Consumer Protection in Turkey and Distance Contracts*

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1. Consumer Protection in EU and the Principles of Consumer Protection

Consumer Protection was mentioned in the Treaty of Rome of 1957, and later it was developed in the European Union environment by the Maastricht Treaty¹,² and in art. 153 EC Treaty it has been given even more importance³.

The protection of consumers and promoting their rights are some of the core values of the EU, and the legislation of the member states reflects this. Recently the EU Commission described the minimum level of consumer protection, which should be given to consumers in every member state. This has been summed up in ten basic principles of consumer protection:

1. Buy what you want, where you want;

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2. If it doesn’t work, send it back;
3. High safety standards for food and other consumer goods;
4. Know what you are eating;
5. Contracts should be fair to consumers;
6. Sometimes consumers can change their mind;
7. Making it easier to compare prices;
8. Consumer should not be misled;
9. Protection while you are on holiday;
10. Effective redress for cross-border disputes.

These ten principles represent the minimum level of protection that all EU-countries according to EU law should give consumers.

2. Consumer Protection in the Turkish Law

(1) Introduction

In the early years of the Turkish Republic, the 1920’es, it was accepted that the creation of a total legal system in conformity with the basic philosophy of the Republic would take too long time, and that borrowing from western sources would be a quicker method. Therefore modern Turkish Private Law is essentially based on Swiss and German law, and consequently in many respects almost identical to these. The Turkish Civil Code [Türk Medenî Kanunu, hereinafter ‘MK’] and the Law of Obligations [Borçlar Kanunu, hereinafter ‘BK’] are based on the Swiss Civil Code (ZGB) and the Swiss Law of Obligation (OR).

Consumer protection was not introduced with the law reforms. In Turkey as in the rest of Europe, measures of consumer protection is a fairly new and developing area of Private Law, although in fact the Ottoman Empire had rules meant to provide protection for the consumers, such as the system of “Ahilik ve Loncalık” (Fraternity and Guild), build on even older rules from the Seljuk times.

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However, these were abolished together with the Medjelle after the establishment of the Turkish Republic.

(2) Consumer Protection in the Turkish Constitution

The preparatory work for consumer protection in Turkey began as early as in 1972, but until 1982 no actual drafts were made. The first step towards a regulation was art. 172 of the Turkish Constitution of 1982, which guarantees the rights of the consumer\(^5\). Art. 172 of the Constitution stipulates that, “the state shall take measures to protect and inform consumers; shall encourage their initiatives to protect themselves.” This not only gives the consumers a right to expect, and apply to government for, protective measures, but also the right to establish consumer organisations. Following the implementation of this article, the chambers, associations, foundations and other professional and voluntary organizations started to participate in activities related to protection of consumer rights\(^6\).

(3) The Turkish Consumer Protection Act

Subsequently Tüketicinin Korunması Hakkında Kanun [the Consumer Protection Act, hereinafter ‘TKHK’], Law No. 4077, was introduced in 1995. Even though it doesn’t encompass every possible problem the consumer might be faced with, the introduction of TKHK was a very important step for the consumers. It covered faulty goods and services, purchase by instalments, campaign sales, door sales, consumer credits, subscriptions, advertising, guarantees, consumer boards, consumer courts, etc.

This law was amended in 2003, with the objective of harmonizing it with the 13 EU-directives concerning the EU Consumer Law, and introduce more effective protection of the consumer in the face of developments in social and economic life. The amendment is rather drastic. It was published in the Official Gazette number 25048, on March 14, 2003, and took effect on June 14, 2003, Law No. 4822.

Some countries have separate laws covering respectively Consumer Contracts, Unfair Terms, Consumer Credit Contracts, Marketing, Product Liability etc., but in Turkey there is so far only the TKHK to cover all these subjects. The TKHK is a separate law, not a chapter in the BK, which regulates contracts in general.

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6 www.tbb.gen.tr.
The TKHK also provides the legal fundament for establishing an Advertising Council to examine, and if necessary apply to the authorities for banning illegal, advertising, a Consumer Council, and a Board\(^7\) for Consumer Affairs, as well as a special section in the ordinary courts for consumer cases. It also lays down statutes of limitations, rules for examining laboratories and other controlling institutions, and the punitive measures. The TKHK in other words is covering a wide area. Even though it doesn’t encompass every possible problem the consumer might be faced with, the implementation of it was a very important step for the consumers.

The TKHK, like the consumer protective legislation of the EU countries, is based on the principles of consumer protection. This was a break of the Turkish tradition to follow Swiss legislation closely, since although until recently Switzerland has to a large extent adapted EU legislation, the Swiss authors in general are not in favour of giving the consumer advantages over the sellers/suppliers\(^8\). Switzerland as recently as November 9, 2005, rejected a Draft Law that should have amended their consumer protective laws to bring them in accordance with the EU Directives on E-Commerce and Distance Contracts. The main arguments was that the rules might cause increase in the prices of goods and services to the disadvantage of the consumer and that Switzerland is not obliged to accept the EU Laws\(^9\).

(4) Consumer Protection in The Law for the Protection Against Unfair Competition

Another consumer protective law, which was published before the TKHK, was the Law for the Protection Against Unfair Competition, published in the Official Gazette number 22140, on December 13, 1994. After it took effect, the Competition Board was established with the objective of effectively controlling the agreements, takeovers and decisions, which are against the rules of fair competition.

\(^7\) For further information about Consumer Boards see, Ümit Gezder, “Comparison between the Regulations for the Turkish, Danish, Swedish and Portuguese Consumer Boards,” Annales XXXVI, No. 53, 2004, p. 397 etc.


The aim of the law is to prevent monopolization and abuse of a dominant position, to provide equal opportunity for all enterprises in the market, and to protect the rights and interests of the consumers (art. 5 p.1 (b); art. 6 p.2 (e)). The Competition Board closely follows the relevant activities of its counterparts in EU members and other countries, as well as international organizations such as the UN and the OECD. It also takes measures to ensure that the rules of competition are observed in privatization cases as well\(^\text{10}\).

### 3. Distance Contracts

The TKHK has 34 articles. The TKHK art. 9/A, which was added in 2003, is the only rule in TKHK that is concerned with distance contracts. As the TKHK art. 9/A p.2 and art. 31 require, the Ministry of Industry and Commerce (the TKHK art. 3/a) prepared a regulation, the aim of which is to regulate procedures and essences of application on distance contracts. The Regulation of Procedures and Basic Principles of Application on Distance Contracts [Hereinafter 'Turkish Regulation'] was published in the Official Gazette on June 13, 2003 – Number: 25137. With this, the Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts\(^\text{11}\) [Hereinafter ‘Distance Contracts Directive’] was implemented in Turkish Law. Unfortunately later directives, as for example 2002/65/EC, were not.


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\(^\text{10}\) www.tbb.gen.tr.


(1) Is a Distance Contract a Special Type of Contract?

The Turkish Regulation art. 4 (i) uses the expression mesafeli sözleşmeler, literally translated ‘distance contracts’. This does not, as little as the terms used in the English version of the Distance Contracts Directive art. 2 (1) (“distance contract”), define a new or special type of contract, it describes only a certain form for and method of making contracts13, namely when the parties are not present, face-to-face.

Distance contracts can, but need not, be E-Commerce. For the purposes of this article, E-Commerce refers specifically to a consumer’s (see 4.1.a.) sale or purchase of goods or services, conducted over the Internet14. Therefore an E-Commerce contract mentioned in this article will be a Distance Contract, and also a consumer contract, a B2C (Business-to-Consumer).

4. Scope of Application

In order for a contract to fall within the scope of the Turkish Regulation it must be a distance contract as defined in art. 4 (i): Contracts, which are about

- goods or services to be delivered or supplied at once or at a later time,
- are concluded by use of writing, visual or phonetic means, or
- by electronic or other means of communication,
- without the consumer coming face to face (with the seller/supplier).

(1) Definition of “Consumer” and of his Counterpart

(a) Consumer15

According to the Turkish Regulation art. 4 (g), a consumer is a natural or legal person, who buys, uses or benefits from goods

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15 See Cevdet Yavuz, Satıcının Satılanın (Malın) Ayıplarından Sorumluluğu, Istanbul,
or services outside his trade or profession. The Distance Contracts Directive art. 2 (2)\textsuperscript{16} defines “consumer” as a natural person only. Thus the Turkish Regulation gives a wider definition than the EU Directive.

According to the Turkish Supreme Court of Appeals [Yargıtay], companies acting in any way in their line of business cannot be considered consumers. In two decisions the Supreme Court of Appeals ruled that a limited company is a merchant. Contracts concluded for business enterprises of merchants cannot be consumer contracts as defined by the TKHK\textsuperscript{17}.

Although a company as such in no way can trade for consumable products without it being in its line of business, the seemingly undiscriminating inclusion of legal persons in the definition of consumers is contrary to what ought to be the prior aim of any consumer protection legislation: protection of the weaker party, that is protection of the individual, physical consumer, because it opens up for the widest possible interpretation of the concept of a consumer.

Article 4 (g) needs to be rewritten to escape uncertainties. For example it should be made clear that the only legal persons which may be accepted as consumers are charitable trust funds and societies, because although they may be operating a business, for example a shop, the profit they make is not for the owners of the business, but is to be distributed to those in need.

In the new Draft Law on Electronic Communication of October 17, 2005, consumers are defined as only natural persons. It is an open question whether this will be in conflict with the prohibition against lowering the level of consumer protection.

\textsuperscript{16} Art. 2 (2) “consumer’ means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession”.

(b) The Consumers’ Counterpart

The counterpart of the consumer is called satıcı, literally seller, or sağlayıcı, literally supplier. A seller is a natural or legal person, including public institutions, who provides goods to consumers within his trade or profession (the Turkish Regulation art. 4 (e)). A supplier is a natural or legal person, including public institutions, who provides service to consumers within his trade or profession (the Turkish Regulation art. 4 (f)). Thus, the other party to a consumer contract must be a businessman, tradesman or company, acting in the line of business.

The definition of seller/supplier is more detailed than the definition in the Distance Contracts Directive art. 2 (3): “supplier means any natural or legal person who, in contracts covered by this Directive, is acting in his commercial or professional capacity”, in that it expressly includes public institutions. This has been thought necessary because certain public institutions are not legal persons.

(c) Operator of a means of communication

The Turkish Regulation does not mention operators of means of communication in any way. Thus it is uncertain how such operators would be classified in case of a conflict.

During the legislative procedure of the Distance Contracts Directive it was discussed whether the operators of means of communication should be considered as counterparts of the consumers, but it has been decided that operator is to be understood as a person, who makes the means of communication available to the supplier (counterpart of the consumer). Thus the Distance Contracts Directive art. 2 (5) defines “operator of a means of communication” as “any public or private natural or legal person whose trade, business or profession involves making one or more means of distance communication available to suppliers.” A public or a private TV, radio- or Internet provider is an operator in the sense of the Distance Contracts Directive.

To avoid uncertainties a similar rule ought to be added to the Turkish Regulation.

18 Compare to the Distance Contracts Directive art. 2 (3): “supplier means any natural or legal person who, in contracts covered by this Directive, is acting in his commercial or professional capacity”.

19 Micklitz, p. 9-10.
(2) The Object of the Contract

The Turkish Regulation art. 4 (c) and (d) define the object of the contract as goods and services. According to the Turkish Regulation art. 4 (c), “goods” are movable objects of sale, immovable property intended for residence or vacation, and intangible goods that are prepared for use in an electronic environment, such as software, sound, visual and the like.

There is no definition of movable goods in the Turkish Regulation, but it can be found in the MK art. 762: “Movable property (taşınır mülkiyeti), comprises corporeal chattels that by their nature are movable, as well as those natural forces which can be controlled and which do not belong to the immovable property.” Thus for example electricity is a movable goods.

Selling and downloading digital products for example music or program CDs via Internet where the object of the contract is delivered at once is called direct E-Commerce (online) transaction, whereas if the object of the contract, for example a book, is ordered via Internet, but is to be delivered by conventional mail, this is an indirect E-Commerce (offline) transaction.

The phrase of the Turkish Regulation art. 4 (ı): “must be designated to be delivered at once or at a later time” has been used in order to encompass online as well as offline transactions, and it should be kept in mind that it does not entail that for the contract to be valid it must be clearly stated whether the object is to be delivered at once or at a later time.

The Turkish Regulation art. 4 (d) defines service (hizmet) as any activity done in exchange for a wage or benefit.

(3) Elements of Distance Contract

(a) Use of means of Distance Communication

The first characteristic element for conclusion of a distance contract is the use of a means of communication.

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20 See below, 5.7.
22 For further information see Köhler/Arndt, p.62; Dilger, p. 33; Duisberg/Fritzemeyer/Gijrath, p. 5; Gezder, Internet, p. 106-107. Between difference offline and online transactions see Hans-Werner Moritz, Quo vadis elektronischer Geschäftsverkehr, CR, 2000, p. 61-62.
Means of distance communication makes it possible to conclude a contract without the simultaneous physical presence of the parties. They include conventional means like standard letter, catalogue and telephone as well as electronic means like TV (tele-shopping) and the Internet (E-Commerce). The means of electronic communication allows communication, which is neither exactly written nor oral as we know it from letters and telephone communication. Telephone communication means instant communication where any uncertainty might be cleared up at once. In electronic communication there will be a time-delay as in traditional letter-writing, but much shorter, and the fact that there is a service-provider will be less obvious than when post or telegraph is used.

During the contract negotiations several means of distance communication can be combined – for example can an offeror advertise his offer in TV or newspapers, and there give a website address, address or telephone number, which allows the contract to be concluded by Internet, by letter or by telephone.

Because of the constant development of new technique, the Turkish Regulation art. 2, like the Distance Contracts Directive art. 2 (4), does not include a comprehensive list of means of communication, but simply adds “... or other means of communication ....” to the few means mentioned.

Neither art. 2 nor art. 4 of the Turkish Regulation state clearly whether a distance contract must be negotiated and concluded exclusively by use of distance communication means. Since the main reason for creating the extra protection of the consumer which obligation of information and right of withdrawal provides, is that in distance contracts he doesn't have any opportunity to inspect the offered goods, if at any phase of the contracting the parties have come face to face, the contract cannot fall within the scope of the

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23 See the Distance Contracts Directive Annex I; Honsell/Pietruszak, p. 772; Norbert Reich, Die neue Richtlinie 97/7/EG über den Verbraucherschutz bei Vertragsabschlüssen im Fernabsatz, EuZW, 1997, p. 582.
26 The consumer for example sees an advertisement on the Internet, contacts the supplier by e-mail, but before finally concluding the contract by telephone or e-mail decides to visit his shop to inspect the goods. This contract would not be a distance contract in the meaning of the Regulation.
Turkish Regulation. This would bring Turkish Law in accordance with the Distance Contracts Directive art. 2 (1).

(b) The parties to the contract not coming face-to-face

The second element of the definition in the Turkish Regulation art. 4 (i) is the absence of a face-to-face27 meeting of the contracting parties. This element can also be called ‘the distance element’. The length of distance is not important; it can be anything between next door to another country.

It should be remembered that distance contracts can be made between parties absent as well as present, in the sense of the BK art. 4, and 5, for example a contract concluded by the e-mail28 or by filling in web forms (parties absent), or a contract concluded over the telephone or online-chat (parties present)29.

Jörg and Arter are of the opinion that offers given by SMS on a cell-phone should not be considered given to a party present if no dialogue ensues, and also that if an offer left on an answering machine cannot be considered given to a party present, although in both situations a telephone is used30. I agree that the contract should be considered as a contract between parties present only if the use of telephone or any other means of distance communication implies an instant dialogue.

(4) Organized Distance Sales or Service Provision Scheme

In the Turkish Regulation there is no rule stating that there must be an organized distance sales or service provision scheme run by the seller/supplier.

The original draft of the Distance Contracts Directive from 1992 also did not include such a rule31, but it was added in the 1993 draft32. If the supplier, who acts in his commercial or profes-

27 The Distance Contracts Directive art. 2 (4), “.. without the simultaneous physical presence ..”
30 Jörg/Arter, p. 166.
31 Reich, p. 583.
32 See the Distance Contracts Directive art. 2 (1).
sional capacity, directs all or at least a certain part\textsuperscript{33} of his sales/services at distance selling, this constitutes an organized distance sales or service-provision scheme. The supplier must maintain an infrastructure, which makes distance contracts possible, or distance contracts must have become a regular practice in his business, although he can use both distance and direct methods\textsuperscript{34}. The supplier, who only occasionally receives a telephone or an e-mail conveyed order, is not subject to the Distance Contracts Directive\textsuperscript{35}, even though he may have organised his business so that he can deal with such contracts.

According to the Turkish Regulation, the consumer does not even have to prove that there is an organized scheme; if the seller/supplier uses distance communication means, this immediately brings the contract within the sphere of the Turkish Regulation. The Turkish consumer thus has the advantage of being protected by the rules about distance contracts in many cases where other European consumers would not be.

Since this provides a higher level of protection than the Distance Contracts Directive requires, in future it would not be possible for the Turkish lawmakers to add the requirement of an organised scheme because of the prohibition against lowering the level of the consumer protection\textsuperscript{36}.

5. Exceptions from the rules

The Turkish Regulation art. 11 lists several exemptions (almost similar to the exemptions of the Distance Contracts Directive), as indicated below:

(1) Financial Services

The Turkish Regulation art. 11 excludes some, but not all kinds of financial service contracts. Contracts relating to banking and insurance will not be considered Distance Contracts. There is as yet no special regulation for kinds of contracts that are excluded.

\textsuperscript{33} Michael Bürger, “Das Fernabsatzrecht und seine Anwendbarkeit auf Rechtsanwälte”, NJW, 2002, p. 465; Reich, p. 583.

\textsuperscript{34} Reich, p. 583.

\textsuperscript{35} Micklitz, p. 8; see also the Swiss Bundesgesetz über den elektronischen Geschäftsverkehr (Teilrevision des Obligationenrechts und des Bundesgesetzes gegen den unlauteren Wettbewerb (Vernehmlassungsvorlage) Begleitbericht zum Entwurf Januar 2001, (Begleitbericht zum Entwurf), E-OR art. 40c, p. 13.

\textsuperscript{36} About this prohibition see Pfeiffer, p. 7-8.
The first indent of the Distance Contracts Directive art. 3 (1) excluded the contracts relating to financial services from scope of the Distance Contracts Directive\(^{37}\), because these were thought to be of a so complicated nature that they should be regulated in a separate directive. The Directive on Distance Marketing of Consumer Financial Services 2002/65/EC was prepared for these contracts\(^{38}\).

**(2) Concluded by Means of Automatic Vending Machines**

The Turkish Regulation, like the Distance Contracts Directive, regulate only the contracts concluded by using means of distance communication, and it thus seems logical to exclude both the contracts concluded by means of automatic vending machines and automated commercial premises.

These are excluded by the Distance Contracts Directive art. 3 (1), and the reason for this is that it is not the conclusion of contract as such, which is to be regulated, only contracts concluded by use of means of distance communication\(^{39}\). The consumer cannot be said to be in distance communication with the seller/supplier by inserting a coin, token or credit card in a hot-drink or gasoline automat, which must be considered the sellers/suppliers business premise\(^{40}\).

**(3) Concluded by Public Pay Phones**

The Turkish lawmakers have excluded all contracts concluded by use of public pay phones (the Turkish Regulation art. 11 (c)). This is perhaps owing to Micklitz's comment\(^{41}\), where he assumes that the justification for the exclusion in the Distance Contracts Directive is that the consumer on his way to the public pay phone

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\(^{39}\) Micklitz, p. 11.

\(^{40}\) Begleitbericht zum Entwurf, p. 13.

\(^{41}\) Micklitz, p. 12.
has time to ponder on his decision to buy the advertised item/service, and thus will not be victim to rash decisions. This is un-consequential, since if this were the decisive argument one should also exempt contracts concluded by use of a public computer at an Internet Café or a library.

The Distance Contracts Directive art. 3 (1) exclude contracts ‘concluded with telecommunications operators through the use of public payphones’. By this is meant the contract, which is concluded by the consumer inserting his token, coin or telephone-card to make a phone call, not all contracts concluded by means of public payphones.

The Turkish Regulation ought to be amended, so that contracts concluded by use of public phones are included under the protection, not least because the exclusion means that the level of protection is lower than required by the Distance Contracts Directive.

(4) Concluded at an Auction

The Turkish Regulation art. 11 (d)\(^42\) excludes contracts, which are concluded at an auction, even though online auctions are very popular now\(^43\).

It seems there has been no debate as to whether to exclude auctions as such or not from the sphere of the Distance Contracts Directive, since the ‘practical details’ of auctions are found to be a sufficient reason. Micklitz, however, does not find that these reasons are convincing\(^44\).

At least one EU member state, Denmark, includes Internet auctions: The Danish Consumer Law of June 9, 2004, art. 2, no: 2 excludes only auction sales where (most of) the parties are normally physically present. Thus according to the Danish Consumer Law sales on Internet auctions will be distance contracts.

(5) Concluded for Consumption Goods

The Turkish Regulation art. 11 (e) completely excludes the contracts for the supply of foodstuffs, beverages and other goods intended for everyday consumption supplied to the home of the consumer, or to his workplace.

These contracts are in principle not excluded by the Distance Contracts Directive. However according to the Distance Contracts

\(^42\) Critically on the Regulation statement, see Gezder, İnternet, p. 72-73.
\(^43\) For an example, see Kelleher/Murray, p. 141.
\(^44\) Micklitz, p. 12.
Directive art. 3 (2), Articles 4, 5, 6 and 7 (1) shall not apply to these contracts.

In order to provide the same level of protection as the Distance Contracts Directive, the Turkish Regulation art. 11 (e) must be amended.

(6) Contracts Restricted by Time

The Turkish Regulation art. 11 (f) completely excludes the contracts for the provision of accommodation, transport, catering services, sporting, cultural and entertainment services where the supplier undertakes, when the contract is concluded, to provide these services on a specific day or within a specific period.

However according to the Distance Contracts Directive art. 3 (2), Articles 4, 5, 6 and 7(1) shall not apply these contracts.

If for example a contract between a consumer and a Hotel in Çesme for a 15 days stay be concluded using i.e. Internet means, this contract would not be within the scope of the Turkish Regulation.

Also the Turkish Regulation art. 11 (f) must be amended to comply with the rules of the Distance Contracts Directive.

(7) Concluded for the sale of immovable property or relating to other immovable property rights, except for rental and construction

Unlike the Distance Contracts Directive art. 3 (1)\textsuperscript{45}, the Turkish Regulation does not exclude contracts concluded for construction and sale of immovable property, or relating to other immovable property rights. Also, according to the Turkish Regulation art. 4 (c), “Goods means .... immovable property intended for residence or vacation, ...” Considering this, and that there is no express exclusion, it could be assumed that contracts about residences or summerhouses concluded by means of distance communication, for example e-mail, are within the scope of TKHK and the Turkish Regulation, but this is not the case.

According to the MK art. 704, the objects of immovable property are: 1. Land; 2. Independent and continuing rights registered on a separate page in the Land Register; 3. Condominium. According to the MK art. 706 and art. 1021, a contract on transfer of immovable

\textsuperscript{45} During the legislative procedure, there was a general agreement that immovable property would be excluded from the scope of the Distance Contracts Directive, see Micklitz, p. 12.
property requires registering in the Land Register to be valid, which registration at present is not possible by means of distance communication. Accordingly, a transfer of immovable property cannot be concluded validly by any means of distance communication.

Just as they do not openly exclude contracts about immovable property, the Turkish Regulation does not exclude or include the contracts concluded for rental\textsuperscript{46}, but in this case it can be inferred from the fact that there are no rules in other laws preventing their conclusion by means of distance communication that rental contracts may be concluded as distance contracts. The same can be said for contracts for construction of homes.

\textbf{Conclusion}

Since the 1920’es Turkey has mainly turned to studies of developments in Swiss Private law, when she found that changes in Turkish society brought the need for amending the Private laws. Even before becoming a candidate country, Turkey turned her attention more and more to the developments of the European Union. Turkey wished to be up-to-date with the legislation, which it hoped to be obliged to implement soon, and had already implemented a number of EU-Directives before acquiring candidate status.

Turkey has developed a high level of consumer protection, which in many respects is on a level with the consumer protection provided by EU.

However there is still some work to do, and besides the points mentioned here, it is of importance to implement Directives 2000/31/EC\textsuperscript{47}, 2002/65/EC and 2005/29/EC as soon as possible.

\textsuperscript{46} See the Distance Contracts Directive art. 3 (1).

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