European Perspectives on Producers’ Liability

Direct Producers’ Liability for Non-conformity and the Sellers’ Right of Redress

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Third Persons' Liability for Non-conformity in Sales Contracts and Sellers' Right of Redress in Turkey

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A. An Overview of Turkish Sales Law

Turkish sales law regarding moveables is governed by Art. 182-213 of the Turkish Code of Obligations (CO).\(^1\) But there are also special provisions in the Turkish Commercial Code regarding certain aspects of commercial sales (Art. 23 ComC) and in the Turkish Code of Consumer Protection regarding consumer sales (Art. 4 CCP). Among these regulations only Art. 4 CCP includes a direct producers' liability. This means that only in connection to a sales agreement where one of the parties is acting for purposes relating to its trade or profession and the other party is not (B2C transaction), can a direct claim be made against the producer and, as will be seen below, against other intermediaries in the sales chain. In case of B2B or C2C sales the buyer can use its rights solely against the seller. Therefore, with regard to direct producers' liability this paper will focus primarily on consumer sales and will refer to the provisions of the Code of Obligations only as far as they are applicable to consumer sales.\(^2\)

Turkish law, however, does not provide any special provisions regarding the final sellers' (or any intermediaries) right of redress in case it is held liable under a sales contract for lack of conformity, which it did not cause. The final seller therefore will only be able to resort to those rights it is granted under its own sales agreement with the previous seller in the distribution chain. According to the nature of the contract, either the provisions of the Code of Obligation will find exclusive application or, in cases where both parties are merchants, together with Art. 25 of the Commercial Code.

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\(^1\) The author wishes to sincerely thank her assistant Kadır Berk Kopancı who was so kind to read and summarise 125 unpublished decisions given by first instance specialised Consumer Courts seated in Istanbul and 55 published decisions of the Court of Appeal (Yargıtay). This information provided substantial material about the relevance of the direct claim against producers. The results of this study are analysed below.

\(^2\) The Turkish Code of Obligations was introduced in 1926 and is, except for minor differences, a literal translation of the Swiss Code of Obligations (CO). In this paper the relevant Articles of the Swiss Code will be given in brackets. The English translation of the relevant provisions was taken from: Swiss Code of Obligations, Vol. I, Contract Law, Art. 1-551, Swiss Chamber of Commerce, 2002. Regarding the history of reception in Turkey see Atamer, Rezeption und Weiterentwicklung des Schweizerischen Zivilgesetzbuches in der Türkei, Rabbel's Zeitschrift für ausländisches und internationales Privatrecht (RabbelZ) 2008, 723 et seq.

\(^3\) Art. 30 CCP is referring for all matters not covered by the Code of Consumer Protection to the general provisions of the Code of Obligations.
B. The Adoption of the Consumer Protection Acquis in Turkey

Turkey introduced its first Code of Consumer Protection and related bylaws in March 1995 with view to establishing a Customs Union with the European Union (EU). The main aim of the Code was the implementation of the directives that had been issued by the European Union in the area of consumer protection. In 1999, with recognition of its status as a candidate country for full membership in the EU, Turkey further obliged itself to comply with the so-called Copenhagen criteria and to adopt the acquis communautaire in full. In order to fulfill this commitment, Turkey issued an almost 900 page long National Programme in 2002 and within this framework instituted some major changes to the CCP. Yet, this was not the end to Turkish endeavors to bring its consumer law in line with EU law. In 2005 the "EU Twinning Project for Strengthening of the Capacity of Turkey in its Efforts in the Full Alignment, Enforcement and Implementation of Consumer Protection between the Turkish Ministry of Industry and Trade and the German Ministry of Consumer Protection, Food and Agriculture" was launched and the Code, as well as all the bylaws, was revised. Discussions on a new, improved draft of the CCP began on 3 March 2006.6

C. Development of the Special Provisions Regarding Consumer Sales

I. In General

The first special provision regarding consumer sales (Art. 4) was introduced in 1995 along with the CCP, although the topic at that time was not yet covered by EU legislation. The main reasons for this were the inadequate provisions of the Turkish Code of Obligations regarding warranty in sales contracts; the right of the buyer to ask for reparation was not provided for and the statute of limitation was only one year (Art. 207 tCO/Art. 210 sCO).

Additionally, Art. 198 tCO (Art. 201 sCO) stipulated a duty to examine goods delivered, which did not seem appropriate for consumer sales.8 Art. 4 of the Code mainly adopted a more detailed definition of conformity with the contract, described the rights of the consumer in case of non-conformity, and extended the limitation period and the scope of persons liable for these claims. The provision was later revised in 2003, partly with a view to adjusting to the Directive 99/44 on consumer sales. Although the structure of the article was kept, changes with respect to the definition of non-conformity and also to the circle of persons liable were adopted; this is also true for the 2008 proposal. In order to give an accurate picture of the developments all three versions of Art. 4 CCP will be discussed below.

Some problems related to the drafting of the CCP in general and Art. 4 should be particularly stressed here. The Turkish Ministry for Industry and Trade, which is in charge of preparing consumer legislation, was not assisted by lawyers during the process of drafting the 1995 Code. This had major repercussions on the wording, systematic and methodology of the Code, which becomes manifest, specifically in relation to the sales provisions. It has led, for example, to the peculiar situation in which the legislator tried to regulate not only consumer sales in Art. 4 but also the liability of the producer for defective goods (Directive 85/374). The division between the tort-based liability of the producer for damages occurring due to defective production and the contract based liability of the seller for non-contract conform delivery were confused. This mistake in conception also underlies the provisions regarding direct producer liability and is therefore important in understanding some of the provisions of the Code which will be discussed below.

II. Definition of Non-conformity

According to Art. 4(1) of the CCP (1995) lack of conformity was given in the following case:

"Goods or services which are not in accordance with the quality or quantity which is specified on the packaging, labelling, presentation or operating instructions, or declared by the seller or established in its standards, or goods which contain material, legal or economic deficiencies decreasing or eliminating its value with respect to its fitness regarding its intended use or with respect to the benefits expected by the consumer shall be deemed goods or services which are not in conformity with the contract."9

As the definition shows, goods had to comply with objective standards, meaning that they had to show the qualifications of goods of the same type and be fit for the ordinary use of...
these goods. Moreover, they also had to fulfill the subjective criteria, that is to say, the criteria contractually agreed upon that were determined taking into account the statements of the seller and/or the producer. Although advertisements made by the producer were not covered by this provision, public statements on the package, label or in instruction manuals were decisive in the 1995 Code and interpreted as express warranties also from the seller. With the changes introduced in 2003 the wording of Art. 4 CCP became as follows:

“1) Goods which are not in accordance with the quality or the quantity affecting its quality, specified on the packaging, labelling, presentation or operating instructions, or in the advertisements or announcements, or declarations by the seller or which are established in the standards or technical regulations, or goods which contain material, legal or economic deficiencies decreasing or eliminating their value with respect to their fitness regarding their intended use or with respect to the benefits expected by the consumer shall be deemed goods which are not in conformity with the contract.”

The new provision now specifically includes every kind of advertisement or other forms of public statements and therefore conforms with the requirements of the Directive 99/44. The 2008 proposal does not make any major changes to this wording.

III. Consumer Claims in Case of Non-conformity

Seller’s liability for non-conformity is strict; this is true for consumer sales as well as for all other sales types regulated in the Code of Obligations.11 It is therefore not a prerequisite that the seller acts negligently. Art. 4 CCP (2003) stresses this with its formulation that “missing knowledge about the lack of conformity does not exempt from liability.”12 This constitutes an exception under Turkish contract law. The general rule for non-performance is fault based liability (Art. 96 tCO/Art. 97 sCO), yet the burden of proof is inverse: the obligor has to prove that no fault is attributable to him.

In the 1995 version of Art. 4 CCP, the consumer was given four rights among which it could choose freely in case goods did not conform to the contract. These rights were repair, replacement, reduction of the purchase price and rescission. The Code did not introduce a sequence between those choices. The 2003 changes and the 2008 Draft deliberately did not take over the two-layer system of Art. 3 of the Directive, as this was believed to be too restrictive on the consumer; therefore, the consumer may immediately choose to rescind the contract or ask for reduction.

Art. 4 of the CCP does not state exceptions to the free choice of the consumer and the applicability of the exceptions provided in the Code of Obligations is debated.13 Regardless, the general defence of Art. 2(2) Turkish Civil Code stating that “the manifest abuse of a right is not protected by law” is also applicable to consumer sales, preventing the election of a certain remedy if special circumstances are given. The 2008 Draft, on the other hand, includes the exception of Art. 3(3) Directive 99/44, expressly giving the seller a defence in case repair or replacement are impossible or disproportionate.

It is not apparent from Art. 4 CCP (2003) if expectation damages, aside from the four elective rights, can also be asserted against the seller. The current wording of Art. 4 CCP mentions a damages claim only in relation to the indemnity interest of the consumer.14 However, this lacuna can be filled via Art. 30 of the CCP (2003), which refers all matters not covered by the Code to provisions of the Code of Obligations. The consumer will therefore have a damages claim against the seller based on the relevant articles of the Code of Obligations.15

IV. Prerequisites of a Claim

A claim for non-conformity will only be granted if at the time of conclusion of the contract the consumer was not aware and could also reasonably not be aware of the lack of conformity. Otherwise it will be presumed the consumer has accepted the goods in the condition in which they are delivered.

In order for the consumer’s claims to be accepted, non-conformity has to exist at the moment when risk passes to the consumer.16 The CCP offers no special provision regarding this issue, thus Art. 183 tCO (Art. 185 sCO) is applicable17 therefore, “unless special circumstances or agreements lead to an exception, benefit and risk with regard to the object of the purchase pass to the buyer upon conclusion of the contract.”18 This can cause difficulties under the Consumer Sales Directive. Although the Directive does not specify what the exact moment for the passing of risk, the moment according to which non-conformity has to be judged is the moment of delivery (Art. 3(1) Directive 99/44), which can be later than the conclusion of the contract. The easiest way to solve this problem is to subsume consumer sales contracts under the “special circumstances” mentioned in Art. 183 tCO and therefore to accept that risk passes with delivery and not already with the conclusion of the contract.

11 Art. 4(2), 4th sentence CCP reads as follows: “In addition to this right of election, the consumer shall also be entitled to claim damages from the producer, in the event that the non-conforming good causes death and/or injury and/or harm to other goods used.” Cf. for the changes in the formulation of the CCP regarding the damages claim below E.I.
12 Cf. for the damages claim below E.II.
14 Art. 30 CCP (op. cit. fn. 2).
Under current legislation the consumer must notify the seller within thirty days of delivery of the existence of any non-conformity (Art. 4(2) CCP). If the consumer misses this period it loses its rights against the seller. However, this provision should be interpreted very strictly due to the fact that it does not comply with Art. 5(2) of Directive 99/44, which foresees that a notification period should not be less than two months and should commence from the moment of detection of such non-conformity. The thirty day period should therefore only find application for non-conformities that are easily identifiable at the moment of delivery. For any other non-conformity, the notification duty will only start with the moment of detection. The 2008 Draft abrogates the consumer’s notification duty in full.

V. Time Limit

The limitation period for the liability of the seller is two years from the moment of delivery (Art. 4(4) CCP). Should the seller wilfully deceive the consumer regarding non-conformity of the goods, the expiration of the limitation period cannot be invoked. In such cases the general limitation period, which is ten years for contractual claims (Art. 125 TCC/Art. 127 sCO), is applicable. Neither the 2003 changes nor the 2008 Draft made any alterations to this time period.

D. Guarantees

With the enactment of the Code of Consumer Protection of 1995 consumer sales contracts were not only regulated for the first time but also consumer guarantees (Art. 13 CCP). This provision imposed on producers and importers of certain industrial goods20 the duty to issue guarantees with a specified content. In this regard there is quite a difference to the voluntary commercial guarantee approach provided under the Directive. Nevertheless, in the revision of 2003 this provision was maintained although harmonisation with the Consumer Sales Directive was envisaged.

For the guarantee to become effective the seller is obliged to complete a document, which is pre-printed and issued by the producer, providing the date and invoice number regarding the sales contract and to furnish this to the consumer (Art. 13(3) CCP). The Code does not specify if the mere statement on the document is enough to constitute a guarantee. However, the contractual approach based on the presumption that the consumer implicitly accepts a guarantee should be applicable in such cases. The seller will be deemed to be acting as an agent of the producer or importer.21

20 Cf. e.g. Aslan (op. cit. fn. 13), 140-141; Zevdiller/Aydagibi, Tüketicinin Korunması Haklari (Consumer Protection Law), 3rd ed., Ankara 2004, 121.

21 This provision is modelled on Art. 207(2) TCC (Art. 210(3) sCO).


23 These goods are listed by the Ministry of Industry and Trade in the Annex to the Decree Regarding the Implementation of Guarantee Certificates (RG 14.06.2003 axv 25138) and revised if needed.

24 Cf. e.g. Serenoglu (op. cit. fn. 16), 144.

The terms “producer” and “importer” are defined in Art. 3 CCP, which is a general provision containing definitions of terms used in the Code. According to the 1995 version producer means the producer of a finished product, of any raw material or of a component part. Since the 2003 changes to the CCP, any other person who offers goods for sales after putting its distinguishing feature, trademark or other name on the product is also considered to be the producer. The importer is a person who imports finished products, raw material or any component part to Turkey and offers them for sale.

It is explained in the complementary Decree27 issued based on Art. 13 CCP, exactly what a guarantee statement must tender the consumer. According to Art. 4(g) of this Decree:

"Guarantee certificate means a certificate drawn up for goods sold, manufactured and/or imported by producers or importers, in which repair, free replacement, price reimbursement or reduction are undertaken for at least two years (...) in case a non-conformity occurs within the period of guarantee."

The prerequisite for liability under a guarantee is non-conformity of goods. Non-conformity must be understood as defined in Art. 4 of the CCP. The question of at what moment non-conformity has to be existent is not raised in either the CCP or in the Decree. In case of commercial (voluntary) guarantees it is accepted that the guarantee may also be liable for non-conformities which only arise after the moment of delivery. This depends on the coverage of the guarantee. With regard to the obligatory guarantee of Art. 13 CCP, it should be assumed that the guarantor is liable only for non-conformities which were existent at the moment of delivery regardless of the fact that they might become apparent later. The guarantee is valid for at least two years from the moment of delivery of goods to the consumer (Art. 13 CCP).

The Code, read together with the Decree, practically endows the consumer with all four rights it would normally have only against the seller. But the structure of the Decree, which first analyses the right to repair (Art. 13) and then discusses the option to use the other three rights depending on the failure of repair (Art. 14), shows that the obligatory guarantee channels the consumer to the right of repair and provides the other rights only if repair is unsuccessful. As there are no special provisions regarding damages claims of consumers, which might accompany one of the elective claims, it must be inferred that this is not covered by the compulsory guarantee.

Certainly every producer or importer should be free to provide a commercial guarantee e.g. for marketing purposes. However, in the author’s view it goes much too far to oblige all those producing or importing goods, which are listed by the Ministry, to issue such a guarantee. The rationality of this decision by the Turkish Parliament is further called into doubt as direct producers’ liability was introduced with the Code of 1995 – as will be seen below. Direct producers’ liability means that consumers can enforce all four rights against


26 Cf. above fn. 22.

27 Ersoz (op. cit. fn. 16), 144; Arslan, Boylular Haklari, Ozel Boru Ilkikleri (Law Obligations, Special Provisions), 7th ed., Ankara 2007, 144-145.
the producer. An extra guarantee statement therefore does not make sense and can only be explained by a lack of methodology and an overprotective approach in regard to consumer issues by those who drafted the Code.

In the 2008 proposal the concept of compulsory guarantees has been abandoned and a provision regarding voluntary commercial guarantees was introduced instead (Art. 4/B). This article mainly reproduces the relevant statements of Art. 6 of Directive 99/44. It is therefore left to the discretion of the guarantor as to what kind of rights it will grant the consumer and for which period. The provision only underlines that the guarantee is binding regarding conditions expressly laid down and concerning all associated advertisements. Additionally, some information duties are imposed on the guarantor, in particular the requirement that the guarantor must declare in its statement that the consumer’s warranty rights under the sale contract are not affected by the guarantee.

E. Liability of Third Persons alongside the Seller in Case of Contractual Non-conformity

I. In General

Art. 4 of CCP (1995) introduced, for the first time, a special provision about the liability of the producer and the intermediaries regarding the consumer’s elective rights and for damages evoked by non-conforming goods. According to paragraph 3 of Art. 4:

“The seller, dealer, agent, producer and importer are jointly and severally liable for the non-conformity of the goods and/or for any damage caused by the non-conforming goods.”

The roots of this provision were not made clear in the legislative history of the Code, nor was any explanation given regarding the scope of application. The provision was problematic from several points of view: firstly it introduced a claim against third parties who were not party to the contract; this was certainly a major novelty as the Turkish contract law works with the principle of privy of contracts.28 On the other hand, it also seemed to regulate a separate product liability claim for damages, but the wording was far too vague and the division between the contractual claim and the tort based claim was not clear.

Strangely enough there was no debate in the Turkish literature regarding this new option for the consumer to enforce its elective rights against third parties and it was mostly acknowledged as a medium to better protect consumers.29 The debate concentrated much more on the interpretation of the term “damage” and whether it should be understood to cover only losses incurred due to non-performance of the sales contract (expectation interest), or also cover damage related to death or personal injuries caused by the non-conforming goods (indemnity interest). In the literature both views were expressed30 while the Court of Appeals rejected successive producer liability claims under Art. 4 CCP (1995).31

With the revision in 2003 the wording of Art. 4 changed and some clarity was provided:

“(2) The consumer shall notify the seller of the non-conformity within 30 days following the date of delivery of the product. In such case, the consumer shall be entitled to rescind the contract with a refund, or demand the replacement of the good with a contract conform one, or a reduction of the price proportional to the non-conformity, or free of charge repair. The seller is obliged to comply with the consumer’s choice of remedy. In addition to this right of election, the consumer shall also be entitled to claim damages from the producer, in the event that the non-conforming good causes death and/or injury and/or harm to other goods used.

(3) The producer, seller, dealer, agent, importer and creditor, who grant a credit in accordance with Subsection 5 of Article 10, shall be jointly and severally liable for the non-conforming good and the consumer’s right of election provided for in this Article.”

The new formulation made it unambiguous that every seller in the distribution chain can be subject to the four rights given to the consumer, but only the producer can be held liable for personal damage or damage to goods other than the one sold. In this way the tort-based claim was, at least in wording, separated from the contract-based claim, but the misconception that product liability is an issue related to the sales contract remained.32

Code of 2008 introduces in Art. 1478 a direct claim against the insurer for all types of liability insurance.33

28 Cf. e.g. Ercan yazarı, Başyapı, Hukuku, Hukuki İşlem, Sıddeşme (Introduction to the Law of Obligations, Legal Transactions, Contracts), Istanbul 2008, 15 et seq.; Azer, Üçüncü Kişinin Uğradığı Zararların Sıddeşmesi konusundaki KanunARA Tarımı (Indemnification of Third Party Damages According to Contractual Liability Principles), Yargın Dergisi (YD) 1996/1-2, 99-132. Cf. for a detailed analysis of the exceptions to the principle of privity under Turkish law: Tandogan, Üçüncü Sahibinin Zararını Tartın (Indemnification of Third Party Damages), Ankara 1963. One of the most important exceptions can be found in the area of insurance law. Art. 1310 of the Turkish Commercial Code provides for fire insurance, particularly that third persons suffering harm from a fire have a direct claim against the insurer. Although there is no general provision regarding liability insurance, the general insurance conditions of several types of liability insurance (e.g. regarding motor vehicles, dangerous goods, LPG bottles) which are published by the Treasury, grant such a direct claim against the insurer. This is also accepted as a general rule by the Court of Appeals, e.g. YHİD 30.06.2003, 15857/134 (published in Çelik/Lale, Sigorta Hukuku (Insurance Law), Ankara 2007, 1457). The Draft Turkish Commercial

29 Cf. e.g. Zekâli/Aydagöz (op. cit. fn. 19), 143; Kanuni, Türkçecinin Korunması (Consumer Protection), YasaHİD 1996, 42, 50.

30 In favour of including product liability claims: Aşosy/WithTag/Genç, Türkçecibilgisini Koruma Hukuku (Consumer Protection Law), 2nd ed., Ankara 2000, 87-88; Akın (op. cit. fn. 13), 177; Kanuni (op. cit. fn. 29), 50-51; excluding product liability claims: Türkçecibilgisini Hukuku (Consumer Law), published by the Ankara Bar Association, 2000, 35; Soysal (op. cit. fn. 16), 592.

31 Cf. YHİD 11.04.2000, 517/3348 (www.karanci.com): the sold refrigerator caused a fire due to a defect in its wiring system and several goods in the household were damaged. The Court found that this was a claim based on the law of tort and should be raised according to the relevant provisions of the Code of Obligations.

In the third attempt, the 2008 Draft has finally separated liability for non-conformity and product liability, the first being regulated in Art. 4 and the second in Art. 9/2. According to this provision product liability is triggered by a "defect" in the product and not non-conformity; the conditions and duration of liability and the exonerating circumstances are in compliance with Directive 85/374. On the other hand, the producer's liability for non-conforming goods is regulated as follows in Art. 4:

"(9) In case of non-conformity the consumer may use its rights of replacement and repair also against the producer or importer. The costs of repair or replacement have to be carried by the producer or importer. Repair or replacement has to be completed in a reasonable time span without any significant inconvenience to the consumer, taking account of the nature of the goods and the purpose for which the consumer required the goods. In any case this period shall not exceed thirty days. Otherwise the consumer may make use of its alternative elective rights against the producer or importer. The producer or importer cannot be held liable if they prove that the non-conformity occurred after the goods were put into circulation. The liability of the producer or importer is time barred after two years following the conclusion of the consumer sales contract. For second hand goods the period starts with the first sales agreement."

The explanations below will focus on the current situation under the 2003 amendments and the 2008 Draft.

II. The Nature of the Direct Claim

The question about the nature of the direct claim of the consumer did not attract much attention in Turkish literature. The courts have acknowledged this new claim without further elaborating upon it. Art. 4 CCP (2003) itself does not give any guidance. The only information provided in Art. 4 is that the seller and the producer/intermediaries are jointly and severally held liable. However, as Serogen correctly argues, this formulation merely informs about the consequences of liability not about its grounds. The rule is positioning an "army of guarantors" beside the main debtor (the seller) so that it is assured that the consumer can enforce its rights. Yet, the relation between these "guarantors" and the consumer is left open.

In the author's view, this claim arises neither from contractual nor tortious liability. It should be categorised as an obligation arising out of a special statutory provision (gesetzliches Schuldverhältnis) based on the idea of liability for consequence, which was inspired in consumers regarding a certain product but was not fulfilled. Trademarks, public statements or advertisements are all means used by producers to influence consumer choices by building up confidence in these goods; this confidence should oblige the producer to contractually be bound independent of its intention. Subject to the conclusion of a sales contract regarding a given product the consumer is awarded statutory protection beside the contractual one. In this regard the liability is an accessory one as the sales contract needs to be validly concluded. However, it is not a prerequisite that the producer or any intermediary act negligently as the provision is based on the principle of strict liability. Art. 4

CCP (2003) stresses this with the formulation that "missing knowledge about the lack of conformity does not exempt from liability."

III. The Ambit of Persons Liable to the Consumer

Art. 4(3) CCP (2003) does not just place the burden of responsibility on the producer. Every person in the sales chain and the creditor of a linked credit agreement is liable alongside the seller. Although the terms "dealer" or "agent" are not defined in the CCP, it is obvious that the legislature wanted to refer to any intermediary seller. The terms "producer" and "importer" are defined above. The "creditor" is any financial institution authorised to grant credit to consumers (Art. 3) CCP. Under the 2008 proposal, the scope of persons liable has been limited to the producer and importer. The main reason for this was the finding that in practice consumer claims concentrated on these two and not on any intermediary in the distribution chain of whom the consumer is merely not aware.

IV. The Prerequisites of Liability

Since the liability of the producer/intermediary is accessory to that of the seller, all prerequisites regarding the seller's liability have to be fulfilled. This means the goods must show a lack of conformity with the contract that existed at the time of delivery but was unknown to the consumer. The existence of a lack of conformity is going to be judged according to the definition given under C.II. above. As seen before, this definition covers both, subjective and objective elements. Whereas it is comprehensible that the producer/intermediary should be liable for the lack of qualifications average goods normally would have (objective criteria), it is hardly explicable that they should also stand in for declarations made solely by the seller or for any contractually agreed special fitness requirement (subjective criteria). However, the present wording does not differentiate between these two, which means that the producer and all the intermediaries can be held liable for something they did not promise. Although it was advised, the 2008 Proposal also did not include any limitation in this regard.

33 Cf. Serogen (op. cit. fn. 16), 590-591.
34 Karahan (op. cit. fn. 29), 44-45.
35 Cf. above the text related to fn. 26.
36 In the 2008 Draft, the liability of a credit institute for non-conformity of goods financed by a linked credit agreement is regulated separately among the provisions regarding consumer credits. The new formulation corrects the misleading statement of the current Art. 4 CCP (2003) according to which credit institutes are liable for all four elective rights so as to cover repair and replacement. Under Art. 10 Draft CCP (2008) the consumer can only assert rights against the creditor of the linked credit agreement in case of retraction from the sales contract or reduction of the sales price.
37 Cf. below E.VIII.
38 Cf. for the arguments also below G.1.2.
39 Cf. Atamer (op. cit. fn. 6), 89 and 96-99.
The current version of Art. 4 CCP does not define at which moment non-conformity has to be existent in order for the producer and the intermediaries to be held liable. Certainly, the latest moment can only be the moment of delivery to the consumer when risk will also pass for any non-conformity arising after this moment, the seller, as well as others in the chain, are not responsible. The more problematic issue is how to handle situations in which the non-conformity has occurred after the goods are placed into circulation i.e. after they have left the sphere of the producer/importer but before they are handed over to the consumer; or, secondly, how to treat each intermediary for any non-conformity arising after risk has passed in its respective sales contract. The silence of the current provision could be interpreted in either way: it could be said that the legislature wanted to broaden the sphere of responsibility of the producer/intermediary i.e. also attaching any non-conformity caused by the intermediary/seller to the preceding link in the distribution chain. At the same time, it could be argued that for any non-conformity arising after the risk has passed to the next buyer in the chain, the previous buyer cannot be held liable as the causal connection is missing. The 2008 Proposal included an express statement in this regard providing that “the producer or importer cannot be held liable if they can prove that the non-conformity arose after the goods were put into circulation”. This provision follows the concept of Directive 85/374 on product liability whereby in Art. 7(b) the producer is given the right to exonerate himself if, considering the circumstances, it is probable that the defect which caused the damage did not exist at the time when the product was put into circulation.

With regard to the burden of proof, the present CCP does not include any special provision. According to the general rule of Art. 6 Turkish Civil Code everyone has to prove the facts on which the allegation is based. As such, in order to benefit from their rights against the producer/intermediary, consumers must prove that there was a lack of conformity that existed already at the time of delivery. In the 2008 Draft, the six months presumption under Art. 5(3) of the Directive is introduced into Turkish law. According to the new wording of Art. 4(4) Draft CCP any lack of conformity will be presumed to have existed at the date of delivery if it becomes apparent within six months from the date of delivery unless proven otherwise.

V. The Rights Held by the Consumer

Art. 4 CCP (2003) does not differentiate according to the type of remedy consumers may seek. Paragraph 3 states that the producer and the intermediaries are jointly and severally obliged to fulfill the consumer's choice regarding repair or replacement as well as rescission or reduction.41 Whereas in connection with repair or replacement claims no major problems arise, the use of the rescission or reduction claims suggest a debate about the calculation of the amount the producer or intermediary have to pay to the consumer. Will the amount be what was paid by the consumer to the final seller or the amount the producer or intermediary has received? If reduction is chosen, will the amount be calculated in comparison to the sales price of the last sales contract or the one to which the defendant is a party to? These questions are not only left open by the Code but are also neglected in the legal literature. In court practice the consumer sales contract is taken as reference for the calculation without even raising the issue.

If accepted in Turkish law, as suggested above, that the consumer's claim against the producer/intermediary is a statutory one not based on contract, these questions could be easily solved. In such cases the producer/intermediary's obligation will be compensation for damage endured by the consumer in case of rescission from the consumer sales contract or reduction due to non-conformity. The producer/intermediary must pay damages and not “repay” any contractual performance. The damage will be calculated according to the consumer's actual loss and not in relation to any contract in the distribution chain.

It is unclear from the wording of Art. 4 CCP if the consumer can also claim its expectation interest from the producer/intermediary together with repair, replacement or together with the damages it claims in case it chooses rescission or reduction. The legislative history shows that Art. 4 CCP was not formulated along the lines of a clear concept adopted by deliberate decisions, but that it is difficult to come to a conclusion via historical interpretation. As the legislature were always in favour of introducing a wide-ranging liability for everyone in the distribution chain without any clear-cut limits it should be concluded that the consumer can also assert a damages claim beside its elective rights.42 The 2008 Draft however provides the consumer with an express claim for damages against the seller and refers to the Code of Obligations for the details. Any further claim against the producer/importer is not given.

VI. Limits to the Direct Claim

As expressed in Art. 4 CCP (2003), there is a solidary obligation (joint and several obligation) between the seller and the producer/intermediary as they are bound to render one and the same performance; the consumer may require this performance from any one of them until full performance has been received. According to Art. 143 §CO (Art. 145 §CO) a joint and severally liable obligor can raise those defenses against the obligee which stem either from its personal relation to the obligee, or from a common basis, or the contents of the joint and several liability. The producer/intermediary can therefore make use of all defenses such as those that the sales contract is void so that no enforceable obligation has arisen, or that there is no lack of conformity or that the obligation arising out of the contract was already performed. In each case the direct claim will be rejected.

Art. 4 CCP leaves open the issue of whether or not an omitted notification about the non-conformity also triggers a loss of the rights against the producer or any other intermediary. As there is no indication that the legislature wanted to introduce a stricter liability regime regarding the direct claim it should be accepted that the notification of the seller is also needed for the enforcement of the rights against the producer/intermediary.43

The passing of the limitation period is another defence the producer/intermediary can refer to. The Code again only regulates this period with regard to the liability of the seller.

40 In 6 out of 125 proceedings of the Istanbul Consumer Courts a claim regarding damages was raised but only in one of them did the Court decide that the seller and the importer are jointly and severally responsible for this claim: Istanbul, 2nd Consumer Court, 29.11.2007, E. 2006/231, K. 2007/726. Cf. also below E.VIII.
41 In the 2008 Draft the consumer's notification duty was dropped so that it no longer constitutes a prerequisite for any claim.
which is two years from the moment of delivery. Similar to the notification duty, it should be accepted that this period is also valid for the producer/intermediary liability. Their liability will be time bound to two years from delivery of the goods to the consumer. According to Art. 134 CCO (Art. 136 CCO) the interruption of the running of the statute of limitations against a joint and several obligor is also effective against the other obligors.

The 2008 DRAFT introduces a clear rule regarding the limitation period. According to the proposed provision "The liability of the producer or importer is time barred after two years following the conclusion of the consumer sales contract. For second hand goods the period begins with the first sales agreement." In this way the provision makes it indisputable that even in case of a resale of the acquired goods by the consumer to another consumer the liability of the producer/importer will last for two years from the moment of the conclusion of the first sales contract. Although the second consumer cannot make use of the CCP provisions against his own seller, as he is not a trader, he will be able to profit from the direct liability provision.

The question if the producer or any other intermediary may raise a defence arising from the contract between the consumer and seller (e.g. limitations on liability) was not discussed at all in relation to consumer sales. This is of minor importance as the provisions of the CCP are mandatory and therefore prohibit the consumer from waiving the rights granted in Art. 4 CCP against the seller as well as the producer/intermediary.

VII. Relationship between the Direct Claim and other Remedies

The direct claim of the consumer is not secondary to the claim it has against the seller. The consumer is therefore free to choose who it wants to sue amongst the jointly and several liable persons in the sales chain. In fact, the statistics below (E.VIII.) show that the consumer often prefers to sue the seller and the producer/importer together.

Alasong the claims arising out of Art. 4 CCP, consumers may also resort to the compulsory guarantee that is granted on the base of Art. 13 CCP. As the rights given to them are overlapping with those emanating from the direct claim, the results will be similar. In practice, the courts never take the trouble to differentiate among the different causes of action. In fact, the only practical difference is that, under the guarantee, consumers cannot sue for their expectation interest whereas direct producer's liability gives them this right alongside the four elective rights.

VIII. The Direct Claim in Practice

The direct claim is actively used in Turkish legal practice. A survey of 125 unpublished first instance court decisions, which were decided by the 1st-6th Chambers of the Istanbul Consumer Courts during the period of October 2007-April 2008, resulted in the following findings regarding respondents:

<table>
<thead>
<tr>
<th>Number of legal proceedings</th>
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<tbody>
<tr>
<td>69</td>
</tr>
<tr>
<td>2</td>
</tr>
<tr>
<td>49</td>
</tr>
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<td>4</td>
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In 55 published cases of the Court of Appeals decided since 1996, the findings regarding the respondents were as follows:

<table>
<thead>
<tr>
<th>Number of legal proceedings</th>
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<tbody>
<tr>
<td>45</td>
</tr>
<tr>
<td>7</td>
</tr>
<tr>
<td>1</td>
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<td>2</td>
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These findings allow for the conclusion that it is either the seller alone or the seller and producer together which are sued in practice. The consumer does not avail itself of its right to sue any intermediary in the chain.

F. The Seller’s Right of Redress

1. In General

Under Turkish law there are no special provisions regarding the right of redress of a seller; neither for the final seller who was held liable to the consumer because of a lack of conformity nor for any other seller in the sales chain. As such, the general sales provisions of the Code of Obligations and of the Code of Commerce are applicable, which means that the buyer/final seller will in principle have rights under its own sales agreement which it concluded with a supplier or directly with the producer. Any non-conformity in consumer sales, which constitutes non-conformity also with regard to the commercial sales agreement, will grant the final seller rights against its own providers. Should there be a guarantee contract, which the final seller can also refer to, this might provide some extra protection.

II. Claims from the Final Seller under its Sales Contract

The claims from the final seller are given irrespective of negligence on the part of the previous seller. Liability for non-conformity in sales contracts is, as a rule, based on the principle of strict liability. According to Art. 202-203 CCO (Art. 205-206 CCO) the final seller
can choose between rescinding the contract, reducing the purchase price or demanding replacement. A right of repair is not given in the Code of Obligations, and it is debated in literature if this gap can be filled e.g. analogous to the right of repair given under the provisions regarding the contract of work (Art. 360(2) cO/Art. 368(2) cO).45 The Court of Appeals rejects this view and does not accept a right to repair for sales contracts that are not concluded with a consumer.46

In respect of the right to claim damages in relation with non-conformity in sales contracts there are some questions that are disputed independent of the final seller's claim. Firstly, a damages claim in relation with the sales contract is only regulated by the Code for the situation in which the buyer uses its right of rescission (Art. 205 cO/Art. 208 cO). This raises the question under which provision the buyer possesses a right to ask for damages if it chooses to use its right of reduction or replacement. Either Art. 205 cO will be applied per analogy or the general rules of non-conformity in contracts (Art. 96 cO/Art. 97 cO) will fill the gap. This choice is of particular importance as Art. 205 cO is based partly on the principle of strict liability, whereas the general rule of Art. 96 cO et seq. is fault based liability, yet the burden of proof is inverse; the obligor has to prove that no fault is attributable to him. The Turkish doctrine tends to give the buyer who has chosen to make use of its elective rights other than rescission a right to claim damages per analogy to Art. 205.47

According to Art. 205 cO the type of harm suffered is determinant of the type of liability; a strict liability regime is accepted for all harm “directly” caused by non-conforming goods (Art. 205(2) cO/Art. 208(2) cO); for any “further” damage the seller can exonerate itself by proving that it was not at fault (Art. 205(3) cO/Art. 208(3) cO). The borderline between directly and indirectly caused harm is highly debated and no common criteria have, as yet, been developed to define these terms.

However, when looking at the Turkish doctrine and jurisprudence one can see that, without exception, losses suffered by the reselling person in the sales chain due to lack of conformity of the goods are categorised as indirect damage, which can only be claimed if the previous seller is at fault.48 No differentiation is made between damages for profits lost due to the impaired benefits of the final seller (or any intermediary) and damages for loss suffered due to the obligation to fulfill one of the consumer's elective rights (or any buyer in the chain), e.g. repair or replacement. In any case, the seller/buyer will not be compensated if its respective seller can prove that no fault was attributable to him.

III. Prerequisites of the Final Seller's Claims

As in any consumer sales contract, the buying party in a commercial sales contract also has to be unaware of the non-conformity at the time of conclusion of the contract, otherwise it would be deemed to have accepted the goods as they are. On the other hand, the non-conformity must exist at the time when risk passes to the buyer/final seller although it might become apparent at a later time.49 This means that the grounds for non-conformity of the consumer sales must have already existed at the time the commercial contract was concluded.50 In this regard, the burden of proof is on the buyer/final seller.

Distinct from consumer sales, in commercial sales there is a strict duty to examine the goods after taking delivery and to notify the seller of any non-conformity. Art. 25 CoC introduces a threefold system51 for non-conformity that is apparent without examination: the notification period is two days from delivery; for non-conformity that becomes apparent only after examination, the notification period is eight days from delivery; and for any non-conformity that does not become apparent even through a customary examination the notification has to take place immediately upon its discovery - there are no special form requirements for notification.52

A special problem regarding the duty to examine might arise in sales chains if the goods are packaged. In practice the buyer/final seller is expected to perform a test examination meaning that it must inspect a representative amount of the goods in order to clarify the conformity of the goods.53 Any lack of conformity, which might not be revealed by such inspection, will be qualified as a hidden one and the eight day limit is not applied. In such cases it will mostly be the consumer, as the end user, who discovers the non-conformity and informs the final seller who in turn must immediately notify its seller.

In case the buyer does not conform to its notification duty within the legal limit, as a rule, lose all rights it could exercise against the seller. However, Art. 201 cO (Art. 203 cO) provides some relief. If the seller has wilfully deceived the buyer, an omission of notification by the buyer will not limit the warranty.54 Wilful misconduct exists if the seller fraudulently concealed a non-conformity, meaning that the duty to give information is not fulfilled in breach of the principle of good faith.55 In order for this to occur, the seller must know about the non-conformity, the buyer must be unaware, the seller must know that the buyer is unaware and must willingly refrain from informing the buyer.

45 Cf. for detailed references A ręk, Semsu Korunan Açılış: Malın Tamir Edilmesi (Repair of Non-Conforming Goods), Ankara 2008, 64 et seq. (the author himself rejects a lacuna); the same Şahin, Tükir Avan Tüzükçüler Sertifikatı Açılış: İfladın Sorumluluğu (The Sellers Liability for Non-Conformity in Commercial Sales), Ankara 2008, 165; Tordan (op. cit. fn. 16), 187.

46 In favour of a right to repair: Sereğ (op. cit. fn. 16), 153-154.


48 Aral (op. cit. fn. 27), 144 and 146; Sereğ (op. cit. fn. 16), 153-154; Yarık (op. cit. fn. 16), 189 and 191; Şahin (op. cit. fn. 45), 160; Aral (op. cit. fn. 45), 59. The Court of Appeals has not declared its view in a clear-cut way. In a 1984 decision the buyer was given the right to claim damages according to Art. 96 cO/Art. 97 cO without further elaborating on the issue. Cf. YİSDİ 16.3.1984, E. 8918, K. 2052, YDR 1984, 1046-1047.

49 Şahin (op. cit. fn. 45), 146-147; Tordan (op. cit. fn. 16), 192; Aral (op. cit. fn. 27), 141; Sereğ (op. cit. fn. 16), 151. YİSDİ 10.2.1984, E.1984/7317, K. 1984/968; YİSDİ 25.3.1991, E.1020, K. 3508 (Şahin (op. cit. fn. 45), 146, ar fn. 496).

50 Cf. for the parallel prerequisites above CIV.

51 Cf. for the relevant Turkish provision above CIV.


53 Doğanay (op. cit. fn. 51), 161; Şahin (op. cit. fn. 45), 80.

54 Doğanay (op. cit. fn. 51), 158-159; Şahin (op. cit. fn. 45), 75 and e.g. YİSDİ 28.05.1990, 1652/4339 (printed in Doğanay (op. cit. fn. 51), 156).

55 YİSDİ 3.10.1986, E. 1986/44447, K. 1986/4964 (The seller had asserted that the goods sold were produced according to the standards set by the Turkish Standards Institute, which turned out to be wrong, www.kasnam.com).

56 Tordan (op. cit. fn. 16), 176.
IV. Time Limit for Claims from the Final Seller

Although in Art. 207 CCO/Art. 210 sCC the limitation period for sales contracts is set at one year, this has been reduced for commercial sales by Art. 25 ConsC to six months from the moment of delivery. All of the buyer's claims - the elective ones and the damages claim - are subject to this six months period. Given the fact that the final seller is responsible for a period of two years to the consumer, the limitation period of six months will often be the main reason for the final seller to lose its rights against its own seller. However, there are some possible cures:

First of all, according to Art. 207(3) CCO/Art. 210(3) sCC the ten year period prescribed by Art. 125 CCO/Art. 127 sCC will apply instead of the six months period in cases where the seller has been wilfully deceived by the buyer regarding the non-conformity. On the other hand, Art. 207(2) CCO/Art. 210(2) sCC states that "objections made by the buyer based on existing non-conformities remain valid if the required notification has been given to the seller within one year after delivery." This means that although the final seller's claims will no longer be recognised, it may at least invoke non-conformity as a defence in a lawsuit filed against it. If, for example, the supplier claims the sales price after one year, the final seller can invoke this defence. However, for this plea to be heard the final seller must have notified its supplier about the non-conformity within the one year period.

Finally, the majority of Turkish legal doctrine favours that the general provisions regarding non-performance find application in addition to the special warranty provisions of the Code of Obligations. Other than the warranty provisions, where strict liability is the rule, Art. 96 CCO/Art. 97 sCC gives the obligee protection only if the obligor is at fault. Should, however, the obligor not be able to prove that the non-performance is not attributable to it, the limitation period is the ten year period prescribed by Art. 125 CCO/Art. 127 sCC. This means that the final seller/intermediary may lose its rights under the favourable strict liability regime but still make use of its rights under the fault-based regime for a longer period.

V. Limitation of Liability by Contract

It is obvious that parties to a commercial sales contract can stipulate liability limitations. In the Code of Obligations there are only a few restrictions regarding such stipulations. According to Art. 196 CCO/Art. 199 sCC: "An agreement to exclude or to limit the obligation to warrant is invalid if the seller has fraudulently concealed the defects." On the other hand Art. 99 OR/Art. 100 sCC provides that "An agreement previously entered into, according to which liability for unlawful intent or gross negligence would be excluded, is null and void." In particular, it is debatable to what extent Art. 99 and 196 may be applied alongside each other. Art. 99 sCC permits limitations of liability for only light negligence (culpa levée) for all contractual obligations, while Art. 196 sCC permits limitations of liability also for gross negligence in the case of sale contracts. A uniform position has not yet been formed in Turkish legal doctrine as to how these two provisions may be reconciled, nor has the Court of Appeals offered any decisions clarifying the problem.

VI. Redress in Practice

A survey of published decisions of the Court of Appeals regarding commercial sales contracts reveals that claims mostly focus on instances where the merchant is buying the goods as the final user. Disputes arising from sales agreements for the purpose of resale are rarely brought before the Court. A possible reason for this might be that in distribution chains the rights of the parties are regulated in detail by contract as these are mostly long-term relations. Often the producer, wholesaler and the retailer/final seller will already have specified in the contract what kind of rights the final seller or retailer has in case the goods are not in conformity with the consumer sales. It can be assumed that repair services or replacement will anyway be provided for by the seller in consultation with the producer as the consumer can assert these claims either under the warranty rules or the guarantee of the producer. On the other hand, it is most probable that these contracts contain special stipulations regarding damages claims from the final seller and liability limitations regarding these claims.

VII. CCP Draft Proposal 2008 Regarding the Right of Redress

The 2008 Proposal includes a special provision regarding the right of redress in Art. 4(11):

"The final seller who was held liable to a consumer according to this article can take recourse to its supplier pursuant to the provisions of the Code of Obligation even if the limitation period for commercial sales has elapsed, provided that the supplier was also acting in the course of its business or trade while concluding the contract. But the final seller has to apply to its supplier in two months after fulfilling the claims of the consumer. The right of redress is in any case barred five years after the goods were delivered to the final seller. Any intermediary in the sales chain can also refer to this provision provided that it is acting in the course of its business or trade."

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54 Yavuz (op. cit. fn. 16), 156; Serçan (op. cit. fn. 16), 156; Aral (op. cit. fn. 27), 147.
55 The term "wilfully deceive" will be interpreted as in the context of Art. 200 CCO, cf. above text to fn. 55.
56 Yavuz is in favour of interpreting this very broadly with regard to professional sellers. He assumes that they should always know about the non-conformity and therefore always wilfully deceive the buyer. Cf. Yavuz (op. cit. fn. 16), 125.
57 Aral (op. cit. fn. 37), 150-159; Serçan (op. cit. fn. 16), 133-134; Şahidin (op. cit. fn. 45), 198-199.
This provision only envisages sales chains where the final link is a consumer. Each party in the distribution chain can make use of this article provided that the previous link in the chain is also acting in the course of its business or trade. If the final seller is, for example, selling second hand goods it acquired from consumers Art. 4(11) will give no special right of redress. For each respective sales agreement the overall period to profit from the right of redress is five years from the moment of delivery of the goods. However, the final seller or intermediary has to assert its claims against the previous seller within two months of the moment it has fulfilled the claims of its own buyer.

G. Outlook

1. Need for a Direct Claim

Examining the Turkish experience with the direct claims since 1995 it seems advisable to also endow the consumers with a similar right under European Union law. Several reasons can be brought forward in favour of this, which can be grouped under two headings:

1. Consumer Based Arguments in Favour of a Direct Claim

In a regime where contractual privity is strictly applied the consumer would be burdened with the risk of insolvency of the final seller who is often the weaker link in the chain. However, it is questionable if this result can be defended with the sole argument that contractual privity is a general rule that is long established. The equation "seller = producer", which underlies the current rules of sales contracts, does not reflect reality anymore. A classical distribution channel today is multilayered and consists of a manufacturer, wholesaler and a retailer - sometimes also an importer is added to the chain. But these new market formations also deserve new rules regarding liability. It should not be disregarded that such a system of distribution is only used by producers in cases where value analysis yields that using a channel partner, despite the costs, is more profitable than distributing the goods through its own means. But this profitable marketing strategy should not result in lesser protection of the consumer by leaving him face to face with the seller who has little to do with the non-conformity of the goods.

Holding the producer directly liable would also be a fair response to the fact that in today's economies consumer choices are not dominated by whom the goods are sold but by whom they are produced and/or which brand they are. The consumer trusts in the name and therefore often perceives the producer as the one responsible for any non-conformity of the goods. This trust deserves to be protected.

2. Argument for a Direct Claim Based on the Structure of Distribution

As much as it does not seem to convince that the consumer carries the risk of insolvency of the final seller, it is also less than convincing that the final seller should carry the damage caused by non-conformity of goods it did not produce. Although it would have rights under its own sales agreement with the previous seller, the notification duty or the limitation period will often constitute a serious obstacle to enforce these rights. From this point of view it also seems reasonable to introduce a direct liability of the producer in order to avoid the problems related to the final seller's redress.

This decision further seems to be justified due to the fact that the producer is the party who can most cheaply take precautions to avoid the occurrence of any non-conformity (cheapest cost avoider) by controlling its production sphere but also later by controlling its wholesalers. This party can best anticipate the risks and take these into account in its contracts with the wholesalers. In its contracts it will also often be able to burden the wholesaler with the supervision of the retailer so that the goods are not damaged at any step in the distribution chain. Certainly the producer can also cover the costs of risk through insurance and allocate this back to the consumer via pricing.

II. Possible Ways to Regulate such a Direct Claim

1. Who Should Be Held Liable?

The direct claim should be given against the producer. In the author's view the producer definition given by Art. 3 of the Directive 85/374 on product liability could inspire to some extent: the producer is first of all the manufacturer of the finished product. However, the producer is also "any person who, by putting its name, trademark or other distinguishing feature on the product presents itself as its producer". This is especially important to cover such cases where it is not the producer but the wholesaler who is the one with economic power, letting its products be manufactured by no-name producers and then putting its trademark on them. It is the brand that attracts the consumer and is therefore the determining factor for liability. However, liability of any producer for raw materials or component parts as in Directive 85/374 would not make sense regarding the consumer's claims.

Besides the producer, the importer should also be held liable. Similar to the producer, the importer primarily builds a distribution network in a country based on wholesalers and retailers and is often able to control distribution as much as a producer.

2. Liability for Which Non-conformities?

If a direct claim is granted it is obvious that the producer will first of all be held liable for non-conformities arising out of its production sphere. For manufacturing failures the producer has to stand in. But for any non-conformity arising after the goods leave its control the question is not easy to answer as it comprises a policy decision. In the author's view, liability for non-conformities arising until the moment the goods are delivered to the consumer could also be attributed to the producer. In such case the burden to take redress to the person who has caused this non-conformity will be on the producer. Yet, as the producer is in the position to control this risk by individual contract terms and pricing policy, it seems a more convenient solution in comparison to giving the producer the right to exonerate itself and thereby leaving the consumer with the sole option to claim its rights from the seller. It should not be disregarded that the producer can and should control its distribution grid. The only exception to this liability should be made for particular arrangements between the seller and consumer regarding the goods, of which the producer cannot be aware.
3. Liability for which Claims?

Direct producer liability could be introduced in two ways. The less intrusive route would be to only give the consumer the rights to repair or replacement against the producer but no damages claim; this was the choice of the 2008 Draft in Turkey. A more advanced protection could be given to the consumer by also allowing for a damages claim so that coverage for the case of rescission or reduction is granted. The author favours such a solution based on the arguments given above regarding the ability of the producer to control the distribution chain and to reflect the costs of potential claims of consumers by way of pricing.

4. Prerequisites of Liability?

The liability of the producer should be strict just as for the sellers. Negligence should not be a precondition, but it should be considered to configure the direct claim as a secondary claim. This means that only in cases where the consumer is not able to enforce its rights against the seller can he/she make use of their rights against the producer. In the author's view this would not be too much a burden for the consumer if the prerequisites were defined accordingly. A fair balance could be found if, for example, the consumer might bring its claims against the producer in case the seller does not fulfil its claims within two months. The burden of proof regarding the application to the seller and the seller’s refusal should be on the consumer.

5. Limits to Liability?

The liability of the producer should be subject to the same time limitation as the consumer sales contract, that is two years. This period should begin with the moment the goods are delivered to the consumer.