

## **How to Build a Legitimate Commercial Electronic Communication Structure: Shedding Light unto Dark Spots of the Legislation**

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Recent legislative updates on commercial electronic communications changed the whole commercial e-communication structure between the companies and customers in Turkey. E-commerce Law (i.e. Law on Regulation of Electronic Commerce) and its Regulation (i.e. Regulation on Commercial Communication and Commercial Electronic Communications) are enacted consecutively, and they introduced strict processes for businesses. Aim of this piece is to highlight main weak spots and disorienting points of the Regulation, guide companies on how to proceed in a manner to balance the rights of consumers and protect their business structure, and bring a clear legal understanding on the debated matters.

From a consumer's perspective, even if the number of commercial electronic communications decreases, the regulation may lead to vast amount of communications sent for obtaining prior consent, which would practically not prevent unwanted communications. From a business perspective, especially the ones whose target audience is consumers may have difficulties in promoting their goods and services due to the strict opt-in provisions. Additionally, the Regulation introduces many details, which requires changes to business structures for compliance. Still, it became effective immediately without granting a transition period, and lack of such a period led to concerns among businesses.

E-commerce Law and the Regulation aim to regulate the principles and processes regarding commercial electronic communications, the obligation to inform in particular. The scope of the regulation envelops all kinds of communication sent by electronic means to promote goods and services or brands of real or legal persons, directly or indirectly.

The Regulation focuses on elaborating on how specific provisions of the E-Commerce Law on commercial communications should apply in practice. Still, the Regulation includes significant weak spots and disorienting points, which confuse both the companies sending commercial electronic communications and their recipients.

Commercial electronic communication is defined under the Regulation as the communications with audio and video content and data sent with "commercial purposes" and that are carried out electronically through tools such as telephone, call center, fax, automatic dialer systems, smart voice recording systems, electronic mail, SMS. Regulation brings further details to the "commercial purposes" with Article 5 of the Regulation. Article 5 states that the prior consent is required for electronic commercial communications for promoting, marketing goods and services, promoting business or increasing recognition through contents of celebration or wishes. Therefore, yes, not only promotional messages, but also a simple "happy birthday" message to be sent to the customer requires prior consent form the recipient.

Having said that, the scope of the Regulation causes confusions in practice. One of the controversial provisions of the Regulation is under Article 6. Article 5 states that commercial electronic messages can only be sent to recipients by obtaining their prior consent. Article 6 introduces content-free situations, where one of them is: if the recipient gave contact information to receive communication, no additional consent is required for the electronic commercial communications regarding modification, usage and maintenance of provided goods and services. In practice, companies are confused about the interpretation of “modification, usage and maintenance of provided goods and services”. For example, an SMS sent to a customer for promoting a new accessorize of the mobile phone sold to a customer, may be interpreted as to be related with the “usage” of that mobile phone. Therefore, if the foregoing phrase is interpreted broadly, the relevant exemption would go beyond the main purpose of the requirement of obtaining prior consent. To be on the safe side, the exemptions regulated under Article 6 should be interpreted in a narrow way.

Another problematic point under the Regulation is the content of the commercial electronic communication. Article 8 of the Regulation gives more detail about the content of the commercial electronic communications. Commercial electronic communication should include at least one of the accessible contact information such as service provider’s phone, fax or SMS number and electronic mail address, depending on the type of electronic commercial communication tool. Moreover, if the electronic commercial communication has promotions of sale and gift or games or contents organized for promotion, this nature of the communication should be clearly stated within the communications itself. Option to opt-out should be provided in all commercial electronic communications. Now, think about a promotion call which includes all of the foregoing elements. Considering the foregoing requirements under the Regulation, certain sales and marketing functions of the companies would be obstructed.

E-commerce Law entered into force in May 1, 2015, imposing an overall obligation to obtain prior consent of the recipients of commercial electronic communications. The Regulation, which entered into force on July 15, 2015, on the other hand, introduced very detailed process for obtaining prior consent and the companies had to restructure their businesses in accordance with these detailed requirements, some of which do not exist under the Law. No transition period was regulated for these structural changes, and lack of a transition period brought certain questions in mind: Will the companies be required to re-obtain prior consents in accordance with the Regulation for the consents they obtained between those dates? Will the companies be required to cease sending commercial electronic communications until they re-structure their business per the Regulation? Apart from the exceptions, mainly, the answer to the first question would be “no”, and to the second question would be “yes”.

Would keeping customer data outside of Turkey exempt the companies from complying with these requirements? No, it would not. E-commerce Law and the Regulation are applicable the

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companies which are keeping their customer records outside of Turkey; as the main aim of the relevant legislation is to protect consumers from unwanted commercial communications in Turkey, and they do not introduce an exemption for the companies which are keeping that data abroad.

There are certain paths that companies may choose to follow in this legal landscape of commercial electronic communications. First of all, they may classify and categorize their database based on the requirements and exceptions provided within the E-commerce Law and the Regulation. A guideline on how to handle the commercial electronic communications and the legal requirements regulated under E-commerce Law and the Regulation would be helpful for smooth operations. The last and one of the most important points; this legal landscape's main aim is to protect consumers. To that end, while structuring the businesses, legal prong of this structuring should interpret E-commerce Law and the Regulation together with the consumer protection legislation.

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