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Mercedes-Decision of the European Court of Justice: A New Phase in European Law

Adalet Divanı'nın Mercedes Kararı: Avrupa Hukuku'nda Yeni Bir Safha

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ÖZ

Avrupa Adalet Divanı'nın 2023 tarihli Mercedes davası kararı, açık yasal hükümlerin yokluğunda bile davacının bireysel tazminat talebini onaylamıştır. Dönüm noktası niteliğindeki bu karar, Avrupa'da kamu politikası düzenlemeleri ile ulusal özel hukuk arasındaki etkileşime ilişkin uzun süredir devam eden tartışmayı da yeniden alevlendirmiştir. Bu makale işbu davayı analiz etmekte, davanın temelini oluşturan tarihi ve siyasi tartışmaları incelemekte ve pozitif hukuk açısından sonuçlarını araştırmaktadır. Makalenin temel üç önemli bulgusu şunlardır: İlk olarak, AAD'nin kararı, Avrupa hukukunun ihlaline dayalı bireysel talepler için yeni bir yol oluşturmakta ve Üye Devletleri uygun iyileştirici tedbirleri hayata geçirmeye sevk etmektedir. İkincisi, karar kamu yararı düzenlemesi ile bireysel koruma arasındaki dengeye ilişkin neredeyse yüzyıllık bir tartışmayı yeni bir boyuta taşımaktadır. Üçüncüsü, karar şimdiden Avrupa ve Almanya'daki hukuki çerçeveyi şekillendirmeye başlamış olup, Türk hukukunda da özellikle de haksız rekabet hukuku alanında benzer tartışmaları tetikleme potansiyeline sahiptir.

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Anahtar Kelimeler: *Avrupa sözleşme hukuku, Türk hukukunda haksız ticari uygulamalar, regülasyon-iç özel hukuk ilişkisi, borçlar hukuku bağlamında haksız rekabet.*

ABSTRACT

The European Court of Justice's 2023 ruling in the Mercedes case has upheld an individual compensation claim even without explicit legislative provisions for such compensation. This landmark decision has reignited the longstanding debate in Europe regarding the interplay between public policy regulation and national private law. This paper analyses the case, delves into the historical and political debates underpinning it, and explores its implications for positive law. It offers three key contributions to the ongoing discourse: First, the ECJ's ruling establishes a new pathway for individual claims based on breaches of European law, prompting Member States to implement appropriate remedial measures. Second, the decision elevates a nearly century-old debate on balancing public interest regulation and individual protection to new heights. Third, the ruling has already begun to shape the European and German legal landscapes, provoking similar discussions in Turkish law, particularly in unfair competition law.

Keywords: *European contract law, Turkish unfair commercial practices law, regulation and national private law, unfair practices within TBK.*

Introduction

On 21.3.2023, the European Court of Justice (ECJ) ruled in the case of QB v Mercedes AG[1] and granted compensation to the plaintiff for the damage caused by a thermal device installed in the engines of such Mercedes vehicles, which was designed to reduce emissions when the outside temperature was between certain degrees.[2]

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1 Formerly Daimler AG.

2 ECJ, Case 100/21 QB v Mercedes-Benz Group AG, formerly Daimler AG from 21.3.2023.

The case was referred to the ECJ by the LG Ravensburg in Germany with two main questions, the first and essential of which was whether the regulation in question was also intended to protect individuals, thereby giving them a right to compensation.[3]

The Court's decision and reasoning rocked the foundations of the relationship between European public regulation and national private law, which had been the subject of debate since the mid-sixties.[4] The decision follows a novel approach to the issue that has gained momentum since the turn of the millennium. It could even be described – after similar decisions in the last 20 years[5] – as the last piece of the puzzle, in that it allows individual claims for breach of EU law, regardless of the regulatory picture at the time. The courts' ruling enriches the prior discussions and strengthens the fourth and youngest approach,[6] which sees the European public good regulation and national private laws as complementary.

This paper consists of three main sections. The first section (Section A) provides information on the case itself, explaining the subject matter, the legal considerations and the outturn. This is followed by Section B, which deals with the underlying discussion, namely the relationship between European public regulation and national private law. Section C then discusses the impact of the decision on German law, together with possible implications for Türkiye and Turkish law. The paper concludes with the main findings in the form of theses.

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3 The second question was only about the parameters for calculating damages if the first question was answered positively, so it does not contribute to the discussion.

4 For a summary of discussions see for example Olha Cherednychenko, "Islands and the Ocean: Three Models of the Relationship between EU Market Regulation and National Private Law", *Modern Law Review,* Volume: 84(6), 1294–1329, 2021. See also section B below.

5 For a previous decision see ECJ, Case 453/99 Courage v Bernard Crehan [2001] ECR 2001 I-06297.

6 Forthcoming at section B-IV below.

A. The Process in A Summary

The case involved the purchase of a Mercedes C220 CDI fitted with a thermal software device that reduces emissions when the outside temperature is between a certain threshold.[7] This was particularly difficult to maintain in Germany, where the average outside temperature is around 10.5 degrees Celsius.[8] The use of such devices was reminiscent of Volkswagen's infamous diesel scandal, which led to several compensation claims at the time.[9] The use of thermal devices as such was considered a defeat device[10] under Art. 5 of Regulation 715/2007 of the European Parliament and of the Council of 20 June 2007 on Type Approval of Motor Vehicles with Respect to Emissions from Light Passenger and Commercial Vehicles (Euro 5 And Euro 6) and on Access to Vehicle Repair and Maintenance Information.[11]

QB, the customer, brought the dispute before LG Ravensburg and claimed that he was entitled to compensation through the breach of European law, especially through different articles from the Regulation 2007/715.

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7 For optimal results, the outside temperature should be between 20-30 degrees Celsius.

8 For a monthly report of average temperature in Germany in 2023 see https://www.statista.com/statistics/982472/average-monthly-temperature-germany/ (last visited on 21.7.2024). Interestingly, even the warmest months like June, July or August do not reach the threshold of 20-30 degrees Celsius.

9 An overview at the case could be found at https://www.epa.gov/vw/learn-about-volkswagen-violations#:~:text=On%20June%2028%2C%202016%2C%20Volkswagen,The%20settlement%20was%20formally%20entered (last visited on 21.7.2024).

10 A defeat device is defined as any element of design which senses temperature, vehicle speed, engine speed (RPM), transmission gear, manifold vacuum or any other parameter for the purpose of activating, modulating, delaying or deactivating the operation of any part of the emission control system, that reduces the effectiveness of the emission control system under conditions which may reasonably be expected to be encountered in normal vehicle operation and use, according to the Art. 3(1) Nr. 10 of the Regulation 2007/715.

11 Called from now on just Regulation 2007/715.

I. Court of First Instance (LG Ravensburg)

The BGH's well-established rulings on such cases consisted of the possibility of a remedy under § 826 BGB (German Civil Code),[12] which presupposes intent. This has only been successful in a handful of cases, such as the Volkswagen diesel scandal.[13] A remedy under § 823(2) BGB,[14] which is much easier to implement because simple negligence is sufficient, has always been ruled out by the BGH.

As the LG Ravensburg was not fully convinced by the current case law and the approach of the BGH, it halted the proceedings and referred two main questions to the ECJ: First, whether Regulation 2007/715 also covers individual claims together with the general interests of the public, and second, how the court should calculate the damages suffered if the former answered in the affirmative.[15]

II. ECJ Decision

After further consideration, the ECJ granted the plaintiff QB compensation under German law, principally under § 823(2) BGB, overturning the established rulings of the BGH.[16] The court has made it easier for such claims to be granted in the future, as § 823(2) BGB

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12 Corresponding to the § 49(2) TBK (Turkish Code of Obligations). According to § 826 BGB, any person who, in a manner offending common decency, intentionally inflicts damage on another person is liable to the other person to provide compensation for the damage.

13 See in extenso https://www.justice.gov/opa/pr/volkswagen-spend-147-billion-settle-allegations-cheating-emissions-tests-and-deceiving (last visited on 21.7.2024).

14 Corresponding to the §49(1) TBK. According to § 823(2) BGB, the same duty (to compensate damages) is incumbent on a person who commits a breach of a statute that is intended to protect another person. If, according to the contents of the statute, it is possible to violate it also without fault, then liability to compensation only exists in the case of fault.

15 For a German summary of the case see https://www.anwalt.de/rechtstipps/aktuelles-vom-eugh-zu-abschalteinrichtungen-c-100-21-v-21-3-2023-daimler-diesel-210575.html (last visited on 21.7.2024).

16 ECJ, Case 100/21 QB v Mercedes-Benz Group AG, formerly Daimler AG from 21.3.2023. par. 96 et seq.

provides for a much simpler claim for compensation in the event of negligence.

In the words of the ECJ, the European legislation in this area "(...) must be interpreted as protecting, in addition to public interests, the specific interests of the individual purchaser of a motor vehicle vis-à-vis the manufacturer of that vehicle, where that vehicle is equipped with a prohibited defeat device within the meaning of the latter provision".[17]

In similar cases, individual claims will now be presented regardless of whether they pertain to an individual or an EU public interest violation. Notably, future cases will no longer require specific remedies from European regulations, as the decision affirms individual claims irrespective of the regulatory context.[18]

B. The Underlying Discussion: The Relationship Between Regulation and Private Law

The ECJ ruling reopens the debate on the relationship between public interest (or the market) regulation and private law.[19] The decision is significant beyond its immediate subject matter, as it may shift the discussion towards a light-touch regulatory approach. Accordingly, even when the European legislative status lacks an applicable individual remedy, EU Member States should ensure at least one available remedy to effectively compensate the damages in their national law. Further explanation is needed at this point to illuminate the underlying discussions.

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17 ECJ, Case 100/21 QB v Mercedes-Benz Group AG, formerly Daimler AG from 21.3.2023, par. 85, 88.

18 See for similar discussions Cihat Börklüce, Big Data Misuse and European Contract Law, Pending for Publication at *ERCL (European Review of Contract Law),* De Gruyter, 2024, s. 13 et seq.

19 See for such discussions in extenso Hugh Collins, *Regulating Contracts*, Oxford International, 2002; Alexander Hellgardt, *Regulierung und Privatrecht*, Mohr Siebeck, 2016.

I. Ordoliberal Approach

The discussion could be traced back to the 60s in Germany and to the ordoliberal thoughts. At that time, when European legislation was still young, the regulation of the public interest and national private law were seen as two completely separate spheres.[20] This is why the first approach was called the strict separation approach. At its core, the ordoliberal view did not grant private rights to individuals unless they were directly granted by the regulatory act itself.

These preliminary discussions were particularly praiseworthy in that they saw economic, political and even social powers as a whole.[21] But soon enough they were criticised for being nothing but a German variant of neo-liberal thinking.[22] The ordoliberal approach also did not provide a viable explanation of how a sufficient market order could be constructed.[23] Others soon followed, trying to provide a better explanation for the weaknesses of this initial attempt.

II. More Economic Approach

This first approach was quickly softened by a second, economic approach, which upheld the former but put public good regulation and national private law on an equal footing.[24] This approach could be viewed as a bridge between the strict separation approach and subsequent discussions, rather than as a distinct phase.

With its foundations in the works of Manne the alike,[25] this second approach was also praised for being more logical and persuasive

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20 In extenso Franz Böhm, "Privatgesellschaft und Marktwirtschaft", *ORDO*, 1966, 75-150.

21 See Stefan Grundmann, *Privatrecht und Regulierung* in H. G. Grigoleit and J. Petersen (eds.): *Privatrechtsdogmatik im 21. Jahrhundert: Festschrift für Claus-Wilhelm Canaris zum 80. Geburtstag*, De Gruyter, 2017, 907-948, s. 918.

22 A so-called *Sonderweg*.

23 Grundmann, Privatrecht und Regulierung, s. 919, 920.

24 In extenso ibid, 920 et seq.

25 See for example Henry Manne, "Insider Trading and the Stock Market", *The Free Press*, 1966, 76–91.

than the first.[26] However, its application to certain specific concerns also seemed troublesome. For example, according to the more economic approach, an anti-competitive practice could only be prohibited if its disadvantages for the general welfare outweighed its advantages, *de facto* paving the way for monopolies and cartels in a given market.[27] Thus it seemed not viable to separate the public interest from the protection of the individual.

III. Embedding (Integration) Approach

With the third phase, the general view began to change fundamentally. According to the embedding approach, public regulation and national private law could not be seen as separate paths, since the two strongly influenced each other.[28] According to George Akerlof, for example, information asymmetries in a given market endangered not only the interests of individuals but also the market as a whole.[29]

His famous example was the used car market. According to Akerlof, the fact that the seller of a used car with problems (a lemon)[30] knows that his car lacks the necessary quality, but the buyer does not, leads to more problems than just damaging that particular buyer.

The existence of *lemons* could lead to a shortage of quality used cars eventually, as sellers with good cars might feel that their cars are not getting their value, since the cost of the defective cars is more or less the same. So, they would withdraw such vehicles from the market, which would lead to adverse selection eventually and could even lead to the collapse of this particular market altogether.[31] Thus, the information

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26 Grundmann, Privatrecht und Regulierung, s. 924, 925.

27 Ibid, s. 925.

28 In extenso ibid, s. 926 et seq.

29 See George Akerlof, "The Market for 'Lemons': Quality Uncertainty and the Market Mechanism", *Quarterly Journal of Economics,* Volume: 84(3), 488–500, 1970.

30 Lemon is used as an American slang for such cars, hence the name of the essay.

31 Akerlof, s. 490, 493 et seq.

asymmetries that at first sight might only appear to harm individual buyers could, given enough time and repetition, damage the whole market irreversibly.

This economic theory also strongly influenced the third approach, which saw the regulation of the public good and the rights of individuals under national law not as separate but as complementary.

IV. Harmonization Approach and The Importance of The ECJ Decision

Since the turn of the millennium, the rulings of the European Court of Justice and the legal literature have taken a softer, more harmonious approach. Initially, the so-called Courage decision mainly influenced discussions on antitrust law.[32]

It is at this point that the most recent ECJ decision becomes central, as it turns the discussion towards this fourth approach. National private law and public good regulation should not be seen as separate paths, not as either/or legislations, but rather as complementary.[33] In cases where European legislation lacks individual protection, general rules of national private law such as §§ 823(2)[34] or 311(2)[35] or 119 et seq. BGB[36] should be considered to fill the gap and provide such protection.[37]

This paper also follows the fourth approach in similar cases, which grants individual claims notwithstanding the European legal situation prevailing at the relevant time. Given the tendency to follow European legislation as part of the process of modernising national

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32 ECJ, Case 453/99 Courage v Bernard Crehan [2001] ECR 2001 I-06297.

33 Stefan Grundmann, "European Private Law and EU Regulation", Pending for publication at *ERCL (European Review of Contract Law*), De Gruyter, 2024, s. 20 et seq.

34 Tort law under § 49(1) TBK.

35 Culpa in contrahendo within § 2 TMK (Turkish Civil Code).

36 Voidability under §§ 30 et seq. TBK.

37 ECJ, Case 100/21 QB v Mercedes-Benz Group AG, formerly Daimler AG from 21.3.2023, par. 85, 88.

private law, the Turkish academic literature and the decisions of Yargıtay may see some changes coming in the future.[38]

C. A New Era in European Law

The resonance of the ECJ decision has already had an impact on European and German contract law. Amid the proceedings, Art. 11a was added to the Unfair Commercial Practices Directive 2005/29,[39] encouraging member states to grant individual rights to consumers in cases of unfair commercial practices. According to the newly added Art. 11a, consumers harmed by unfair commercial practices shall have access to proportionate and effective remedies, including compensation for the damage suffered and, where relevant, a price reduction or the contract's termination. Member States may determine the conditions of application and effects of these remedies. Member States may, where appropriate, take into account the seriousness and nature of the unfair commercial practice, the damage suffered by the consumer and other relevant circumstances. Art. 11a (2) also states that these remedies shall be without prejudice to the application of other remedies available to consumers under Union or national law.[40]

I. What's New for Germany?

Following this amendment, the German Unfair Competition Act (UWG) was also changed in 2022 and an individual remedy was added under § 9(2) UWG.[41] § 9(2) UWG states that whoever intentionally or negligently[42] engages in an unlawful commercial practice within the

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38 See also section C-II.

39 Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 Concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market.

40 See in extenso Köhler/Bornkamm/Feddersen/*Köhler*, 42. Edition, 2024, UWG § 9 mn. 2.2 et seq.

41 See ibid, mn. 2.5 et seq.

42 This refers to the liability rule in § 276(2) BGB. According to § 276(2) BGB, anyone who acts negligently and fails to exercise the diligence required in proper business conduct is liable for the damage caused.

meaning of § 3[43] and thereby induces consumers to take a transactional decision which they would not have taken otherwise, is obliged to compensate for the damage resulting therefrom. This means that an individual claim will also be granted in such cases as Mercedes' thermal windows, regardless of whether or not the European regulation grants such an individual claim within its own scope. The decision of the ECJ and the underlying discussions on individual protection have thus changed German private law permanently.

II. Possible Implications for Turkish Law

The Turkish Unfair Commercial Practices Law could also undergo some changes after the Mercedes decision. As it stands, the regulation of unfair practices in Türkiye has three main pillars: the general rule pursuant to § 57 TBK (Turkish Code of Obligations) and the specific prohibitions and claims under §§ 54 et seq. of TTK (Turkish Commercial Code) and § 62 TKHK (Turkish Consumer Protection Code). The claims under §§ 54 et seq. TTK are not only reserved and cited by § 57(2) TBK for commercial transactions, but also have priority over the general rule: *lex specialis derogat legi generali*.[44] This is because the TTK has priority in cases involving commercial transactions and the TKHK has priority in cases against consumers against the general provisions of TMK (Turkish Civil Code) and TBK. As a result, the general rule on unfair commercial practices under § 57 TBK does not apply to *almost*[45] any transaction.[46]

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43 According to § 3(2) UWG commercial practices targeting or reaching consumers are unfair if they are not in compliance with the requirements of professional diligence and are suited to materially distorting the economic behaviour of consumers.

44 The same rule applies to § 62 TKHK against the TBK as well.

45 For a rather exceptional case, compare Yargıtay, 11th Civil Chamber, Decision of: 3.5.2017, E: 2016/2973, K: 2017/2585. The dispute in this case was between two competing booksellers who sold books to police candidates from a bookstand near a police academy.

46 See also Asena Sinanoğlu, "Saldırgan Ticari Uygulamaların Tüketici Hukukunda İncelenmesi Ve Konunun Haksız Rekabet Boyutu", *İnönü Üniversitesi Hukuk Fakültesi Dergisi,* Volume: 13(1), 1-15, 2022, s. 4, 5.

Since its enforcement in 2012, § 56(2) TTK grants individual claims to all customers.[47] According to § 56(2) TTK, customers whose economic interests have been damaged or who may be threatened with such damage may also bring an action under § 56(1) TTK but may not demand the destruction of equipment and goods.[48]

It is safe to say that the TTK granted individual claims in cases of unfair commercial practices long before its German counterpart decided to do so. It also has a broader scope of application, i.e., it covers not only consumer claims but also other possible claims where the counterparty who is subject to unfair commercial practices is not a consumer within the meaning of § 3(1)(k) TKHK.[49]

Furthermore, § 56(2) of the TTK is not limited to compensation claims, which would only apply in the case of fault, but grants the customer further legal entitlements, such as the termination of the unfair practice under § 56(1)(b) TTK[50] or a declaratory judgement under § 56(1)(a) TTK[51] or even compensation for foregone profits[52] according to § 56(1) sent. 2 TTK.

However, it lacks an essential feature in that it does not provide for specific infringement remedies vis-à-vis the consumer, as is the case, for example, in § 3 UWG. For example, the nudging of the consumer is always unfair according to the UWG, as it is part of the appendix to § 3(3) UWG,[53] thus it is categorically prohibited.[54] This is where the

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47 Not only consumers as in the UWG but also all customers.

48 This also includes compensation under § 56(1)(d) TTK.

49 There it says: Ekonomik çıkarları zarar gören veya böyle bir tehlikeyle karşılaşabilecek *müşteriler* de birinci fıkradaki davaları açabilirler, ancak araçların ve malların imhasını isteyemezler (*Customers* whose economic interests have been damaged or who may face such a danger may also bring proceedings under the first paragraph but may not request the destruction of vehicles and goods).

50 Haksız Rekabetin Men'i.

51 Fiilin Haksız Olup Olmadığının Tespiti.

52 Yoksun Kalınan Kazanç.

53 List of prohibited acts against consumers.

provisions of the TKHK should come in, but this opens up new debates rather than providing answers.

The nexus between TTK and TKHK is also unclear in this context, as it is not entirely settled whether TTK or TKHK should primarily apply to cases where only one party to the contract is a merchant and the other a consumer.[55] Yargıtay considers such cases to be mainly of a consumer law nature, thus excluding the expertise of commercial courts altogether.[56] The problem is further exacerbated by the fact that § 62(1) TKHK prohibits unfair commercial practices against the consumer but does not provide for an individual remedy against such instances. In other words, consumer courts or consumer arbitration committees[57] have to take the relevant provisions from §§ 54 et seq. TTK or general provisions. Such a discrepancy might also have other disadvantages for the consumer, e.g., by denying him access to remedies which he would normally have had under commercial norms, which is also contrary to the very nature and the core meaning of consumer law and thus of the TKHK.[58]

Overall, all three pillars appear to be problematic from different perspectives. § 57 TBK has no practical use, § 56(2) has the tools to protect the consumer but has no settled area of application, and § 62 TKHK has indeed application but not enough tools and expertise due to the shortcomings of the arbitration committees. Here, a dysfunctional

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54 The wording of Nr. 31 is as follows: Making the false statement, or creating the false impression, that the consumer has already won, or will win a prize, or that the consumer will win a prize or other equivalent benefit subject to a specific act if a) there is in fact no such prize to win or other equivalent benefit or b) the possibility of winning such a prize or other equivalent benefit is made dependent on payment of a sum of money or incurring costs.

55 Typical B2C transactions.

56 For an example see Şafak Narbay/Muhammed Akkuş, "Ticari İş Ve Tüketici İşlemi Kavramları Ekseninde Görevli Mahkeme Ve Dava Şartı Arabuluculuk Üzerine Düşünceler", Türkiye Adalet Akademisi Dergisi, Year: 11, Volume: 44, 301–333, 2020, s. 323,

57 Tüketici Hakem Heyetleri.

58 Compare Şafak Narbay/Muhammed Akkuş, s. 324.

interrelation emerges, where those with competence do not have expertise, and those with expertise do not have competence. A possible solution seems to be to apply § 4 TTK in this case and to accept such transactions as a commercial practice as well, hence giving the commercial courts competence.[59] Yargıtay amending its approach on similar cases could also prove to be moving forward.

Another option would be to amend the TKHK and include claims similar to those of the TTK directly in the TKHK. However, although debatable,[60] even in cases where the consumer courts have authority, the rules of the TTK might also apply. The main question at this point is whether the TTK has a complementary role in cases where the TKHK is primarily applicable, or in other words, whether the TTK is a general act corresponding to the provisions of the TKHK. § 83(1) TKHK states that in cases where there is no provision in TKHK, general provisions shall apply. General provisions are primarily considered to be the statutes of the TMK and the TTK.[61]

However, § 83(2) then states the following: The fact that there are provisions in other acts governing transactions in which one of the parties is a consumer shall not prevent the transaction from being regarded as a consumer transaction and the provisions of this Act regarding duty and authorisation shall not apply. The reasonable approach would therefore be to examine each case on its own merits and see whether there are other provisions in codes such as TTK. In this context, the provisions of the TKHK on unfair commercial practices cannot be considered separately from the provisions of the TTK.

This paper argues that even if the case itself is accepted as a consumer transaction, §§ 54 et seq. TKHK would still be applicable by virtue of § 83 TKHK. In unfair practices against the consumer, the rules of TTK and TKHK are complementary.[62] Therefore, this second option to

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59 Ibid, s. 328 et seq.

60 See for a similar criticism ibid, especially s. 329.

61 See also the preamble to § 83 TKHK.

62 Compare Ebru Ceylan, "Tüketici Hukukunda Haksız Ticari Uygulamalar Ve Uygulama Örnekleri", *Uyuşmazlık Mahkemesi Dergisi*, 123-147, 2020, s. 132.

amend TKHK accordingly seems to be a last resort if nothing else succeeds.

Irrespective of this discourse from the topic, the Turkish Unfair Commercial Practices Law could also undergo some changes after the Mercedes decision, especially in the way the courts share authority. A wave of compensation claims for similar cars could also arise in the future in Türkiye, whether within the scope of §§ 54 et seq. TTK or general provisions such as tort law under § 49 et seq. TBK.

D. Concluding Remarks in Theses

- In the case of QB v Mercedes AG, the LG Ravensburg sought the help of the ECJ to determine whether the plaintiff had access to compensation under § 823(2) BGB, a type of claim typically prohibited by the BGH.

- The ECJ decision on the case allowed individual compensation claims for breach of Regulation 2007/715, which itself does not allow such a claim.

- Amidst the discussions, an Art. 11a was added to the Unfair Commercial Practices Directive, encouraging Member States to allow individual redress for breach of European law without prejudice to other European/national claims.

- This set of developments has an underpinning significance that touches on an ongoing debate about the interplay between public interest regulation and Member States' national private law.

- Enhanced is the view that the two should not be seen as either/or, but rather as mutually complementary.

- Such developments could also have an indirect impact on Turkish private law and especially on the law against unfair practices. It would be necessary to reassess the relationship between the three pillars of the law against unfair practices, the TBK, the TTK and the TKHK.

- To avoid any possible confusion, it seems to be the appropriate solution to give the commercial courts and the provisions of

TTK against unfair commercial practices the primary authority over similar cases.

- In cases where the counterparty is a consumer, the provisions of TKHK and TTK against unfair commercial practices should apply complementarily. If this person is not a consumer, then the provisions of TTK should apply exclusively.

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ÖZET

Avrupa Adalet Divanı (AAD), 21.3.2023 tarihli QB v Mercedes AG kararında, Mercedes marka araçların motorlarına takılan ve dış hava sıcaklığı belirli dereceler arasında olduğunda emisyonları azaltmak üzere tasarlanan bir termal cihazın neden olduğu zarar için davacıya tazminat ödenmesine hükmetmiştir.

Dava, Alman LG Ravensburg Mahkemesi tarafından iki ana soruyla AAD'ye havale edilmişti; bunlardan ilki ve esas olanı, söz konusu düzenlemenin bireyleri de korumayı amaçlayıp amaçlamadığı ve dolayısıyla onlara tazminat hakkı verip vermediğiydi. Mahkeme'nin kararı ve karar gerekçesi, altmışlı yılların ortalarından beri tartışma konusu olan Avrupa kamu yararı düzenlemesi ile ulusal özel hukuktan doğan bireysel haklar arasındaki ilişkinin temellerini sarsmıştır. Karar, milenyumun başından bu yana ivme kazanmakta olan yeni, hafif regülasyon temelli bir yaklaşımı takip etmektedir. Buna göre, ilgili andaki kanuni durumdan bağımsız olarak AB hukukunun ihlali halinde bireysel taleplere izin verilmeli ve üye devletler bu noktada teşvik edilmelidir. Mahkemeye göre, Avrupa Hukuku'nun kişisel korumayı sağlamakta eksik kaldığı noktada üye ülkelerin iç özel hukuku devreye girmeli ve kişilere, kolayca uygulanabilir ve hakkaniyetli en az bir hukuki koruma hakkı sağlamalıdır. Bu yönüyle AAD Mercedes kararı hem tarihsel hem güncel hukuki bağlamda incelenmelidir.

Bahsi geçen tartışma, Avrupa Birliği hukuku ile iç özel hukuk mekanizmalarının ne derece çatıştığı/ne derece dayanıştığı, bir başka deyişle, regülasyon ile bireysel koruma amaçlı iç hukukun arasındaki ilişkinin tam olarak ne olduğudur. Ordoliberal görüş, bu ikisini birbirinden tamamen ayırmakta ve dolayısıyla bireysel ihlaller sebebiyle doğrudan Avrupa regülasyonu kaynaklı bir talep hakkını reddetmektedir. Takip eden ekonomik görüşe göre de bu ikisi birbirinden ayrıdır; ancak Ordoliberal görüşten farklı olarak, bu görüş en azından iki motivasyonu (bireyin korunması ve kamu yararının gözetilmesi) aynı düzeyde kabul etmektedir. George Akerlof gibi ekonomistlerin başını çektiği entegrasyon görüşüne göre ise bireyin korunması olmaksızın kamu yararına ulaşılması da zaten imkânsız olduğundan, bu ikisi birbirinden ayrı görülemez, tersine birbirini destekler. Sonuç olarak, kendisini

bu üçüncü görüş üzerine bina eden harmonizasyon görüşü, regülasyonun yalnızca gerekli olan yerde yapılmasını, Avrupa Birliği hukuku ve iç özel hukukun birbirini boşluk halinde tamamlaması gerektiğini savunur. AAD'nin son 20 yıllık içtihadı da bu görüşü güçlendirir niteliktedir. Bu noktada, Mercedes kararı da büyük önem kazanmaktadır, zira AAD ilk defa, bu tartışmaya dair tarafını bu kadar net ifadelerle belirtmiştir.

Bu durum, Avrupa ve Alman hukukunu çoktan kanun düzeyinde etkilemiş, Avrupa düzeyinde Haksız Rekabet Direktifi'ne (2005/29) eklenen 11a maddesi ve devamında Almanya'da Haksız Rekabete Karşı Kanun'a (UWG) eklenen 9(2) maddesi, haksız ticari uygulamalar aleyhinde tüketicinin korunmasını bizzat lafız altına almıştır. Bu düzenlemeler ve düzenlemelere ilham veren karar, Türk hukuku bakımından da sonuçlar doğurma potansiyeline sahiptir.

Öncelikle, Türk hukukunda, belki de biraz gereksiz şekilde karmaşık düzenlenmiş olan ve üç kaynaktan (TBK madde 57, TTK madde 54 vd. ve TKHK madde 62) beslenen haksız rekabet düzenlemesini gözden geçirme ihtiyacı doğurabilir. Zira şu anki haliyle, genel hüküm olması ve ticari işlere uygulanmaması sebebiyle TBK, Yargıtay'ın bir tarafı tüketici bir tarafı tacir olan işleri tüketici işi sayma ve görevi Tüketici Mahkemelerine (ve dolayısıyla Tüketici Hakem Heyetleri'ne) verme eğiliminden dolayı da TTK hükümleri yeterli uygulama alanı bulamamaktadır. Oysaki özellikle TTK hükümleri bireysel koruma anlamında oldukça geniş kapsamlı düzenlemeler getirmekte, Alman Hukuku'nda yeni tanınan tazminat talebinin yanında tespit davası ve men davası gibi haklar da tanımaktadır. Bu sebeple, elde bulunan TTK düzenlemesi bireysel koruma için fazlasıyla yeterlidir.

Bu noktada, Yargıtay'ın ilgili konulardaki içtihadını gözden geçirmesi, bu olmayacaksa, TKHK kapsamına da doğrudan TTK gibi bireysel taleplerin eklenmesi de gündeme gelebilir. Ancak, bu olmasa bile, TTK ve TKHK'nın getirdiği haksız rekabet hükümlerinin beraber uygulanmasında bir sakınca bulunmamaktadır. Zira tüketici aleyhine olacak şekilde rekabetin engellendiği hallerde, her iki kanunun da korumasına başvurulabilir. Bu iki ihtimalin de atlandığı durumda, TBK'nın haksız fiil hükümleri kapsamında da hukuki koruma sağlanabilir. Her halükârda, 2016'da Volkswagen kararının devamında da olduğu gibi, bir dizi tazminat talebini ülkemizde de beklemek mümkün görünmektedir.

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