The purpose of this paper is to evaluate the systems of E-commerce of the EU and Turkey. This chapter will firstly consider the EU System, after that, Turkish system will be criticized when it is compared to the European system.

1. UNCITRAL

a. Evaluation

The main difference between EU Directive and UNCITRAL Model Law is that all the rules in Directive are about the formation of an electronic commerce law that can be qualified as being international or transnational either by its sources or by the very nature of the medium in which exchanges occur. However, it is not a uniform law but rather a harmonized law.

Indeed, both on the universal level, and on the European level, the regulation methods adopted so far- Model Law for the UNCITRAL, directives for the EU- will lead to harmonized but not identical laws. On the European level, directives only aim at bringing together the legislation of Member States, as far as that will be necessary for a good market operation; on the universal level the UNCITRAL held that a Model Law- less restricting than a uniform law convention- would have been quicker to elaborate and would have resulted in a spontaneous assimilation of the solutions selected by the different legal systems.

It could be assumed that, from now on, no country is going to legislate on this matter without taking into account the rules suggested by this law, along with the solutions mentioned in its “Guide for incorporation”, although the States remain free to depart from it. It concludes that the differences in solutions between legislation will be blurred but not obliterated; besides, it is possible that some States refrain from legislating in this matter or choose different solutions.¹

The use of modern means of communication such as electronic mail and electronic data interchange (EDI) for the conduct of international trade transactions has been increasing rapidly and is expected to develop further as technical supports such as information highways and the INTERNET become more widely accessible. However, the communication of legally significant information in the form of paperless messages may be hindered by legal obstacles to the use of such messages, or by uncertainty as to their legal effect or validity. The purpose of the Model Law is to offer national legislators a set of internationally acceptable rules as to how a number of such legal obstacles may be removed, and how a more secure legal environment may be created for what has become known as "electronic commerce". The principles expressed in the Model Law are also intended to be of use to individual users of electronic commerce in the drafting of some of the contractual solutions that might be needed to overcome the legal obstacles to the increased use of electronic commerce.

The decision by UNCITRAL to formulate model legislation on electronic commerce was taken in response to the fact that in a number of countries the existing legislation governing communication and storage of information is inadequate or outdated because it does not contemplate the use of electronic commerce. In certain cases, existing legislation imposes or implies restrictions on the use of modern means of communication, for example by prescribing the use of "written", "signed" or "original" documents. While a few countries have adopted specific provisions to deal with certain aspects of electronic commerce, there exists no legislation dealing with electronic commerce as a whole. This may result in uncertainty as to the legal nature and validity of information presented in a form other than a traditional paper document. Moreover, while sound laws and practices are necessary in all countries where the use of EDI and electronic mail is becoming widespread, this need is also felt in many countries with respect to such communication techniques as telecopy and telex.

The Model Law may also help to remedy disadvantages that stem from the fact that inadequate legislation at the national level creates obstacles to international trade, a significant amount of which is linked to the use of modern communication techniques. Disparities among, and uncertainty about, national legal regimes
governing the use of such communication techniques may contribute to limiting the extent to which businesses may access international markets.

Furthermore, at an international level, the Model Law may be useful in certain cases as a tool for interpreting existing international conventions and other international instruments that create legal obstacles to the use of electronic commerce, for example by prescribing that certain documents or contractual clauses be made in written form. As between those States parties to such international instruments, the adoption of the Model Law as a rule of interpretation might provide the means to recognize the use of electronic commerce and obviate the need to negotiate a protocol to the international instrument involved.

The objectives of the Model Law, which include enabling or facilitating the use of electronic commerce and providing equal treatment to users of paper-based documentation and to users of computer-based information, are essential for fostering economy and efficiency in international trade. By incorporating the procedures prescribed in the Model Law in its national legislation for those situations where parties opt to use electronic means of communication, an enacting State would create a media-neutral environment.²

b. Conclusion

E-commerce in Europe has been developed in time according to needs of people.

First studies regarding e-commerce have been started with studies of UNCITRAL Model Law. The purpose of UNCITRAL is to provide harmonization in international trade law. UNCITRAL is formulating modern, fair, and harmonized rules on commercial transactions. These include conventions, model laws and rules, legal and legislative guides and recommendations, technical assistance and regional and national seminars on uniform commercial law.³

² http://www.jus.uio.no/lm/un.electronic.commerce.model.law.1996/doc.html#153
³ <http://www.uncitral.org/uncitral/en/about_us.html> accessed 31.10.15
The process of preparing of the Model Law took so much time and sessions. It came into force in 2001 after 37 sessions of the Working Group of UNCITRAL. The Model Law consists of two main parts. The title of the part one is “Electronic commerce in general” which has three chapters (with 15 articles) in it. The title of the part two is “Electronic commerce in specific areas” which has Art. 16 (“Actions related to contracts of carriage of goods”) and Art. 17 (“Transport documents”).

2. EU Directive

a. Evaluation

The aims set out in the EU treaties are achieved by several types of legal act. Some are binding while others are not. Some apply to all EU countries, others to just a few.

A "directive" is a legislative act that sets out a goal that all EU countries must achieve. However, it is up to the individual countries to decide how. This was the case with the working time directive, which stipulates that too much overtime work is illegal. The directive sets out minimum rest periods and a maximum number of working hours, but it is up to each country to devise its own laws on how to implement this.4

The purpose of the Directive on electronic commerce is to improve the legal security of such commerce in order to increase the confidence of Internet users. It sets up a stable legal framework by making information society services subject to the principles of the internal market (free circulation and freedom of establishment) and by introducing a limited number of harmonized measures.

The European Union ("EU") consists of 27 Member States that attempts to coordinate over 500 million citizens, with 23 languages, on political and economic matters of common interest. A means by which the European Parliament can seek to unify law as to a given matter is through the passage of a "directive" that it issues to the Member States, for implementation under local law. Several directives have issued from the European Parliament to Member States on the different subjects, but the EU’s approach to the issue of ISP liability is set forth in the Directive

4 <http://europa.eu/eu-law/decision-making/legal-acts/index_en.htm> accessed 31.10.15
2000/31/EC (Directive on certain legal aspects of electronic commerce in the Internal Market, commonly known as the "E-Commerce Directive").


The Directive is based on the guidelines in the Commission communication on electronic commerce which had set the objective of creating a legal framework for electronic commerce in Europe by the year 2000. The approach which takes aims, in particular, at avoiding over-regulation, is based on the free internal market, takes account of commercial realities and provides efficient protection for objectives in the general interest. The Directive also takes account of the wish to remove disparities between case-law in the Member States so as to introduce a level of security which will encourage the confidence of consumers and enterprise.5

With regard to follow-up work, the Commission would like to:

- guarantee the correct application of the Directive;
- encourage administrative cooperation and the exchange of information between Member States;
- improve the information available to and the awareness of enterprises and citizens;
- follow political developments and identify areas for action in future;
- strengthen international cooperation and legislative dialogue.6

The European Union directive on electronic commerce clearly reflects the legislative parameters which have been outlined. The provisions on electronic contracting (Articles 9, 10 and 11) do not address the full process of how a contract may be concluded by electronic means. Rather they combine a broad general rule enabling electronic contracts as such (Art. 9) with some detailed disclosure obligations (Art. 10) and narrow mandatory requirements for the exchange of order and acceptance in online contracting (Art. 11). Both the general rule and the

more specific provisions do not directly interfere with the existing national systems of „general“ contract law. They are “contract law neutral”\(^7\). This is obvious for Art. 9:

It leaves to the European Union Member States the decision how they want to make their contract law conform to the requirements of electronic commerce. Only the level of conformity – full acceptance of electronic contracts – is laid down. While less clear, the same is true for the rules on online orders in Art. 11. This provision is not supposed to introduce a new way for the exchange of offer and acceptance, but imposes an additional duty upon any e-business to send an acknowledgment of receipt upon a communication sent by the consumer. Art. 11 does not decide whether the business posting an interactive Web site makes an offer which the consumer accepts or whether the consumer clicking through the site makes the offer which is accepted through the confirmation sent by the business or otherwise.\(^8\) The only rule that might directly interfere with national contract law is the provision on the moment of receipt of electronic offers and acceptances. The original approach for the directive had been slightly different. The draft Art. 11 contained a substantive rule for the conclusion of contracts by electronic means which differed considerably from any mechanism that could be found in national contract law: It required double confirmation by both contracting parties after the exchange of offer and acceptance. Upon almost unanimous disapproval by commentators, the Council cancelled the rule in the final version of the directive.\(^9\)

The directive on electronic commerce has been criticized for a lack of clarity in the provisions on electronic contracts and for its fragmentary character. Indeed, the articles of the directive may hardly serve as a model for precise drafting. In this respect, reference to successful examples like the UNCITRAL Model Law on Electronic Commerce would certainly have been fruitful. But analyzing such “technical deficiencies” in the light of what has been said about the difficulties of European contract law harmonization it appears necessary to distinguish between unclear drafting on the one hand and what may have been a deliberate abstention of the drafters on the other hand. The directive does not provide for any legal consequence or sanction to the failure of a supplier to give the required information or to


\(^8\) Emmanuel Crabit, La directive sur le commerce électronique. Le projet "Méditerranéée", Revue du Droit de l'Union Européenne 2000, 749, 818.

confirm receipt of an order by the consumer. This will lead to a considerable variety of implementations in the European Union Member States.

This divergence of the sanctions is certainly an unfortunate situation. However, it does not necessarily have negative impacts on the efficiency of the internal market. From the directive it is rather clear to Internet suppliers which information they have to provide to their customers and that they have to face negative consequences when they fail to do so.

The Directive on Electronic Commerce does not address the issues of signature and writing requirements in electronic environments which are major issues in other instruments like the UNCITRAL Model Law. It would indeed have been an advantage had the drafters of the directive made use of the experience gained with these models before they worked on the directive’s general rule. Isolated legislation for a global issue as electronic commerce may once become one would be unfortunate at best. On the other hand, the general rule in Art. 9 of the directive is much broader in scope than the respective provisions in the UNCITRAL Model Law. Art. 9 imposes a duty upon the member states to enable the conclusion and performance of contracts by electronic means. The modification or abolition of writing or signature requirements is perhaps the main element of it, but it is clearly only one of the obligations that the member states must undertake. Thus, it seems as if the directive, in its Art. 9, has transferred the obligation to refer to existing models to some extent to the member states enacting it. It is left to national legislatures to find out the best way to adapt their national contract law – writing and signature requirements in particular – to electronic commerce. A detailed European rule on what writing means in electronic environments would also have been possible. But it would have called for a thorough analysis of the purpose of statutory writing requirements in all member states. It would certainly have been commendable if the drafters of the directive had assumed this task. On the other hand, the reluctance to interfere with national concepts of contract law – i.e. the “contract law neutrality” of the directive – may have been one reason why they did not do so. On balance, the Directive on electronic commerce has not created a comprehensive codification for electronic contracting and has not even harmonized a few, if any, aspects of contract law.

The E-Commerce Directive provides for exemptions from liability for information society service providers when they host or transmit illegal content that has been provided by a third party. Information society service providers can under certain conditions benefit from these
exemptions when they provide one of the so-called intermediary services set out in Articles 12 to 14 of the Directive.

Article 14 of the Directive specifies that, for hosting activities, a provider can benefit from a liability exemption regime either if there is an absence of actual knowledge or if "the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information". The Directive does not specify what removing or disabling expeditiously exactly means.

Moreover, Article 15 of the Directive prohibits Member States from imposing on providers of these services a general obligation to monitor content that they transmit or host. The Directive provides for a technologically neutral framework and the liability regime strikes a balance between the several interests at stake, in particular between the development of intermediary services, the societal interest that illegal information is taken down quickly, and the protection of fundamental rights.\(^\text{10}\)

Considering the current state of European civil law harmonization, it is doubtful whether it would have been reasonable to try to do more than this. A clear advantage of the Directive is its approach to sort out specific problems which currently affect consumer trust in electronic transactions. In this respect, the Directive − together with the other European consumer protection instruments − seems to be moving in the right direction.\(^\text{11}\)

b. Conclusion

EU Directive 2000/31/EC of 8 June 2000 mentioned on electronic commerce in the Internal Market ("Directive on electronic commerce"). It sets up an Internal Market framework for electronic commerce, which provides legal certainty for business and consumers alike. It

\(^{10}\) Recital 41 provides the following: "This Directive strikes a balance between the different interests at stake and establishes principles upon which industry agreements and standards can be based". Recital 46 provides: "In order to benefit from a limitation of liability, the provider of an information society service, consisting of the storage of information, upon obtaining actual knowledge or awareness of illegal activities has to act expeditiously to remove or to disable access to the information concerned; the removal or disabling of access has to be undertaken in the observance of the principle of freedom of expression and of procedures established for this purpose at national level; this Directive does not affect Member States' possibility of establishing specific requirements which must be fulfilled expeditiously prior to the removal or disabling of information."

establishes harmonized rules on issues such as the transparency and information requirements for online service providers, commercial communications, electronic contracts and limitations of liability of intermediary service providers.

EU directive consists of 4 main chapters and 21 articles. The contents of the articles were prepared carefully and rationally that serve the people of Europe wisely.

E-commerce has certainly developed, but it has still not reached its full potential. Certain issues arising from both the E-Commerce Directive and other parts of the EU acquis can go some way towards explaining this. The results of the public consultation and the analysis of the Commission services show that, despite praise for the positive role it has played in the development of online services, there is a need for further information on the application of the E-Commerce Directive. More administrative cooperation, improved enforcement and greater clarification in the liability regime of internet intermediaries are required to increase its impact.12

3. The Turkish Legislation After Consideration of the EU System

a. Evaluation

The system of e-commerce -before the Turkish Code of E-commerce- was to fill the gaps of Private Law and Law of Contracts provisions. Yet, it was seen that this solution was not enough in the area of E-Commerce Law. Thus, many problems arose from lack of a legislation regarding this huge area of law environment. After many years of research and preparation, the Turkish Code of E-Commerce has come into force on 1st of May 2015. The Code has not met any expectation from it as there are only sixteen provisions. Hence, the Code does not cover the whole area of e-commerce. The gap of e-commerce law is still huge. The Code is an attempt which should be improved. Yet, owing to the fact that there are more gaps to be filled, there is still a need to be applied to private law provisions- especially Code of Consumers.
My criticism regarding the Turkish Code of E-Commerce article by article are;

i. Commercial communication is defined in Art. 2 and it is stated that commercial communication can be occurred without including domain names and e-mail addresses of the commercial communication. However, when the law-maker defines commercial electronic messages, it gives a place to “e-mails”. There is a contradiction that although e-mails are excluded from commercial communication, it states that commercial electronic messages can be done by e-mails. Secondly, it is uncertain which legal and natural person are covered in the definition of intermediary service providers. When it provides help for the activities of service providers, in other words, when it provides an area in order to do e-commerce by a natural or a legal person, it is ambiguous if they are to be called intermediary service providers. It should be certain with a Guide of Code of E-Commerce.

ii. In Art.3, Obligation to inform of service providers and its consent have already existed in Regulations for Distance Contract. Hence, it is unnecessary to be stated again as it is also submitted to the clients the form of rudiments. In the second paragraph of Art.3, it expected from service providers to inform the clients regarding their trade association. Yet, it is unclear which associations of service providers are covered. It should be made certain with a Guide of Code of E-Commerce. Another uncertainty about this article is on the request of correcting mistakes from the service providers. What is uncertain is whether these mistakes are originated from the data entry or service providers.
iii. What is covered by “Electronic Communication Tools” which is stated in Art. 4 is not located in the section of definitions. It would be more proper if electronic communication tools are defined in the section of definitions. It is also stated in the article that the service providers shall give notice to the client regarding order approval without delay. The term of “without delay” is confusing. Generally, service providers send the approval after e-commerce activities have been completed. Yet, the term of “without delay” is open to any comment.

iv. Article 5 limits the activity of promotion since there is still some information to be provided to the clients that are mentioned in the article. All of the information is very hard to squeeze in a 160-character-SMS.

v. According to the Art. 6 of the Code, clients can send their approval for commercial messages using any electronic communication tools. Yet, in the section of the definitions, there is no such a definition as “Electronic Communication Tools”. Yet, the law-maker tries to state here is that the electronic communication tools can be SMS, e-mail or even an approval through social media. Another problem is how to receive the approval. It is not certain if the law maker asks for a second approval as “opt-in”. Another vital point regarding this article is that tradesmen cannot reject to receiving electronic messages. However, it is really hard to determine if someone is a tradesman. There is a need for another article about this issue to make it clear.

vi. The most significant problem regarding article 7 is about SMS messages. The service providers must squeeze in their promotional activities with the mandatory information regarding service providers.
vii. There are not any responsibilities of intermediary service providers in the code. This is the biggest gap in the Turkish Code of E-Commerce. The responsibilities of them should be provided with a Guide of Code of E-Commerce.

b. Conclusion

Although it is the first attempt in Turkey in the area in E-Commerce Law, it is explicit that there are so many deficient to be filled. Statements of the code are unclear and readers can hardly understand what it truly means. What the code needs is to provide more Guides of Code of E-Commerce in order to make the articles certain. Hopefully, after these Guides have been written, deficiencies will be removed.

Turkish Code of E-Commerce is applied to every natural and legal person that deal with e-commerce.

CONCLUSIONS

All in all, the UNCITRAL Model Law on Electronic Commerce, European Union Directive on Electronic Commerce and the Turkish system of Electronic Commerce (in terms of before the new code and the Code of Electronic Commerce) have been examined and evaluated.

With the effect of globalization and technology, States need to develop their system on e-commerce. First initiative has begun with UNCITRAL. They have prepared a Model Law on E-Commerce which is a significant guide for the States while preparing their Code of E-Commerce. The UNCITRAL Model Law on Electronic Commerce was adopted by the United Nations Commission on International Trade Law in 1996 in furtherance of its mandate to promote the harmonization and unification of international trade law, so as to remove unnecessary obstacles to international trade caused by inadequacies and divergences in the law affecting trade. Over the past quarter of a century, UNCITRAL, whose membership consists of
States from all regions and of all levels of economic development, has implemented its mandate by formulating international conventions, model laws and legislative guides.

The Model Law has two main parts: Part I covers E-commerce in general; Part II covers E-commerce in specific areas, here, the carriage of goods. Besides formulating the legal notions of non-discrimination, technological neutrality and functional equivalence, the MLEC establishes rules for the formation and validity of contracts concluded by electronic means, for the attribution of data messages, for the acknowledgement of receipt and for determining the time and place of dispatch and receipt of data messages.

Another legislation that this paper has been examined is European Union Directive on E-Commerce. E-commerce directive has been accepted on 8.6.2000 and has come into force on 17.7.2000. The Electronic Commerce Directive, adopted in 2000, sets up an Internal Market framework for electronic commerce, which provides legal certainty for business and consumers alike. It establishes harmonized rules on issues such as the transparency and information requirements for online service providers, commercial communications, electronic contracts and limitations of liability of intermediary service providers.

The Directive consists of four main chapters which are General Provisions (Chapter 1), Principles (Chapter 2), Implementation (Chapter 3) and Final Provisions (Chapter 4) with 21 articles. The directive makes an important contribution to encouraging trust in the new technologies by establishing an EU-wide model for e-commerce. The continuing divergence of consumer protection policies and uncertainties about jurisdiction, securing redress, the liabilities of service providers and the status of contracts based upon web-site advertisements may continue to discourage the development of e-commerce in the Community.

Before the Turkish Code of E-Commerce, the biggest problem was not to have any regulations specifically about e-commerce. Regulations were lacking for e-commerce law. It was easily seen that Turkish legal system was both enable for e-commerce regulations, yet, in some cases it was able to find solutions, especially in private law cases. Because the internet relations are mostly contract relations, private law and civil law were used to regulate them. However, the problem was regarding non-contractual liability because it was impossible to find any regulation about this issue. Thus, the Turkish legislation was used to have a gap in Public Law area. The purpose was to regulate e-commerce law not only in private law but also in public law because public law is more restricted when it is compared to civil law. Hence, it was
vital to regulate public law to put aside problems and make the rules regulatory, directive and encouraging.

The Turkish Code of E-Commerce came into force on 1st of May 2015. It was sent to Turkish Grand National Assembly in 2010 for the first time. It was not a topical issue for four years. Finally it was accepted and come into force. The Code of E-Commerce contained sixteen provisions which are both about e-commerce and electronic contracting. It can be easily seen from the code that there are some obligations for the ones who provide information services regarding e-commerce. Although it is the first attempt in Turkey in the area in E-Commerce Law, it is explicit that there are so many deficient to be filled. Statements of the code are unclear and readers can hardly understand what it truly means. What the code needs is to provide more Guides of Code of E-Commerce in order to make the articles certain. Hopefully, after these Guides have been written, deficiencies will be removed.

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