduce or promote the goods or services.

The Turkish legal system bounds the seller with some information duties in case of an off-premises contract, which could be found in the Regulations on Off-Premises Contracts[51]. According to the Article 5 of the respective regulations,***(i)*** the basic characteristics of the good or service subject to the contract; ***(ii)*** the name or title of the seller and its details of communication; ***(iii)*** the sales price of the good or service including all the taxes (in Turkish Liras); and ***(iv)*** in case there is a right of withdrawal, the conditions for use of this right, shall be informed to the consumer in a clear and intelligible manner in written format or with a permanent data logger.

On the other hand, distance contracts are defined as contracts concluded between the parties without any physical presence and with the help of a system that has been constructed to do the marketing of the products. These contracts have been concluded between the parties by merely using the distance communication tools (Consumer Protection Code Article 48(1)).

[51] Turkish Official Gazette Date: 14 January 2015, No: 29236.

The seller has to inform the consumer clearly, in case the consumer approves the order, he will be under obligation to pay.

Diverging from the off-premises contracts, here under distance contracts, consumer has the right to withdrawal for fourteen days deriving from the law itself. In case the consumer has not been well-informed about the product, these fourteen days may be prolonged. In all cases, right to withdrawal will be statute barred in one year.

In case of distance contracts, the Turkish legislators imposed certain information duties on the seller specifically by enforcing a regulation, namely Regulations on Distance Contracts[52]. The Article 5 of the respective regulations sets forth that the seller has to inform the consumer with specific information including the characteristics of the good, the name or title of the seller, communication details that allows the consumer to communicate with the seller rapidly, the price of the good or service including all the taxes and expenses (such as transportation of the good or service), information regarding the payment and delivery of the goods etc.

All the information has to be provided in a clear and intelligible manner, in a written form or with a permanent data logger. In case the consumer buys the product through a website, the seller has to inform the consumer in a clear way before taking the order. Furthermore, the consumer has to confirm that he has been informed in a manner possible through the distance communication tool. Otherwise the contract will not be deemed concluded.

2. Marketing

The Consumer Protection Code regulates the commercial marketing of the goods and products under Article 61. Accordingly, the advertisements of the products have to be compatible with the general ethics, public order, and human rights. They have to be true and honest. The seller is under obligation to prove the statements given under the commercial advertisement. The advertisements are subjected to the review of the Marketing Board under the Customs and Trade Ministry upon request.

In case of an unsolicited delivery of a product to a consumer, the seller has no right. Even in the cases of the consumer staying silent and start using the product or the service, does not mean a contract has been concluded between the parties. The consumer does not have to return the product back

[52] Turkish Official Gazette Date: 27 November 2014, No: 29188.

or keep it. If the seller insists the consumer has ordered the product, he has the burden to prove such order.

B. Negotiation and Confidentiality Duties

As mentioned before, the Turkish Law of Obligations does not regulate the concept of pre-contractual duties implicitly; however, the Turkish legal doctrine, following the Swiss tradition, accepts that there is a general principle on negotiating in good faith.Within the doctrine it has been claimed that it forms the basis of certain provisions under the Turkish Civil Code and Turkish Law of Obligations.

Accordingly, the Article 26/I of the Law of Obligations that regulates the compensation in case one party cancels the contract due to their own mistake can be accepted as a reflection of the principle of pre-contractual duties. Few more examples can be given with regard to misrepresentation that were again regulated under Law of Obligations[53].

Some scholars base the principle of good faith during pre-contractual phase to the Article 2 of the Turkish Civil Code, which sets forth that every person using their rights or realizing obligations has to obey the principles of good faith. The legal system does not protect a right that was clearly used in bad faith[54].

However, since there is no implicit regulation on the pre-contractual duties, there is a debate on the nature of this respective obligation. Some scholars claims that the pre-contractual duties under Turkish law relies on the concept of non-compliance with the contract[55], on the other hand, some scholar claims that pre-contractual duties is a part of torts[56].

When it comes to confidentiality, again the Turkish Law of Obligations has no implicit rule. The Ministry of Justice has a Draft Regulation on Commercial, Bank and Consumer Secrets that would make using confidential information an offence (Article 8 of the Draft Regulations). However, currently there is no such regulation enacted and the cases are being decided upon Article 2 of the Turkish Civil Code.

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[53] Huriye Reyhan Demircioğlu, "Culpa in Contrahendo Sorumluluğu", (Doktora Tezi, Ankara Universitesi, 2007),53.

[54] 4721 Sayılı Türk Medeni Kanunu Article 2: "Herkes, haklarını kullanırken ve borçlarını yerine getirirken dürüstlük kurallarına uymak zorundadır. Bir hakkın açıkça kötüye kullanılmasını hukuk düzeni korumaz."

[55] Fikret Eren, *Borçlar Hukuku Genel Hükümler*. 18th ed. (Ankara: YetkinYayınları, 2015),1139.

[56] Ahmet Kılıçoğlu, *Borçlar Hukuku Genel Hükümler*. Revised and Expanded 16th ed. (Ankara: Turhan Kitabevi, July 2012), 84.

C. Breach of Pre-Contractual Duties

The Turkish Supreme Court (*Yargıtay*) specializing in civil law cases, has decided on several cases with regard to pre-contractual duties.

The decision numbered 1997/8864 of the Turkish Supreme Court states that if a party enters into negotiations without having the intention to enter into a contract, that party is responsible. Within the judgment it has been stated that entering into negotiations would create a legal relationship between the parties and this relationship has to be compatible with Article 2 of the Turkish Civil Code which regulates the good faith principle.

Again, in another decision of the Turkish Supreme Court numbered 2013/239, the parties entering into negotiations create a trust relationship, and have to exercise due care for the personal rights and property rights of the other party. In case of breach of this trust relationship, the party that is in breach has to compensate the damages occurred.

To sum up, even though the Turkish Civil Code and Law of Obligations do not clearly regulate the pre-contractual duties, the doctrine and the supreme courts accept of such principle. However, the legal nature of pre-contractual duties is still being debated.

Conclusion

In pursuit of the analysis of three different legal understandings, vaguely the European understanding, the common law understanding and the civil law understanding, we can come up to following conclusions.

When we compare the DCFR, the English system and the Turkish system we do not see a big difference when it comes to consumer protection laws. This could be due to the fact that consumer protection has been regulated by several EU directives and this affects all the legal systems analyzed here. There are few nuances, like the English system accepting the misleading marketing as an offence. And we see that the Turkish legal system mostly has general regulations and the audit of the advertisements is being done by the government officials. However, this does not create a huge difference in the consumer protection.

The biggest difference is on the negotiation and confidentiality duties, in which the English legal system has a rather different understanding of the pre-contractual phase than the civil law systems. We see that the courts do not accept that there is a duty to enter into negotiations with good faith, and this is repugnant to the nature of the negotiations. We can understand that the English legal system has a different understanding when it comes to

competition and sees competition as more important than negotiating in good faith, especially during the pre-contractual phase. There is a concern that having the good faith principle in place would unsettle the commercial bargaining process. Freedom of competition preserves the liberty to move[57]. However, English system has started also to debate on this exact principle, it may accept the principle in good faith in the future. This could be due to the convergence that is happening between the different trends of legal systems today. EU is definitely a trigger, however the recent developments such as the decision of the United Kingdom to leave the EU might change the course of the trend.

It is not only EU though, but also other legal systems that influence indirectly the other states, whether or not a part of an umbrella organization. We see this especially with the United States influencing many other countries. Therefore, it is possible that United Kingdom would gradually introduce the concept of good faith to its legal system.

On the other hand, as a part of the Swiss/German tradition, the Turkish legal system accepts this principle through doctrine and court decisions. However, it is noticed that within the civil law countries, there is a differentiation regarding the nature of the principle. Being a part of the civil law tradition for instance, while it is not certain what the nature of the pre-contractual duties is under the Turkish law, the Portuguese law accepts it as a tort liability.

Lastly, the DCFR accepts the principle of good faith. It should be kept in mind that the DCFR is not a legally binding document, but it could be accepted as a good guidance for a possible European Civil Code in the future.

As an important remark it should be stated since the United Kingdom has voted to leave the EU after the referendum on 23 June 2016, and Article 50 of the TEU has been triggered by the letter sent on 29 March 2017. Accordingly, the EU laws will not be binding on the United Kingdom after such talks and the whole separation process are finalized. Even though it is hard to predict the legal outcome of the separation of the United Kingdom from the EU, there may be two possibilities: It would be a strict separation and EU will not have any more influence on the country and on its legal system. But it is possible that the EU will still have an effect on the legal system of the United Kingdom due to strong economic ties.

[57]Furmston and Tolhurts, *Contract Formation: Law and Practice*,369.

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