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*LEGAL STUDY ON
LEGAL AND ADMINISTRATIVE PRACTICES
REGARDING
THE VALIDITY AND MUTUAL RECOGNITION
OF ELECTRONIC DOCUMENTS*

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Turkey's National Profile

A. General legal profile

The Turkish State is a Republic (Constitution Art.1) and Turkish Republic is a democratic, secular and social state governed by the rule of law. (Constitution Art.2) As for the administrative structuring, Turkey consists of 81 provinces, 933 districts (sub regions of provinces) and 3226 municipality

Since Turkey is a unitary state; the laws are binding throughout the whole country. As Turkey is a member of the Continental Europe Civil Law System; just like all the laws of the Country, Commercial Code and Code of Obligations reflect the features if the said law system. Commercial Code being a separate and individual Code is under the influence of Laws of many European countries. As for the Code of Obligations constituting an integral part of the Civil Code is adopted from Swiss Civil Code- Code of Obligations. Currently alongside with numerous laws; the draft amendments of both the Commercial Code and the Code of Obligations have been prepared in order to ensure the legal harmonization in line with the EU negotiation process.

Under the Turkish judicial system the Courts are independent in the discharge of their duties, (Constitution Art.138/1) and thus no organ, authority, office or individual may give orders or instructions to courts or judges relating to the exercise of judicial power, send them circulars or address recommendations or suggestions (Constitution Art.138/2). No questions shall be asked, debates held, or statements made in the Legislative Assembly relating to the exercise of judicial power concerning a case under trial. (Constitution Art.138/3).

As for the Turkish judicial organization; the Judicial Courts are organs charged with criminal and civil judgment. They are three graded¹. The first degree judicial courts are spread through out the country in accordance with the essence of administrative unit. The basis of these courts called first degree or degree courts is formed by "Courts of First Instance" Courts of First Instance dealing with civil law matters are called "Civil Courts of First Instance", which are single judge courts. In places where commercial transactions are intense, there are Commercial Courts of First Instance consisting of three judges. Commercial disputes of which amount or value exceeds 5490.-YTL are tried by Civil Court of First Instance or Commercial Court of First Instance both having the character of first degree civil courts; whereas the cases including an amount or value less then the aforementioned are tried by Civil Courts of Peace. The District Courts, being second degree judicial courts, examine and adjudicate applications to be conducted against the judgments and decisions of first degree courts that are not final. The appeal for the decisions given by courts of justice is handled by The High Court of Appeals having the character of a last instance court. The High Court of Appeals reviews the decisions given by the commercial courts and generally all civil and criminal courts from the standpoint of contradiction to law.

¹ "Regional Courts of Justice" constituting the "Second Degree" are founded by virtue of Law no: 5235, dated 26.09.2004. The said Law has entered into force in 01.04.2005 and the date for the Regional Courts of Justice to initiate their duties throughout the country, will be announced by The Ministry of Justice until latest 01.04.2007. (Provisional Art. 2.) Until the said date; within the judicial system 2 graded; judicial order will prevail instead of 3 graded. Aybay, Aydın/Aybay, Rona; Introduction to Law, Istanbul 2005, pg. 256, fn. 72.

B. eCommerce Regulations

Notwithstanding the discussions in the Turkish legal jurisprudence over issues with respect to the validity and recognition of electronic documents; provisions and studies related to electronic documents are started to be included within the e-government projects and legislative regulations that are being carried out in recent years. In this section; with respect to the legal validity of the electronic documents, the fundamental principals in the Turkish jurisprudence and provisions set forth by the legislative regulations that are currently in force or draft bills regulations will be evaluated

B.1 eCommerce contract law

B.1.1. General principles

"Electronic Contracts" in a broad sense expresses the contracts that are concluded by means of electronic communication devices and methods.² Under Turkish Law the term "electronic" used in concept of "electronic contract" emphasizes the devices used merely in the conclusion and occasionally in the execution of the contract. According to the jurisprudence³; just because of its abovementioned feature there is no need to create a separate and peculiar contract category as "electronic contracts" and to stipulate special rules to be applied to such contracts. Accordingly, it is possible for the provisions of the Code of Obligations regarding the conclusion, validity and execution of contracts to be applied on the contracts concluded in electronic environment to the extent that this is applicable in terms of the features of these contracts. In that sense; there is no special provision in the Code of Obligations relating to the electronic contracts⁴.

Generally Turkish Law is considerably flexible as to the validity of the contracts. Under Turkish contracts law; it is sufficient for the parties to declare their mutual and compatible will and to have consensus on the essential elements of the contract to ensure the conclusion of a contract⁵. With respect to the form of the contracts Turkish Code of Obligations recognizes the principle of freedom of contracts as a rule.⁶ Thereby, in cases where a form is not explicitly required by law (for example the sales and purchase of movable goods) the parties can express their wills verbally. Nevertheless; law may stipulate a precise form (such as official form, written form etc.) as a condition for the validity of some contracts such as bailment, assignment of claims, promise of donation. In case law requires a contract to be concluded in a precise form, as a rule the stipulated form is a "validity condition"⁷. Thus, contracts that are not concluded in the statutorily required form are void.⁸

² Falcioğlu, Mete Özgür; *Electronic Sales Contract and Its Conclusion Under Turkish Law*, Ankara 2004, pg. 78; Sağlam Atabarut, İpek; *Electronic Contracts*, Istanbul 2003, pg. 50.

³ Özdemir Kocasakal, Hatice; *Determination of the Applicable Law and Competent Jurisdiction in the Resolution of the Disputes Arising From Electronic Agreements*, Istanbul 2003, pg. 37-38;

⁴ Art. 9/A of Law Regarding the Protection of the Consumer setting forth the definition of the distant contracts is a provision where the definition of the electronic contract is legally expressed: " the contracts that are concluded in written, visual, telephone and electronic environment or by means of use of other communication devices and without face to face contact with the consumers and by which the instantaneous or afterwards delivery or performance of the goods and services are agreed"

⁵ Code of Obligations Art.. 1,2.

⁶ Code of Obligations Art. 11/f.1 "The validity of the contract is not bound to any form unless there is an explicitness in law"

⁷ Code of Obligations Art.. 11/f.2.

⁸ Such as sales and purchase contract for real estates.

With regards to the contracts that are required to be concluded in written form, the draft bill of Code of Obligations⁹ which currently is before the Prime Ministry, points out the "signature" as the most important element of written form. According to Article 14/f.1 of the Draft Bill of Code of Obligations; it is mandatory in the contracts that are required to be concluded in written form, to have the signatures of the parties incurring debt. On the other hand; by virtue of Article 14/f.2; unless otherwise is stipulated by law; texts that can be sent and stored by means of a written letter, a telegraph of which the original is signed by the ones incurring debt, fax provided that it is confirmed and other similar communication devices or secure electronic signature, supersedes written form. By virtue of Article 15 regulating the signature; "it is obligatory for the signature to be affixed by the party incurring debts in handwriting. Secure electronic signature has the same legal effect and consequences as the hand-written signature", therefore secure electronic signature is accepted to be equivalent with the signature in handwriting.

The Electronic Signature Law¹⁰, that is published in the Official Gazette dated 23.01.2004 and that has entered into force in 23.07.2004 states that the Secure Electronic Signature has the same legal affect and consequence as the hand-written signature. The Turkish Electronic Signature Law that was prepared based on EU 99/93/EC Directive; includes provisions with regards to the consequences of electronic signature in terms of substantive law and evidence law¹¹. Unlike the EU 99/93/EC Directive; The Turkish Electronic Law does not make a distinction as qualified electronic signature and advanced electronic signature¹²; but it merely puts legal emphasis on secure electronic signature based on qualified electronic certificate¹³. As a consequence of this emphasis; as explained above it is merely the electronic documents signed by secure electronic signatures that will have the same legal effect as the written documents that are signed on paper; and it is clearly set forth as a legal interpretation that only the electronic documents signed by secure electronic signatures have the power of proof in terms of evidence law and will be deemed as conclusive proof until otherwise is proved.

Although Article 6 of Electronic Signature Law states that secure electronic signature shall have the same legal effect and consequence as hand-written signatures in terms of substantive law, it is silent about the legal effect and consequence of electronic documents signed by secure electronic signature from a substantive law perspective. At that point; the interpretation to be conducted in the light of basic principles set forth by Electronic Signature Law and Code of Obligations; leads us to the above stated determination and in other words it may be said as an outcome that electronic documents signed by secure electronic signature and written documents signed by hand-written signatures on paper will be subject to same legal consequences

⁹ <http://www.kgm.adalet.gov.tr/borclarkanunu.htm>.

¹⁰ http://www.tk.gov.tr/eng/pdf/Electronic_Signature_Law.pdf.

¹¹ Keser Berber, Leyla ; A new regulation field for the telecommunication board: e-signature, <http://www.virtuallawjournal.net/?nodeid=29&lang=en>.

¹² Keser Berber, Leyla/Beceni, Yasin/Sevim, Tuğrul ; The Improvement and Consequence Report of National Coordination Commission's Working Group on Electronic Signature Law, Istanbul 2005, http://bthukuku.bilgi.edu.tr/documents/e-imza_hukuk_calisma_grubu_raporu.pdf.

¹³ The secure electronic signature is defined in Article 4 of Electronic Signature Law as follows:

„ARTICLE 4. — Secure Electronic Signature is an electronic signature, which;

a) exclusively belongs to the signatory,

b) is created only by means of secure electronic signature creation device that is under the exclusive disposal of the signatory,

c) enables the identification of the signatory based upon qualified electronic signature

d) enables the determination as to whether any subsequent alteration has been made in the electronic data that is signed “ This definition is a mixed definition including the requirements attached to advanced electronic signature by virtue of Article 5/I of EU 99/93/EC Directive. For detailed information please see Keser Berber/ Beceni/ Sevim, a.g.e.

Under Turkish Law the existence of a written document is not typically required for the conclusion of a contract.¹⁴ However, the obligation of abiding by a form of a certain kind may be required by a mandatory regulation. Nevertheless; in both cases, in case of a dispute; the proof of such legal relation is admissible on the condition that it is concluded in that certain form. In such cases the form has the character of a "condition of proof" and a rule of judicial procedure.¹⁵

As for the electronic signature's power of proof; Article 22 of Electronic Signature Law states that secure electronic signature shall have the same power of proof as the hand-written signature; where as with respect to the power of proof of electronic documents signed by secure electronic signature Article 23 of Electronic Signature Law states:

"ARTICLE 23.- The below stated Article 295/A is added following Article 295 of Law of Civil Procedure no: 1086, dated 18.06.1927

ARTICLE 295/A- Electronic data created duly by means of secure electronic signature shall have the effect of a bill. Such data shall serve as conclusive evidence until otherwise is proved"

The above quoted provision attributes a power of conclusive evidence to the data (documents) created by means of secure electronic signature in terms of any dispute. The characteristic of conclusive proofs is that they are binding upon the judge who is obliged to accept a matter that is proved by one of the conclusive evidences as proved (accurate). In other words the judge does not have discretion over the said evidences.

As an evaluation from a Commercial Law perspective with regards to electronic documents; Turkish Commercial Code in force (TTK)¹⁶ states that the evidences and their submission in commercial case is subject to Civil Procedure Law (HUMK)¹⁷ (TTK Art. 4). In line with this provision; whether it is a commercial or an ordinary civil case; should the parties want to submit evidences, the rules of HUMK shall apply. According to Article 288/f.1; all legal transactions of which amount at the time of conclusion exceeds 430.-YTL, (irrespective of having the character of commercial business or not) shall be proved by a bill (conclusive evidence). This general provision of HUMK highlights the importance of Article 295/A that is added to HUMK by Article 23 of Electronic Signature Law with respect to electronic documents. As explained above; by virtue of Article 295/A of HUMK; documents signed by secure electronic signature shall be deemed as bill (conclusive evidence) as referred to in Article 288/f.1; and accordingly the legal and commercial disputes of which amount exceeds 430 YTL can be proved by an electronic document merely on the condition that such documents are signed by secure electronic signature.

In addition to the above mentioned evidence and proof rules set forth by HUMK; the parties of a contract are enabled to conclude an evidence contract. (HUMK Art. 287-289). In both legal and commercial contracts, the parties may agree without restriction upon the evidences to be used in proving the disputed matters. In that case; the court is bound by such contract of evidence concluded by and between the parties.¹⁸ The parties may agree within the contract of evidence that all kinds of electronic documents and records to arise as a result of the commercial relation between them, shall serve as binding evidence upon the parties. (HUMK Art. 287-289).

¹⁴ However, law may require a written form for the validity of some contracts. Such as; bailment, assignment of claims, promise of donation.

¹⁵ According to Article 288 of Civil Procedure Law; transactions of which amount exceeds 430 ytl, at the time of conclusion; shall be proved by a bill. <http://www.hukuki.net/kanun/5236.15.text.asp>.

¹⁶ <http://www.mevzuat.adalet.gov.tr/html/997.html>.

¹⁷ <http://www.mevzuat.adalet.gov.tr/html/435.html>.

¹⁸ Kuru, Baki/Arslan, Ramazan/Yılmaz, Ejder; Textbook for Civil Procedure Law, Ankara 2005.

The legal and commercial disputes of which value and amount exceeds 430 YTL can be proved by electronic documents, which are not signed by secure electronic signature only on the condition that there is a contract of evidence between the parties satisfying the requirements set forth in Article 287-289

Electronic Signature Law excludes some legal transactions that it considers essential from the scope of application just like in numerous countries. Accordingly; legal transactions which are required by law to be subject to an official form (such as sale and purchase agreement for real estate, heritage contracts) or a special procedure (such as marriage) and contracts of commitments (such as bailment, contract of guaranty) can not be concluded by secure electronic signature. (Electronic Signature Law Art. 5/f.2). Excluding the ones stated in the said Article of Electronic Signature Law; there is nothing precluding legal transactions concluded by secure electronic signature or in other words by means of an electronic document, from being valid and having the power of proof. Nevertheless; in practice the legislation regulating general rules regarding the legal transactions except for the above mentioned; leaves question marks in practitioners' minds as to the application of the process to electronic documents since the structure of judicial and administrative process regarding the application of such legislation are completely designed by taking into account a paper-based system.

Under Turkish Law; by virtue of Article 20, paragraph III of Turkish Commercial Code no 6762; for the notices and notifications aiming the other party to fall under default or termination of or revoking the contract, to be valid such notices and notifications shall be made by means of public notary or a registered and reply-paid letter or telegraph. Notices and notifications regarding all kinds of matters between merchants except for the ones stated in Article 20/III of Turkish Commercial Code and the ones that are not subject to exceptions in terms of special transactions (such as notifications for registration in the share ledger) can be made in any form including electronic forms. However, notices and notifications made in such forms may always be subject to objection and does not have any effect unless the other party admits that such notification is directed to him. This rule applies to notifications to be made between individuals subject to civil law as well. Even though notifications within this scope can be made by being supported by various technologies,¹⁹ or by use of secure electronic signature and time stamp stated within the scope of Electronic Signature Law no: 5070 or upon a mutual agreement of parties over the procedure of an electronic notification and by eliminating the obstacles that may arise in terms of validity and evidence law; currently this method has not been preferred for any concrete matter yet. Other than the aforementioned; the procedure for notifications by means of public notaries, bars, official authorities and judicial authorities is determined by "Notification Law" no: 7201, which grants The General Directorate of Postal Service and Telegraph Organization a general authorization for the realization of notifications to be made by means of the above stated institutions. ²⁰ Accordingly; in practice notifications made between both merchants and civil law individuals are made through The General Directorate of Postal Service and Telegraph Organization in accordance with Notification Law no:7201 in order to benefit from the governance of said Law and avoid form any legal dispute regarding validity and proof. However, Notification Law no: 7201 does not have any provision regarding notifications to be made in electronic environment.

¹⁹ These technologies may be defined technically as all technologic system, process and applications inalterably and undeniably determining whether the electronic document has been sent to the determined target source (the party to which the notification is to be made), when and by whom it has been sent, whether and when the electronic document is received by the addressee.

²⁰ Notification Law No:7201, O.G. Date: 19/2/1959 Issue: 10139, Art.1.

Aside from the above stated current situation under Turkish Law; Article 18/III of the Draft Bill of Turkish Commercial Code brings an essential change to Article 20/III of the current Turkish Commercial Code as follows;

(3) The notices and notifications to be made between merchants in order to put the other party on default, terminate or revoke from the contract shall be made by registered reply-piaded letter, telegraph or a text including secure electronic signature.

In addition; "The Proposal for Electronic Notification Law"²¹ that is presented to the Presidency of Turkish Grand National Assembly on 28.02.2006 within the 22nd Legislation Year; clarifies the electronic notifications to be made between private law individuals and electronic notifications to be made by public institutions, banks and telecommunication companies towards private law individuals and legal entities as Article 4 of the proposal under the heading "The Obligation For Electronic Notification" states:

"Article 4- Electronic Notification Obligation : Upon the demand of individuals and legal entities; it is mandatory for public institutions, banks, telecommunication companies to send the notifications in electronic environment. Associations, charitable foundations and companies that are excluded from the above stated institutions, can be included in the system in order to send their notifications in an electronic environment. Individuals and legal entities can make electronic notifications to other individuals and legal entities provided that it can be proved."

The above stated proposal and its drafts are going through the phases regarding the legislation process in accordance with the provisions of Turkish Grand National Assembly Internal Regulations.²²

Despite the the above mentioned proposal and drafts brings a new perspective to Turkish Law; they lack a concrete approach as to in what forms and criteria should the electronic notifications be made. Even though The Proposal for Electronic Notification Law states that the procedure and principles regarding electronic notification are to be determined by Telecommunication Authority²³, it does not give any clue as to which method shall be applied. In addition; under the coordination of Turkish Ministry of Transportation, The General Directorate of Postal Service and Telegraph Organization²⁴ having general authority in notifications in accordance with Notification Law no: 7201 is currently carrying out a study in order to concretize electronic notification in an applicable method within the scope of e-registered mail²⁵ stated in ETSI TR 102 438 v 1.1.1. Furthermore; another infrastructural study is being carried out within the scope of National Judicial Network Project (UYAP)²⁶ conducted by Turkish Ministry of Justice in order to enable not only the judicial authorities within the judicial process to make notifications to each other or to the parties involved in the process but also the parties involved in the judicial process to make notifications to judicial authorities or to each other by means of the created closed system.

²¹ For general information about the Proposal please see: http://www.tbmm.gov.tr/develop/owa/kanun_teklifi_sd.onerge_bilgileri?kanunlar_sira_no=40916

²² Turkish Grand National Assembly Internal Regulation, O.G. Date: 13/04/1973 Issue: 14506, <http://www.tbmm.gov.tr/ictuzuk/ictuzuk.htm>

²³ Telecommunication Authority, <http://www.tk.gov.tr>

²⁴ General Directorate of Postal Services and Telegraph Organization, <http://www.ptt.gov.tr>

²⁵ ETSI TR 102 438 v 1.1.1 (2006-03), p. 18-20.

²⁶ <http://www.uyap.adalet.gov.tr/>.

Under Turkish Law; the archiving obligation in a general sense is attributed to merchants by virtue of the last paragraph of Article 66 of Turkish Commercial Code stating: *“Merchants are obliged to keep documents and papers that they receive due to affairs relating to their business such as the letters, correspondences,, telegraphs, invoices, scales and documents indicating their payments, copies of the letters, correspondences and telegraphs that they have written and documents such as contracts, guaranty, bailment and other letters of commitment and court orders in an orderly manner as files.”* The term for merchants’ above quoted liabilities is 10 years as from the date of issuance of such documents according to Article 68/I of Turkish Commercial Code. Merchants are also obliged to keep the mandatory commercial books for 10 years as from the last date of record and as from the date of arrangement of accounts. With respect to physical conditions as to how the merchants shall fulfill their archiving obligation; the last paragraph of Article 66 states that the documents shall be kept in an orderly manner as files. Other than the aforementioned; there is no stipulation as to a concrete archiving obligation and method regarding electronic documents for merchants. Nevertheless; Article 64 and 65 of Draft Bill of Turkish Commercial Code not only extensively sets forth a concrete obligation of archiving for merchants with regards to electronic documents and electronic commercial books but also generally stipulates how merchants shall fulfill the said obligations as quoted below:

“Article 64 -- (1).....

(2) Merchant is obliged to keep a copy (photocopy, carbon copy, microfiche, computer record) of all kinds of documents that are sent in relation with his business in a written, visua or electronic environment.

(3) All the commercial books shall be approved by the public notary at their opening and closing. The closing approvals shall be conducted until the end of the sixth month of following fiscal year. At the establishment phase of the companies the opening approvals can be condcuted by the Registry Officer. Incase such approval is conducted by the public notary, notary is obliged to require an activity approval certificate issued by the Chambers. According to Turkish Accounting standards; the Ministry of Industry and Commerce is authorised to determine whether the opening and closing approvals shall be made for commercial books that are kept in electronic environment or by filing and if the approvals shall be made the form and principles of such approval.

.....

Article 65. -- (1) The commercial books and other requisite records shall be kept in Turkish. In case abbrevations, figures, letters and symbols are used, their meaning shall be explicitly stated.

(2)

(3) A writing or a record can not be drawn and altered in a way that the former content becomes undeterminable. Alterations that can not be understood whether they are made during the record or after the record are prohibited.

(4) Commerical books and other requisite records can be kept by means of filing the documents indicating the facts and transactions or by means of data transporters provided that such ways of accouinting and the methods are in compliance with Turkish Accounting Standards. Incase the commercial books and other requisite records are kept in electronic environment; it is mandatory to ensure access and that they are easliy readable during the term that they are kept. In case of keeping the aforementioned in electronic environment the paragraphs from one to three shall apply by comparision”

As it can be clearly seen from the above quoted Articles of the Draft; unlike the current system merchants are obliged to archive all kinds of documents sent in relation to their business including the electronic documents and it is stipulated that this obligation shall be fulfilled electronically provided that the requirements stated in Article 65 shall be satisfied. By virtue of Article 82 of the related Draft; the term for obligation of merchants to archive the requisite documents is decreased to 5 (five) years. Even though the archiving obligation stated in Article 65 is defined to be technology-neutral; it can be said that the merchants can fulfill their related archiving obligation lawfully by signing the electronic documents with secure electronic signature and by time stamping

With respect to electronic archiving; within e-Transformation Turkey Project²⁷ Action Plan, it is planned to determine not only the procedure and principles that will apply to electronic data and documents of public organizations and institutions to be created, recorded, transmitted to other departments or institutions, stored or exterminated when necessary in electronic environment in terms of record, transmission, sharing, extermination and security but also the minimum standards for electronic record systems enabling them to operate compatible with each other and to be efficiently managed. In this regard; a study called "Reference Model for System Criteria of Electronic Document Management" is carried out by Turkish Prime Ministry General Directorate of State Archives with respect to how the electronic archiving should be between public organizations and institutions.²⁸ Other than the aforementioned; another subject for which electronic archiving will be of essence in Turkey falls under the scope of electronic invoice and electronic accounting system as evaluated below.

Under Turkish Law there is no existing court decision yet regarding the electronic documents, electronic signature and electronic contracts.

Another application in Turkey stipulating the use of electronic signature is The "Project of Illuminating Public", which is initiated in order to provide the secure transmission of fiscal tables and material disclosures of Joint Stock Companies, intermediary institutions and independent auditing firm in an electronic environment through computer networks for illuminating the public. The former application required the data to be sent to Capital Market Board Istanbul Stock Exchange on a paper-based environment or via fax, to reach the system and to be recorded on the database in order to be processed; this whole process happened to cause errors and waste of time and labor. In order to minimize the loss; an infrastructure is formed enabling the statements to be made though internet²⁹. Since the data flow in an electronic environment requires a fast and accessible communication infrastructure as well as the existence of related technical and legal regulations regarding information security, Article 22 of Capital Market Law authorizes the Capital Market Board to regulate and monitor the principles of electronic signature use in transactions falling under the scope of the said law and accordingly Capital Market Board has issued a Resolution determining "The Application Principles Regarding The Data, Documents and Statements to be Signed and Sent in the Electronic Environment"³⁰.

²⁷ <http://www.bilgitoplumu.gov.tr/edtr.asp>.

²⁸ <http://www.devletarsivleri.gov.tr>.

²⁹ Yanlı, Veliye; Publicly Held Joint Stock Companies and Illuminating Public Under the Scope of Capital Market Law, Istanbul 2005, pg. 106, fn. 47.

³⁰ Resolution 9.10.2003, no:52/1223

B.1.2. Transposition of the eCommerce directive

There has not been any study in Turkey yet concerning the systematic transposition of Electronic Commerce Directive in Turkish Law. However the provisions regarding the service providers in Articles 14 and 15 of the Directive are regulated within the scope of intellectual property in Annexed Article 4 of the Code of Intellectual and Artistic Works.

Nevertheless; when the sources of positive law under Turkish Law are to be reviewed it can be observed that several issues suggested in the EU e-Commerce Directive are regulated in sources of positive law from the aspect of those who provide or benefit from the service. Basically; the elements of "information society service"³¹ defined in EU 98/34/EC Directive³² are regulated in Article 9/A of the Consumer Protection Law no:4077³³ amended by Law no: 482, under the heading "Distant Contracts"³⁴ in terms of the services provided to the consumers. The Regulation Concerning the Procedures and Principles for the Application of Distant Contracts issued by the Ministry of Industry and Commerce based upon the Article 31 of Consumer Protection Law no:4077 and Article 9/A that is added to the said Law by Law no:4822 and published in the Official Gazette no:25137 dated 13.06.2003 contains regulations that are in conformity with Article 5 and 9/I of the e-Commerce Directive.

There is a sector specific regulation in Turkish Law with regards to the "unsolicited commercial communication" stated in Article 7 of the e-Commerce Directive. The said regulation³⁵ forbids the operators authorized by the Telecommunication Authority and the receivers to communicate including e-mail for the purpose of political propaganda in the absence of assent. Furthermore; the said regulation grants the subscribers and receivers based on opt-out; the right to reject the communications addressed by the operators for the purpose of marketing. In addition; there are legal regulations in Turkish Law in compliance with Article 6.³⁶ and 8.³⁷ of the e-Commerce Directive.

With regards to electronic contracts there are no separate and peculiar provisions in Turkish Code of Obligations; therefore as explained above in detail it is accepted by the Turkish legal jurisprudence that the current rules regarding the form and conclusion of contracts are applicable for electronic contracts as well. Within Turkish legal jurisprudence and practice; several solutions

³¹ "at a distance", "by electronic means", "at the individual request of a recipient of services"

³² Directive 98/34/EC, Art.1.

³³ The definitions set forth in Article 3 of the Law Concerning the Application of Law no:4077, under the heading "Definitions" where the terms regulated by that Law are explained, are in compliance with sub paragraphs (b), (d) and (e) of Article 2 of e-Commerce Directive.

³⁴ Art. 9/A of Law Regarding the Protection of the Consumer setting forth the definition of the distant contracts is a provision where the definition of the electronic contract is legally expressed: " the contracts that are concluded in written, visual, telephone and electronic environment or by means of use of other communication devices and without face to face contact with the consumers and by which the instantaneous or afterwards delivery or performance of the goods and services are agreed".

³⁵ See. Regulation Concerning The Process of Personal Data and Protection of Confidential Information in Telecommunication Sector. Art. 20

http://www.tk.gov.tr/Duzenlemeler/Hukuki/yonetmelikler/Kisisel_Bil_Yon_06_02_04.pdf

³⁶ Regulation Concerning Principles and Application for Commercial Advertisements and Announcements published in the Official Gazette dated 14.06.2003, no 25318; sets an example for the regulations in Turkish Law in compliance with Article 6 of e-Commerce Directive

³⁷ Article 9 under the heading "Internet" of the Turkish Bar Association's Ad Ban Regulation published in the Official Gazette dated 21.11.2003 sets an example for the regulations in Turkish Law in compliance with Article 6 of e-Commerce Directive as it regulates the information and presentations disclosed by attorneys to public through internet.

are suggested having regard to the issues that are highlighted in Articles 34-38 of the "Recital" section of the e-Commerce Directive. The above explained "distant contracts" stated in the Consumer Protection Law no: 4077 is a contract type that may be evaluated within the scope of electronic contracts. Nevertheless, there is no specific category of "electronic contracts" created by neither positive law nor the jurisprudence.

Under Turkish Law; in accordance with the principle of "freedom of contracts"; the parties can be engaged in a contractual relation in any form that they deem fit unless a special official form or procedure is required by law. Thus; the contracts can be concluded electronically unless otherwise is stipulated by mandatory legislation. Various mandatory legislation requires certain contracts to be concluded in a written form as either a validity condition or a condition of proof. The Draft Bill of the Code of Obligations states that contracts that are statutorily required to be concluded in

Written form can be fulfilled electronically by using electronic signature and therefore clarifies the fact that the contracts that are required to be concluded in written form can now be realized electronically provided that secure electronic signature is used. According to Turkish Law; contracts that are required to be concluded in official form (such as sales and purchase contracts for real estates, heritage contracts or contracts that are statutorily required to be subject to a special procedure (such as marriage) and commitment contracts (such as bailment, guaranty contract,) can not be realized by means of a secure electronic signature (Electronic Signature Law Article 5/f.2). Therefore, the contracts falling under the said legal transactions are legally precluded from being concluded electronically.

Under Turkish Law, the use of electronic signature is not a mandatory element for the contracts to be concluded in an electronic environment. Nevertheless; due to the consequences of substantive law and evidence law attached to the "secure electronic signature" by the Electronic Signature Law no:5070; it is an essential factor for the contracts to be concluded by secure electronic signature in terms of ensuring the transaction security.

As for the requisite elements of commercial communications stated in Article 6 of e-Commerce Directive; in Turkish Law Regulation Concerning Principles and Application for Commercial Advertisements and Announcements dated 14.06.2003 based on Articles 16 and 17 of Consumer Protection Law no: 4077³⁸ sets forth a detailed regulation thereof.³⁹ According to Article 1 under the heading "Objective" of the said Regulation;

Article 1 — The objective of this Regulation is to determine the principles set by the Board of Advertisement with which the advertiser, advertisement agencies, channel establishments and all the individuals, institutions and organizations in relation with advertisement should act in conformity and basis of review to be conducted in accordance with said principles where as the freedom of communication is accepted as a basic principle.

Article 2 regarding the scope; states that "this regulation covers all kinds of commercial advertisement and announcements including the contained verbal and written words, numbers, visual presentations, music and sound effects" and therefore includes commercial communications to be conducted through all kinds of informatics devices. Other articles of the regulation contain provisions in conformity with the requirements stated in 4 subparagraphs in Article 6 of the e-Commerce Directive.

With respect to "Alternative Dispute Resolution" set forth in Article 17 of the EU e-Commerce Directive; there is a regulation in Article 10/e of Electronic Signature Law no:5070 concerning the liabilities of Electronic Certificate Service Provider; where it is stated that Electronic Certificate Service Provider is liable for informing in writing the person demanding certificate of the fact that secure electronic signature is equivalent with hand-written signature; provided that the conditions

³⁸ <http://www.mevzuat.adalet.gov.tr/html/862.html>.

³⁹ <http://www.sanayi.gov.tr/webedit/gozlem.aspx?sayfano=1372> .

for the features and dispute resolution regarding the use of certificate and statutory limitations are reserved.

There is a similar provision in Article 14 of the Regulation Concerning Procedure and Principles for the Application of Electronic Signature Law dated 06.01.2005⁴⁰ under the heading "Liabilities of the Electronic Certificate Service Provider" where it is stated that as a minimum requirement the Electronic Certificate Service Provider shall before providing the qualified electronic certificate, inform in writing the person whom the qualified electronic certificate is to be granted of the alternative dispute resolution remedies that can be invoked for the disputes that may arise between the electronic certificate service provider and the qualified electronic certificate owner.

Furthermore; according to Article 10 of Telegraph and Telephone Law⁴¹; *"in case the interconnection contract is not concluded within maximum three months as from the first demand, upon the application of the party demanding an interconnection from the Telecommunication Authority; the Authority manages a settlement procedure between the parties within the principles to be determined having regard to public interest and can take necessary measures that it deems reasonable and requisite for the public interest. In case the parties can not reach an agreement within a period of six weeks that may be extended by the Authority for another four weeks as from the initiation of this procedure; the Authority is authorized to determine the terms, conditions and fees that it deems fit for such interconnection and that will be valid until or unless parties agree otherwise"*

There is a provision regarding the settlement procedure to be implemented by Telecommunication Authority in Article 21 of Access and Interconnection Regulation⁴² under the heading "Dispute Resolution" quoted as follows:

"Article 21 – In case the related parties fail to reach an agreement within maximum three months as from the access demand including interconnection, any of the parties may request the Authority to implement the settlement procedure"

On the other hand, currently in Turkey the legislative studies are being carried out with respect to legal liabilities of internet service providers regulated in Article 12-15 of EU e-Commerce Directive.

B.2 Administrative documents

There is no general regulation in Turkey with regards to the use of electronic document in administrative processes between the citizens and public authorities. However, specific characteristics of administrative procedures realized in electronic environment are stipulated in related regulations. Additionally; the regulations and standards regarding the use of electronic documents between citizens and public authorities will be determined upon the initiation of the e-government gate application.

With regards to the use of electronic documents between the public authorities; "Regulation Concerning Procedures and Principles for Official Correspondences"⁴³, covering all public organizations and institutions, aims to ensure the healthy, fast and secure exchange of data and documents between the mentioned institutions. The security of electronic documents created, sent and stored in electronic environment by the public organizations and institutions; shall be fulfilled by electronic signature by virtue of Article 17/4 of the Regulation. Furthermore; "The Guide For

⁴⁰ <http://www.tk.gov.tr/Duzenlemeler/Hukuki/yonetmelikler/e-imza-yonetmelik.pdf>.

⁴¹ <http://www.tk.gov.tr/Uzlastirma/Uzlastirma.htm>.

⁴² http://www.tk.gov.tr/Duzenlemeler/Hukuki/yonetmelikler/erisim_arabaglanti_yonetmeliqi.pdf.

⁴³ Decision of Council of Ministers Date: 18/10/2004 No : 2004/8125, OG, 2.12.2004, No : 25658, <http://mevzuat.basbakanlik.gov.tr/mevzuat/metinx.asp?mevzuatkod=3.5.20048125>.

Interoperability Principles” that has entered into force by means of the Circular of Prime Ministry no:2005/20; sets the standards regarding the use of electronic documents in public area.

In terms of fulfilling obligations concerning social security and financial obligations; essential steps have been taken within the frame of e-government applications⁴⁴. Furthermore; the “e-document project” conducted by the Undersecretariat of Customs⁴⁵ aims to promote the implementation of foreign trade transactions by the institutional parties involved in the business process by using standard e-documents in an electronic environment and to provide an effective, fast and efficient and reliable e-business infrastructure.

With respect to e-Government; as the Emergency Action Plan prepared by the 58th Government of Turkey includes e-Transformation Turkey Project; by virtue of the Circular of Prime Ministry no: 2003/12, published on 27.02.200; the goals, institutional structure and application principles of e-Transformation Turkey Project are determined. As mentioned in the Circular of Prime Ministry no: 2003/12; the primary objective of the e-Transformation Turkey Project is to prepare the conditions to establish a government structure making a merit of having participatory, transparent, effective and simple business processes in order to provide a more qualified and fast public service to the citizens.⁴⁶

C. *Specific business processes*

In this section of the study, we will take a closer look at certain capita selecta of the applicable Turkish legislation and legal and administrative practice. Specific examples of common document types will be examined to assess the validity and recognition of their electronic counterparts, along with an analysis explaining the (lack of) prevalence of any allowable electronic document types.

The section below is organised according to five stages in the electronic provision of goods on the international market. They comprise the introduction of goods on the market, credit arrangements, transportation and storage, cross border trade formalities and financial/fiscal management.

⁴⁴ Application of e-Declaration enabling the tax payers to conduct their declarations electronically (<https://e-beyanname.mb-ggm.gov.tr/index.html>); is an electronic portal established for the employers to submit the insurance premium documents of their employees through internet and make their accrual payments relating to their declarations by means of automatic payment and internet banking. e-Declaration application (<http://www.ssk.gov.tr/wps/portal#>).

⁴⁵ http://www.gumruk.gov.tr/Content.aspx?cT=0&cId=0_1_12_2_5.

⁴⁶ The objective of this project is as follows;

- Re-arrangement of policies and legislation regarding information and communication technologies after reviewing the EU *acquis communautaire* and adopting the action plan set for the candidate countries within the scope of eEurope+ to Turkey,
- To develop mechanisms that will enable the citizens to participate in the decision making process in the public area by means of information and communication technologies,
- to contribute in the process of formulating the public administration in a transparent and questionable manner
- To foster implementation of good governance principles in the provision of public services by benefiting from information and communication technologies in the broadest sense,
- To generalize the use of information and communication technologies,
- The integration, monitoring and evaluation of repeated and overlapping investment projects of the administration in order to reduce the waste of source in the field of information and communication technologies and providing requisite coordination between the public institutions,
- To guide the private sector activities in the light of the above cited principles.

C.1 Credit arrangements: Bills of exchange and documentary credit

C.1.1. Bills of exchange

Bill of Exchange is a document issued and signed by the exporter; indicating that the importer has paid or committed to pay the amount (amounting to the value of the exported good) in a certain term in the future to the exporter. Bill of Exchange is used for by the exporter in order to be able to claim payment from the importer in return for the transportation of goods. Bill of Exchange has come to its current position at the end of a quite long development phase. (The Hague and Geneva Conventions)⁴⁷. As Turkey is a party to the Geneva Convention; it transposed the provisions of the said Convention to the Turkish Commercial Code system⁴⁸. Bill of Exchange is used in the form of bill and bond and bill is predominantly preferred in foreign trade⁴⁹. Bill of Exchange is subject to the general principles that are applied to negotiable instruments⁵⁰.

Bill is a valuable paper requiring its holder to pay a sum of money. Bills can change hands by endorsement and become subject to legal action by protest in cases where the debtor does not accept the bill or does not make the payment. Bills contain various essential functions in the new economic order: in terms of its development history the first function of a bill is being a "commercial paper" (means of payment). Bills may also be used as a "short term investment vehicle" and "guaranty vehicle"⁵¹.

There is no definition of bill in the Turkish Commercial Code. Nevertheless; bill has the legal character of a remittance and the mandatory and noncompulsory elements that bills shall contain as a condition of form are stated in Turkish Commercial Code⁵². One of the mandatory elements required by Turkish Commercial Code for a negotiable instrument to have a character of bill is the hand-written signature of the drawer.⁵³ The important thing here is that the signature that the bill bears shall be a hand-written signature.⁵⁴ Even though the Law does not explicitly mention a use of "paper", the fact that the drawer shall sign the bill text with his hand-written signature and that a documentary stamp shall be affixed on the bill by virtue of Documentary Stamp Duty Law leads us to the conclusion that the bill shall be paper-based.

Nevertheless; as mentioned before numerous amendments took place in Turkish Law in recent years having regard to the electronic developments. In fact; it has been stated before that the Draft Bill of Code of Obligations accepts the secure electronic signature to be equivalent with the hand-written signature by virtue of Electronic Signature Law no:5070, and since it stipulates that for the contracts that are required by law to be concluded in written form, secure electronic signature fulfills this condition. In this line; with respect to Bills of Exchange The Draft Bill of

⁴⁷ Öztan, Fırat; Kıymetli Evrak Hukuku (Law of Negotiable Instruments), Ankara 2004, pg. 65; Proy, Reha/Tekinalp, Ünal; Kıymetli Evrak Hukuku Esasları, (Principles of Negotiable Instrument Law) İstanbul 2001, pg. 104 vd.

⁴⁸ Proy/Tekinalp, pg. 107-108.

⁴⁹ <http://www.igeme.org.tr/TUR/pratik/belgeler.pdf>,

⁵⁰ TCC Art. 557-565.

⁵¹ Bond is a promise of payment issued by the debtor and directed to his creditor. It is usually presented by the holder at the due date to the creditor through the banks. It is can be endorsed. The subsequent explanations will merely evaluate the bill.

⁵² TCC Art. 583.

⁵³ TCC Art. 583/8.

⁵⁴ TCC Art 668/f.1.

Turkish Commercial Code containing numerous new provisions regarding electronics; sets forth the below quoted article:

III - Secure Electronic Signature

MADDE 1504 – (1) Bill, bond, check, receipt, interest warrant and other instruments that are similar with bill of exchange can not be issued by means of secure electronic signature. The transactions to be conducted on the bill such as request, acceptance and aval can not be implemented by secure electronic signature.

(2) The signature on the consignment, bill of loading and insurance policy can be affixed by hand writing, facsimile print, stapler, stamp or any other electronic vehicle. The records on these bills can be written, created and sent by means of hand writing, telegraph, fax and other electronic vehicles to the extend that it is allowed by the laws of the country in which the bill is issued.

(3) In case it is determined by the Ministry of Justice that the secure electronic signature is used and gained prevalence in foreign countries; the prohibition regarding the bill, bond, check, invoice, interest warrant and other instruments that are similar with bill of exchange may be annulled by the Council of Ministers upon the proposal of Ministry of Justice and may be regulated by a statute upon the proposal of the same Ministry.

As it can be seen; the Turkish legislator, with respect to the Bill of Exchange (bill, bond, check) even though for a temporary period of time; precluded these bills from being issued electronically and prohibited the use of secure electronic signature. The reason of this is that quite strict conditions of form are attached to these bills in Turkish Law as a member of Continental Europe Civil Law and that the legislator is not willing to give up this convention until it deems the technologic developments to be absolutely trustworthy. Accordingly; as mentioned in the last paragraph of the related article; in case the Ministry of Justice determines that the secure electronic signature is widely used in foreign countries, upon the decision of the Council of Ministers, the Bills of Exchange will be able to be issued by secure electronic signature as well. It is acceptable that the legislator has such hesitation in the contemporary circumstances and especially for the electronic signature application is newly initiated in Turkey, however the related regulation may lead to consequences exceeding its objective since it sets the condition of widely use of electronic signatures in foreign countries as a condition for the Bill of Exchange to be issued by electronic signature; because the basic problem as to the issuance of bills of Exchange in electronic environment is not the wide use but the necessity to set technical specifications relating to security issues and prevention of copying the bills. Furthermore; the usage rates of electronic signature differentiate around the world since the electronic signature is actually used in light of the community applications. In other words; aside from the electronic signature infrastructure the application in which the electronic signature is to be used shall be improved and presented to a certain community of users. In that sense; in case community applications satisfying requisite requirements are used on a wide scale, Bills of Exchange should be able to be issued in an electronic environment. Should the aforementioned applications become widespread; it is our opinion that the requirements (not only the requirements related to electronic signature and electronic bills of exchange but also requirements related to the community applications and information security) regarding the issuance of bills of Exchange in an electronic environment will be determined by the mentioned statute.

As the legal situation is as above explained; international trade creates solutions in line with its own needs and can reach the legal results that it needs in practice. As mentioned above; community applications provide services for the implementation of the documents and transactions used between parties in an electronic environment. The frame of these services and the mutual validity of the transactions implemented and the documents sent in electronic environment are determined by the contracts that are agreed by the parties as they participate in the community application and the needed legal function is ensured even though in a limited way.

C.1.2. Documentary Credit

Foreign trade is an activity between different countries or different foreign commercial enterprises. The trade business is conducted by the documents between different countries or the enterprises that are away from each other and also have different economic systems, currencies, customs and business cultures. There are number of documents required in foreign trade. The types of these documents rely on the countries and their legislation involved in foreign trade also depends on the type of the product and the form of transportation and delivery type. The international relations act an important role on marketing of the developing technology and economic productivity. Since the economic and commercial relations became international, the reliable systems between the persons and the states are improved. One of these systems is namely documentary credits.

Although documentary credit is a popular method of payment in the international field, it is not regulated under Turkish Legislation yet. The differences on the commerce and law systems of the countries oblige the application of the international rules rather than the national law systems which is also more beneficial. Since the free will principle prevails on the documentary credit systems, also in Turkey there was no need for a specific regulation on the documentary credit⁵⁵.

UN (United Nations) and ICC (International Chamber of Commerce) have regulated special rules regarding the documents and terminology. Uniform Custom and Practice for Documentary Credits/UCP. No.500 was reviewed and published by the ICC in 1993 in which explained the documents related to documentary credits and specific information of the specific documents. Some amendments adopted on electronic production of the documents were made on UCP 500 in 2002 (+eUCP, 2002). There are studies on less time consuming and more convenient applications of documentary credits by the standardisation of the necessary documents of the documentary credits⁵⁶. All these internationally accepted rules are also applicable in Turkey⁵⁷.

eUCP, extends the documentary credits into the electronic era. It does not have any provisions regarding to the issuance or notifications of the documentary of credits electronically since either UCP or commercial practice provides its applications. eUCP was drafted independently from the specific technologies and improving electronic commerce systems. In other words, there is a convenience on the electronic production by using the specific technologies and systems; however no definition of them exists. Technology constantly improves and changes. Therefore the eUCP, leaves the liberty of the parties to agree on the technologies and systems to be used in their contract.

UCP 500 is stemming its power from neither a law nor a treaty or commercial custom however with the reference declaring "UCP 500 shall be applied". UCP 500 becomes the part of the agreement with the reference in question⁵⁸. It is not sufficient only to notify ICC on the consensus for the application of UCP 500. It should be expressly stated in the documentary credit⁵⁹.

There are more than two hundred documents that required by the Turkish Customs to be originally produced. In the frame of the "e-Document Project in Foreign trade, e-Foreign trade transaction project" conducted by the coordination of the undersecretariat of the prime ministry

⁵⁵ Kostakoğlu, Cengiz; Documentary credit and the disputes arising from the bank credit legislation, Istanbul 2001.

⁵⁶ <http://www.igeme.org.tr/TUR/pratik/belgeler.pdf>, s. 2

⁵⁷ Turkish Banks Association declared via Intenational Chamber of Commerce (ICC) that UCP 500 is approved by Turkish Banks.

⁵⁸ Reisoğlu, Seza; Documentry credits and the problems in practice from the legal aspect. <http://www.tbb.org.tr/turkce/konferans/sr%2Dkonferans%2Dseza.doc>.

⁵⁹ Şanlı Cemal/Ekşi Nuray; International Commercial law, Istanbul 2005, s. 83-84; Bağrıaçık Atilla/Kantekin Seyfettin; Foreign Trade documentary Credit Transactions in practice, Istanbul 1995.

for foreign trade and customs undersecretariat the number of necessary documents have been decreased and it is targeted to provide the common electronic share of the information and documentation and render the commercial transactions more convenient by reducing the amount of the documents. Consequently it is also possible in real life to take part in the less time consuming and also reliable transactions efficiently.

C.2 Transportation of goods: Bills of Lading and Storage agreements

C.2.1. Bills of lading

Bill of lading is called "negotiable instrument" which has a specific importance in the Turkish Law. A bill of lading is a type of negotiable instrument which is issued by the transportation carrier or by the captain (or authorised agent) to the shipper unilaterally acknowledging that they have received the shipment of goods and that they have been placed on board a particular vessel which is bound for a particular destination and states the terms in which these goods received are to be carried⁶⁰. It is used in the maritime trade on the carriage of goods and also internationally accepted.

Bill of lading is regulated under Turkish Commercial Code subtitle Maritime Trade⁶¹. Turkish Commercial Code states two types of bills of lading:

1. Shipped bill of lading: The bill of lading is issued following the shipment.
2. Bill of lading given to the shipper upon receipt of the goods: The bill of lading is issued following the delivery before the shipment.

Issuance of the bill of lading is solely possible upon the request of the shipper. Apart from that there is no other requirement by the commercial law. The bill of lading shall be issued by the carrier.

The form of the bill of lading: The bill of lading is the unilateral note payable of the carrier, a written declaration according to Article 1097 and at seq. of the Commercial Code. Consequently, it should be in compliance with the form requirements of the Code of Obligations which necessitates the original signature.

On the other hand, the international tendency and the developments in the electronic were taken into consideration and regulated differently in the draft of the Turkish Commercial Code. When the draft Code is legislated the rules are going to be in force as follows:

- A) Bill of Lading:
I- Definition, types and regulations:

Article 1228 -

(6) Bill of lading shall be issued in writing; the signature could be originally handwritten, facsimile printed, stamped, as symbol, mechanically or electronically. The records on the bill of

⁶⁰ Çağa, Tahir/Kender, Rayegan; Maritime Trade Law II, Istanbul 2004, p. 65.

⁶¹ TCC md. 1097 vd.

lading may be sent in handwriting, telegraph, telex, fax or other communication methods or may be preserved in the electronically in the frame of the law of the country.

Issuing, sending and preserving of the bill of lading electronically are possible by this provision of the draft Commercial Code. The written form requirement will be fulfilled with the secure electronic signature by this provision and by the Articles 14 and 15 of the draft Code of Obligations.

C.2.1. Storage contracts

The storage agreement was regulated under the section 19 "storage"; subsections storage, illegal consigning, warehouse contract and consignment to the hotel holder.⁶²

The components of the storage contract are as follows: the existence of the good to be preserved, the promise of the storage agent to preserve the good in a secure place, for the trust relationship between the parties it should be accepted that the party may demand the good back from the storage agent at anytime and as last point the parties shall agree on these components for the constitution of the contract. However, there is no need for the delivery of the goods in question. Therefore the storage contract is a consensual contract⁶³.

There is no form requirement on the validity of the escrow contract. The contract shall be concluded by the consensus of the parties. However, the goods in question shall be delivered for the existence of the preserve obligation of the escrow agent. The obligation shall rise with the delivery of the goods. Therefore the escrow contract is non-reciprocal type of agreement.

There is no specific form requirement by the law for the storage contract. On the other hand, it is totally acceptable to stipulate a written form requirement by the parties. In this possibility it is possible to conclude the agreement by signing electronically. Because the draft Code of Obligations grants the permission for the secure electronic signatures in order to content the written form requirements.

Although the code of obligations grants this kind of liberty to the parties on the form requirements, the parties may envisage a written requirement for the conclusion of the agreement in order to prove it before the court in the case of a dispute.

The Articles 473-477 of Code of Obligations and 744 at seq. of the Turkish Commercial Code regulate "the warehouses" or "the public warehouses". Apart from these articles in question, there are "the public warehouse law numbered 2699 and dated 11.08.1982⁶⁴" (PWL) and "the public warehouses regulation numbered 84/8429 and 13.08.1984 dated" (PWR).

The definition of "warehouse" is made in the Article 744 subsection 1 and in the Article 2/a of the PWR⁶⁵. In the frame of these provisions, "public warehouse means a warehouse which runs business by selling or pledging the goods that are unrestricted, duty free or under monopoly."

Consequently there are two different negotiable instruments issued by the warehouses: One of which is the warehouse receipt, proves the possession of the goods, on the other hand, warehouse keeper's warrant proves the pledge of the goods delivered to the warehouses and its form requirements and negotiation forms regulated under Article 746 of Turkish Commercial Code. Article 746 of the TCC subsection 7 requires the "signature" of the manager of the warehouse. The draft TCC Article 1054 does not permit the electronic signature on the warehouse receipt and

⁶² The draft Code of Obligations Article. 561-580, <http://www.kgm.adalet.gov.tr/borclarkanunu.htm>

⁶³Yavuz, Cevdet; Obligation law lectures (Specific provisions), Istanbul 2001, s. 467 at seq. .

⁶⁴ <http://www.mevzuat.adalet.gov.tr/html/594.html>.

⁶⁵ Yavuz, s. 475 vd.

warehouse keeper's warrant. As a result subject to Turkish Law, these documents shall be originally signed in the future⁶⁶.

C.3 Cross border trade formalities: customs declarations

As envisaged in Ankara Agreement in 1963, by which also European Community- Turkey contact was constituted, Customs Union Agreement came into force in January 1996. Legally it is the outcome of the "Community Council Resolution" dated 6th of March 1995⁶⁷. Following the entrance into the Customs Union, in order to adopt the legislation and the documents, "Standard custom declaration" came into force.

Custom declaration shall be issued directly between the owners of the good or their legal agent or attorneys. The custom declarations shall be completed by duly registration of the record book, the registration number, date and stamp. In order to receive the custom declarations electronically, there is a provision in the Regulation of the undersecretariat of the prime ministry for foreign trade as follows:

Article 19- The custom authorities in official automation require the custom declaration stamped by the Association Approval Code during the exportation. The goods are not allowed to leave the country unless the goods have the stamp in question.

In accordance with the above-stated regulation, there is an application of the e-Community on the custom declaration in Turkey⁶⁸:

It is aimed by the Association of Exporters General Secretary to provide the maximum convenience and benefits of its members by exchanging the information like approval of the Custom Declaration. By doing this, the work load will be reduced with the most upgraded technology of the network and computers, and then it will be possible for the staff to work on their main mission. Thus the Exporter's Association not only records the Custom Declaration and provides statistics but also takes an important role in the development of the export.

E-Community project provides the exchange of the documents between the members and the Association and also provides the payment or deduction of the partial contributions via internet banking or on the account. By this way waiting in the long queues or being obliged to carry cash is not an inconvenience to be faced anymore.

E- Community project is negotiated among the undersecretariat of the prime ministry for foreign trade, the customs secretariat and Exporter's Association. The project has a considerable importance for being a model on exchanging and enhancing the information between the other official authorities.

E-Community project the first project that provides the efficient usage of the XML standard on the information technology. The information sent on the EDI format and an additional information can be sent to the server's of the associations without any repetitive operation. E-Community project is one of the first attempting for the introduction of the electronic signature method rather than traditional original signature and stamp method.

⁶⁶ Article. 1504/subsection.1: Policy, bond, cheque, warehouse keeper's warrant and the similar documents shall be issued by the electronic signature. Also these documents shall not be accepted, submitted or bailed with the electronic signature.

⁶⁷ <http://www.deltur.cec.eu.int/i-gumruk1.html>.

⁶⁸ <http://www.ebirlik.org>.

C.4. Financial/Fiscal management: electronic invoicing and accounting

C.4.1. Electronic Invoicing⁶⁹

One of the most important steps to be taken on the electronically realisation of the commercial transactions is the usage of the electronic invoice. The usage of the electronic invoice is going to prevent a considerable time consuming and also underpin the companies by granting an advantage on the costs and competition. It also will provide to reduce the unregistered income and trigger the value added by entering into the e-state projects.

The density of the transactions every each day oblige the more convenient methods rather than on paper. This necessity takes part in the practice especially in countries which adopts the sophisticated society paradigms. There are considerable steps are taken on this issue in Turkey. One of these steps is the "The preparation work of the usage of the electronic invoice" regulated under E-Transform Turkey Project 2005 action plan section 49. In this respect, the Ministry of Finance shall arrange studies on the usage of the electronic invoice by the parties and the standards and other measures.

The e-Invoice is legislated by the European Union with the directive numbered 2001/115/EC. According to the directive the member states shall arrange the necessary law regulations regarding the e-invoice.

In respect with the above mentioned issues the Ministry of Finance has initiated the necessary project studies with *Istanbul Bilgi University Information Technology Law Research Centre* regarding the e-invoice.

The expected targets of the project to be realised are as follows:

- Forming a frame arrangement in compliance with the e-Invoice directive of the European Union numbered 2001/115/EC.
- Forming a frame model in compliance with the business models, legal substances and standards of the European Union.
- Forming a model concept related to issuing, sending, receiving, preserving, submitting, transferring into the business of the invoice,

D. C.4.2. Electronic Accounting

Various implementation and regulation making activities in connection with Electronic Accounting are being carried out in Turkey. Under article 242⁷⁰ of the Tax Procedure Law which is the main regulation with respect to the subject matter:

"Electronic book is the integrity of the electronic records that contains the information, which is, under this Law, required to be in the statutory books irrespective of the form provisions.

Electronic document is the electronic records that contain the information, which is, under this Law, required to be in the documents that are prepared compulsorily irrespective of the form provisions.

⁶⁹ Keser Berber, Leyla; *Electronic Invoice and the digital financial auditing of the companies*, Ankara 2006.

⁷⁰ <http://www.mevzuat.adalet.gov.tr/html/1045.html>.

Electronic record, which forms electronic book and documents and is retained in electronic environment, is smallest information unit that is accessible and penetrable through electronic methods.

The provisions regarding books, records and documents in this Law and other tax laws will also prevail for electronic books, records and documents. The Ministry of Finance may determine different procedure and rules of the electronic books, records and documents from those of other books, records and documents.

The Ministry of Finance may determine procedure and rules with respect to creation, recording, transmission, protection and submission of electronic books, document and records and introduce the obligation of transmission of the information that is required to be in the books and records, which are allowed to be retained and arranged electronically, to the Ministry of Finance or to any other real or legal person that the Ministry of Finance. Information transmission may be carried out through any kind of electronic information transmission tools including the Internet. The Ministry of Finance may regulate and supervise the standards and format that will be complied with in the information transmission and determine the rules and procedures with respect to the implementation, and supervise and determine the rules and procedures of the use of electronic signature in the transactions that are within the scope of this Law.”

As seen, identification of electronic accounting and other main identifications have been made in article 242 and authority to regulate secondarily is granted to the Ministry of Finance. Furthermore, the article provides that the Ministry of Finance is authorized to supervise and determine the rules and procedures of the use of the electronic signature in the transactions that are within the scope of the Tax Procedure Law. The reason for this is that when this Law was prepared, the Electronic Signature Law had not been enacted yet and, therefore, taking the potential practices into account, the Ministry of Finance was authorized to make the necessary regulations.

In connection with the electronic accounting, the Ministry of Finance prepared the “Tax Procedure Law General Communiqué Draft” and sought the public opinion regarding the matter under its authority granted by article 242 of the Tax Procedure Law. In the communiqué draft, instead of the books and documents that are prepared, retained protected and submitted in paper form, the procedures and rules regarding creation, recording, transmission, protection and submission of the electronic books and documents that contain the same information.

The draft communiqué provides some requirements for electronic book and document use. Therefore, the taxpayer who may benefit from the practice must:

- do the book keeping according to the balance sheet
- have made full certification agreement with a chartered accountant
- have an electronic book and document system that is regarded sufficient from the hardware, software, personnel and other points of view by the Revenue Office

The taxpayers who comply with these requirements may do bookkeeping electronically under the draft communiqué rules and procedures. The taxpayers who would like benefit from the regulation should obtain an approval for preparatory period that will take maximum 5 years by submitting a report, which contains their book and document that they would like to keep electronically, hardware and accounting software that forms their electronic accounting systems, explanation how their recording created and kept, and also contains their personnel and system security, and a staged plan regarding retaining and transmission of the electronic book documents in data format. The taxpayers will keep only the books and documents, which they wish to keep electronically, in both electronic and paper forms during the preparatory period. The taxpayer who successfully completes the preparatory period will be granted a permit for electronic bookkeeping and electronic document. The taxpayers may keep their books and documents only in electronic form from the beginning of the data period that follows the permit date.

The Ministry of Finance made the Internet Tax Office available under the Tax Offices Automation Project (VEDOP) and regulated electronic tax return to ensure tax returns and notification and its annexes are submitted more easily and faster and substantially decrease the number of mistakes in filling in the tax returns and provide better service to the taxpayers. The regulations with respect to the matter in the Tax Procedure Law as follows:

Article 257

4- "In view of Article 149 of this Act, the [(Ministry of Finance)] has the competence to authorize, together with the information requested from those obliged to continuously/consistently provide information, the provision of tax declarations and notices through all kinds of electronic information communications means and media, including the internet, with the condition that the a secure environment is established through password, electronic signature and other means; to allow or obligate the declarations and notices to be communicated via real or legal persons with the requisite delegated powers as agents; to determine the format, standards and the practices relating to the procedures and elements to be followed at the communication of declarations, notices and information; to have this obligation practiced in respect of declaration, notice and information types, taxpayer groups and activity subjects separately; to communicate electronically the assessment note and/or the written notice drawn as a response to those declarations provided after the statutory deadline on one's own will or upon a demand of regret to the taxpayer, to the person accountable, or to those real or artificial persons to whom the former have delegated the power to send declarations on the electronic medium, and to determine the procedures and elements relating to this practice".

"In accordance with the 4th clause of the 1st paragraph, in cases where the Ministry of Finance has allowed or obligated the declarations and notices to be communicated via real or legal persons with the requisite delegated powers as agents (on the condition that the taxpayer or other accountable person has arranged a special agreement with the delegated agent), the declarations and notices sent via the electronic medium are regarded as provided by the taxpayer or other accountable person."

Article 28

"In case where the declaration is sent via the electronic medium, the assessment note is drawn up in the electronic medium and is delivered to the taxpayer or the corporate entity/legal person via the electronic medium. This delivery is regarded as the/stands as the communication of the assessment note to the taxpayer."

As a result of the arrangements as set out above, the Ministry of Finance besides acquiring the competence to allow or obligate the communication of tax declarations and notices via electronic means directly by taxpayers, is endowed with the authority to allow or obligate the communication of the said materials by real or legal persons delegated with the appropriate powers.

Considering the judgment found in the Article 28 and its repeating Article 257 of the Tax Procedure Law, tax declarations may be sent by the taxpayers directly, or by their designated agents via the electronic medium, and in both cases they will be regarded as provided by the taxpayer and evaluated as declared by the taxpayer. In this context, there is no difference between declarations sent via the Internet or other electronic information communications means or medium, and those communicated on paper in the legal outcomes they produce/ re their legal effect⁷¹.

Despite the facultative nature of the e-Declaration practice, according to the Tax Procedure Law general communiqué numbered 346, it is obligatory for those taxpayers liable to pay an Income Tax and a Corporate Tax whose total assets are more than 200,000 New Turkish Lira (YTL 200,000) as of 31 December 2004, and has the total turnover of 2004 is more than YTL 400,000 and who pay tax in real procedure due to their commercial, agricultural and occupational

⁷¹ e-Declaration Guide, PricewaterhouseCoopers, Turkey, December 2005

activities, have to submit their Annual Income Tax Return, Corporate Tax Return, Temporary Tax Return electronically. Those who are liable to pay Special Consumption Tax, Special Communication Tax and Gaming Tax are obliged to submit their Special Consumption Tax Return, Special Communication Tax Return and Gaming Tax Return in electronic form.

It is aimed to arrange and audit the Electronic Accountancy Records Archive System Project (EMKAS), which is still in the process of being developed by the Ministry of Finance, together with the 72 different kinds of accountancy related documents found on paper.

The draft Turkish Commercial Code also contains articles concerning electronic accountancy. The decree of the draft code on the keeping of account books in the electronic medium, as found in the relevant section of the draft, are as follows:

Book Keeping and Inventory

Book Keeping Obligation

Article 64 – (1) Every merchant must keep the commercial books and explicitly state his commercial transactions and assets under Turkish Accounting Standards and provisions of this Law particularly article 88. The books must be kept in a way that the third person experts can easily understand the basics of the activities of the enterprise and financial standing. The formation and development of the activities of the enterprise should be easily followed from the books.

(2) The merchant is obliged to keep a copy (photocopy, microchip, computer file etc.) of all kinds of document, which has been forwarded to him, in writing, audio or electronic form.

(3) All the commercial books shall be certified in their opening and closing. The Ministry of Finance will determine how the opening and closing of the books, which are kept electronically or by way of filing according to Turkish Accounting Standards, will be done through a communiqué.

(4) The books that are not related to the accounting of the company such as Stock ledger, Board Resolution Book and General Assembly Negotiation and Decision Book are also commercial books.

(5) The provisions that are stated in this section and the other provisions of this Law that are directly and indirectly related commercial books will be implemented as far as otherwise is not stated in the Turkish Accounting Standards that are in line with the International Financial Audit Standards and as far as these standards allows the implementation of such provisions.

(6) The book that will be kept shall be determined by the Turkish Accounting Standards Board through a communiqué.

Book Keeping

Article 65. – (1) The book and the other necessary records shall be kept in Turkish. In case abbreviations and numbers, letters and symbols are used, their meaning should be clearly stated.

(2) The writings to the books and the other necessary records will be correctly and regularly made in complete and in time.

(3) A writing or record may not be deleted or crossed out in a way that its previous content cannot be determined. The corrections that cannot be clarified regarding its date are prohibited.

(4) the books and other records may be kept in a way of filing the documents that identifies the facts and transactions or through the data carriers on the condition that such bookkeeping and the methods that applied in this matter must be in line with the generally accepted accounting standards. If the book or record is kept in electronic form, it must be ensured that the information is accessible and reader friendly during the period that such information is kept. In case of electronic bookkeeping the sub-article 1 and 3 are implemented by way of analogy.

D. General Assessment

D.1. Characteristics of Turkish eCommerce Law

The legal regulations with respect to substantive law (such as commercial law and law of obligations) in Turkey, on one hand, contains the rules that are in line with the EU Directives and member state implementations and, on the other hand, introduces solutions in accordance with the developments in electronic.

Particularly, in principle, it recognizes the freedom of contract in making the agreements in electronic. It is stated that providing secure electronic signature in terms of the contracts that have to make in writing under the law, which is also an exception to the above; whereas, in terms of the contracts that must be made with strict formalities, the electronic signature has not been allowed, will ensure this. As far as the commercial law is concerned, for instance, until preparation of bill of exchange, cheque, warrant with secure electronic signature is widely recognized, use of electronic signature is not allowed for now. Therefore, apart from the electronic documents that may be prepared under law, paper document will be used for some more time in terms of commercial relations in the national and international relations.

However, the international regulations also play an unifying role for Turkey. For instance, CMI Rules with respect to electronic bill of lading and eUCP are within this scope. The rules that do not refer to a specific technology and find an implementation area with a reference in the contract provides a definite and monotonous character.

A.1. D.2 Main legal barriers to eBusiness

A.2.

From a purely legal perspective, the Turkish legal system presents some significant hindrances relating electronic contracts⁷²: One of the factors, which hinder parties to prefer electronic contracts in Turkey, is administrative organization. For instance; Article 1 of The Code of Stamp Duty is one of the most important hindrances on electronic contracts. Not long after The Code of Electronic Signature presented, it is been judged that to take stamp duty from the electronic documents as in for paper documents by the amendment on the Code of Stamp Duty on 31.7.2004⁷³. This clause, which identifies paper contracts with electronic contracts in the perspective of financial liabilities, has to be removed for wide spreading of e-contracts and e-signature usage as well as opening the barriers over e-trade.

Another hindrance is rooted in The Code of Electronic Signature Article 5/f.2 clause. In this clause, there is a sentence, which is to protect users against the possible damages.

"Secured electronic signature is not allowed to be used in legal operations which are subject to an official duty or a special formality by the law and in assurance contracts."

⁷² Keser Berber, Leyla; Some Barriers Ahead of E-Signature and E-Commerce in Turkey, <http://turk.internet.com/haber/yazigoster.php3?yaziid=12864>.

⁷³ Article 1 – The documents stated in no (1) annexed to the Law are subject to stamp duty.

The documents term in this Law are the documents that are written and signed and the documents that proves or identifies something and the electronic signature containing documents that are created in the magnetic field as electronic data.

The documents that are prepared in foreign countries and embassies and consulates of foreign countries will be subject to tax provided that they are submitted to the official offices or subject to the endorsement or transfer transactions or benefited from.

The main problem is that the scope of the mentioned article is too large and uncertain. Legal operations which are subject to an official duty or a special formality and assurance contracts have not been stated clearly in our legislation, therefore it needs specialty to determine and comment each one of them. It does not seem possible that secured electronic signature users would know or comment on those legal operations and assurance contracts which each may be the subject of controversy even in legal doctrine.

Too large and uncertain scope of the legal operations and assurance contracts in which secured electronic signature is not allowed is quite enough to prevent this new practice to widespread and develop. Users would avoid using electronic signature for legal operations even in a slightest doubt. On the other hand, there would be malicious people who would want to make some legal operations by electronic signature even knowing that it is not allowed, and that would cause no confidence in the system. Users who are hurt by these operations would directly address Electronic Certificate Service Providers, which are bound to provide adequate and correct information about the usage of signature, and the financial liability insurance companies.

In the same paragraph it is stated that it is strictly prohibited to use secured electronic signature in "assurance contracts" with no exceptions, that is highly narrowing the usage of electronic signature especially in the Banking Business.

Namely; assurance clauses are frequently seen in many contracts in operation especially in bank loan contracts, and assurances such as guarantee or surety bond or assurance letter is requested. Apart from the assurance contracts, which are prepared separately from the main contract, all contracts that includes assurance clauses or requests assurances will be determined in the scope of assurance contracts and electronic signature will not be used for them. Otherwise, it may be claimed invalidity of the e-signatures in main contracts and legal operations due to assurance clauses. In this case, no bank or financial company or insurance company etc. will not use or allow using e-signature without assurance.

By an amendment in The Code of Electronic Signature Article 5, it has to be clarified and stated clearly that in which legal operations and contracts are not allowed to use e-signature, and also by an amendment in the Regulation in the same way, aspects and conditions of that have to be determined.

Also, it is wise to make an amendment in Article 1504⁷⁴ of The Turkish Commercial Law Draft, which is at the moment in Parliament's Subcommittee before it becomes law. In this article, by taking the circulation power into account, bill of exchange and cheque, which are stated that they cannot be prepared with the secure electronic signature, will have to be re-evaluated in the light of the international practices. Re-evaluation will have to be made by taking international practice into account. Given that uncovered cheque is an important problem in Turkey, electronic cheque operation could create great advantages on recording the system under control.

A.3. D.3 Main legal enablers to eBusiness

Freedom of contract principle, which dominates Turkish contracts law is also valid for commercial contracts and provides parties to shape juridical relations between them as they wish. Especially electronic signature provides the parties the opportunity to make obligatory international commerce in electronically and that lengthens the freedom more. The situation about the electronic documents in Turkey is framed in EU e-signature and consumer protection; even all has not been gathered under an e-commerce law, many issues in EU directive which to be adapted

⁷⁴ III- Secure Electronic Signature

Article 1504 – (1) Bill of Exchange, bond, cheque, warrant or similar bills may not be prepared with the secure electronic signature. Transaction with respect to these bills such as submission, acceptance and guarantee may not be carried out with the secure electronic signature.

into domestic laws are found adapted in Turkish Law by the laws in effect or law drafts or law preparation works.

The greatest study, which will remove the administrative hindrances over electronic documents and remove legal arrangements, which requires paper documenting, is doubtlessly the e-state project named "the e-transformation Turkey"⁷⁵. Given that in the scope of this project, the projects which are undertaken by the state establishments and which are in the action plans⁷⁶ prepared so far in the scope of the project and the studies which to be undertaken after "The Information Society Strategy Report" which is prepared by State Planning Organization and which is expected to be approved in next days, it is clearly seen that many projects are designed to end exchanging and archiving paper documents. In this context, National Court Network Project which is undertaken by Ministry of Justice and which is aimed to put courts into electronic media; e-invoice, e-account and electronic official books operations of Ministry of Finance; a bunch of projects which are aimed to achieve electrification in Health by Ministry of Health, after all this projects are in effect, Turkey would be stepping into "paperless world" in the perspective of national and international relations. In fact, e-proclamation presented by Ministry of Finance and e-declaration presented by Social Security Organization has resulted in facts clearly in what rates the savings of paper, labour and time can be.

⁷⁵ <http://www.bilgitoplumu.gov.tr>

⁷⁶ OG, 1.4.2005, P. 25773, <http://rega.basbakanlik.gov.tr/>

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