

IT & Internet - Turkey

New draft regulation on commercial electronic communications

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Introduction

On April 27 2015 the Ministry of Customs and Trade published the Draft Regulation on Commercial Communication and Commercial Electronic Communications on its official website for public review. The aim was to clarify the commercial communications practices set out under Law 6563 on the Regulation of Electronic Commerce (for further information please see "[New e-commerce legislation](#)") and to prevent unsolicited electronic marketing communications. Accordingly, the draft regulation introduces no substantial changes to the existing commercial communications regime, but includes detailed instructions on issues that were not precisely defined or thoroughly regulated by the E-commerce Law. However, the draft regulation's guidance regarding commercial marketing messages is significant for businesses that engage in marketing activities.

Purpose and scope of draft regulation

The draft regulation aims to regulate the principles and processes regarding commercial electronic communications – the obligation to provide information in particular. The regulation covers all kinds of communication sent by electronic means to promote goods and services or brands of real or legal persons, directly or indirectly. The draft regulation excludes electronic commercial communications between telecoms operators and their subscribers, which fall under the scope of Law 5809 on Electronic Communication.

Although the draft regulation pertains to the e-commerce law – which is based on the EU E-commerce Directive (2000/31/EC) – the corresponding EU legislation is the EU Privacy and Electronic Communications Directive (2002/58/EC).

While the EU Privacy and Electronic Communications Directive focuses on the protection of privacy and ensuring the free flow of information, the draft regulation focuses merely on elaborating how specific provisions of the E-commerce Law on commercial communications should be applied in practice. It would have been a better approach to adopt the aim and scope of the directive, which would support Turkey's legislative efforts in the process of establishing compliance with European legislation.

Key definitions

Article 4 of the draft regulation provides as follows:

- A 'recipient' is a consumer or any real or legal person acting with professional or other intent.
- An 'electronic contact address' is the address that provides the means to communicate exclusively electronically, such as an email address or telephone number.
- 'Consent' is the recipient's acceptance of real or legal persons sending commercial electronic messages to the recipient's electronic contact address, with the aim of promoting their goods and services, improving their brands or sharing or using the recipient's personal data, provided that the recipient is clearly aware of this fact.

The EU Privacy and Electronic Communications Directive cites EU Directive 95/46/EC in its definition of 'consent', which is defined as "any freely given specific and informed indication of his wishes by which the data subject signifies his agreement to personal data relating to him being processed".

This divergence is in line with the scope of the draft regulation, considering that it focuses on commercial electronic communications and that the EU Privacy and Electronic Communications

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Directive and EU Directive 95/46/EC are part of the European data protection regime, while the draft regulation is part of Turkey's e-commerce regime.

Consent

In addition to the definition of 'consent', the draft regulation includes a significant provision that is of vital importance for commercial entities that send marketing messages to customers and/or potential customers through electronic means.

Article 6 of the draft regulation requires the prior consent of the recipient to send commercial electronic messages, including messages that aim to obtain consent or send congratulations. The draft regulation adopts an opt-in system, whereby consent is a prerequisite, and recipients of commercial electronic messages may receive them only if they have consented for these messages to be sent to them.

The draft regulation also provides a method to obtain the recipient's consent that diverges from the E-commerce Law. Article 7 of the draft regulation sets out several formal requirements, depending on the method of obtaining consent. The E-commerce Law set out no formal requirements for obtaining the consent of recipients.

According to the relevant provision, if prior consent for sending commercial electronic communications is obtained in written form, it must be signed by the recipient. If a company provides forms to be filled in by visitors to an exhibition in order to obtain their contact information and send them marketing materials and messages, the company should ensure that the visitors are informed that their personal data will be used in this context, and each visitor should sign the relevant form and consent to receive marketing messages from the company going forward.

If written or oral consent is obtained through electronic communication channels, the draft regulation requires the recipient's active participation in giving a positive declaration of intent. Further, if consent is obtained through sending an email to the recipient, the draft regulation requires that a confirmation message be sent to the recipient to verify the address provided. Employing the term 'consent' instead of 'declaration of intent' in this provision would help to ensure consistency throughout the draft regulation. However, as the draft regulation is still open to change, such inconsistencies may be corrected before the draft phase ends.

According to Article 7(1)(a), if the recipient does not actively consent to receive commercial electronic messages and remains silent, the request for consent will be deemed to have been rejected. In this regard, a service provider (eg, a company sending marketing messages to a number of recipients) must provide recipients with an option to actively opt in to receiving messages through methods such as clickwrap, provided that the tick box is not pre-emptively ticked within the form.

The consent of recipients may not be obtained through providing disclaimers such as "You are providing consent for receiving electronic commercial communications by signing up/using this service", or through general conditions under terms of service agreements.

Obtaining consent through general terms and conditions is a common practice for businesses; these usually include provisions that aim to extend the reach of such consent to third parties. However, the draft regulation requires consent to include the full names of each real or legal person that will send commercial electronic messages to a recipient or use the recipient's personal data. Using terms such as 'associates', 'subsidiaries' or 'third parties' while obtaining consent is exclusively prohibited.

Further, consent cannot be obtained through the specific provisions of subscription agreements, sales agreements or any other agreements. The draft regulation requires consent to be obtained separately. In this regard, a request to obtain a recipient's consent should be sent as a separate document, even if there is a long-term relationship to be established based on another comprehensive agreement.

Exceptions to consent requirement

The draft regulation does not require senders of commercial electronic messages to obtain a recipient's prior consent if:

- the recipient provided the service provider with its electronic contact address in order to receive updates on goods or services provided;
- the commercial electronic message is sent by the service provider upon the information request of the recipient regarding goods or services, provided that the message is limited to the information requested; or
- the commercial electronic message provides the recipient with information about an ongoing subscription, membership, state of partnership or notification of cash proceeds, debt, information update, delivery or notifications of a similar nature, provided that goods and services are not promoted within these messages.

A database will be deemed to have obtained the prior consent of recipients if:

- a relationship between the service provider and recipient to provide goods and services was established before the effective date of the e-commerce law (May 1 2015) and the service provider's database containing electronic contact addresses is obtained in order to send

commercial electronic messages to the recipients; and

- the database was created for the purpose of sending commercial electronic messages and established before the effective date of the e-commerce law and meets the formal requirements for obtaining consent through written or electronic means.

Comment

The draft regulation might be considered a step forward in terms of clarifying the processes for compliance with the e-commerce law with regard to commercial electronic communications. However, as the regulation is still at the draft stage, it may be subject to substantial changes before it enters into force.

The existing text sets out detailed rules and requires certain changes in the business flow of companies, especially in terms of the opt-in requirement, which was subject to heated discussions and objections from businesses within the sector, mostly telecoms and Global System for Mobile Communications operators. Further, companies would be required to make certain changes to their business flow and would need a transition period to comply with the changes, whereas the draft regulation states that it will have retroactive effect. This leads to the question of whether the business flow of companies would be considered legitimate between the date on which the draft regulation is published in the *Official Gazette* and the date on which it enters into force, and raises another significant ground of objection for companies.

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