

**Turkey Green-Lights Comparative Advertising**

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**Introduction of the Regulation****Conditions for Comparative Advertising****Unfair Competition Angle****Trademark Angle****Comment**

At the beginning of 2015, Turkish Ministry of Customs and Trade issued a new regulation on the principles and procedures pertaining to advertising and abrogated and replaced the outdated regulation of 2003. The regulation ended the prohibition for comparative advertising and included a provision which allows using components related to competitors' goods, trademarks, trade name and services in the advertisements. This provision will enter into force January 10, 2016. The comparative advertising by indicating the competitors' names, trademarks, logos and titles will be legal in Turkey and this may yield to brand new legal disputes between competitors regarding their advertisements.

**Introduction of the Regulation**

The Commercial Advertisements and Unfair Commercial Practices Regulation ("Regulation") is based on the Law No. 6502 on Consumer Protection, which might also be deemed a new piece of legislation that came into force in 2014.

The Regulation was published in the Official Gazette of January 10, 2015 and entered into force and effect on the same day. The provision pertaining to comparative advertising was one of the most significant and newly introduced provisions incorporated within the Regulation. Article 8 of the Regulation regulated the principles and procedures pertaining to comparative advertising. Having said that, Article 8 did not enter into force on the same day that the Regulation became

effective, but was rendered a transition period of one year. Article 8 will be effective on January 10, 2016.

The previous regulation restricted comparative advertising. Article 11 of the abrogated regulation stated that comparative advertisements can only be placed when;

- (i) the advertisement does not include the name of the goods, services or trademark
- (ii) the compared goods and services are of the same type and quality and satisfies the same demand and need
- (iii) the advertisement is in accordance with fair competition principles and is not misleading the consumers.

The abrogated regulation did not allow using and addressing a competitor through impliedly or explicitly.

The Regulation, on the other hand, allows comparative advertising using competitor's name, trademarks, logo, under certain conditions. Comparative advertising is defined under the Regulation as advertisements directly or indirectly using elements related to a competitor's goods or services, in the marketing of a good or service.

### **Conditions for Comparative Advertising**

According to the Regulation comparative advertising may only be allowed, and the competitors' name, logo or other distinctive designs or marks and trade name, business name may only be included in a comparative advertisement if certain conditions are met, including but not limited to that they should not be deceptive and misleading; should not lead to an unfair competition; comparison should be objective and provable, and on an issue beneficial for the consumers. Having said that, comparative advertisements for supplementary nutrients' are specifically prohibited under the Regulation.

The foregoing conditions are quite similar to, and appear to be inspired from the European Union's Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising (codified version). The Directive briefly requires the comparisons to:

- a. relate to goods or services which meet the same needs or are intended for the same purpose,
- b. relate to products with the same designation of origin;
- c. deal objectively with the material, relevant, verifiable and representative features of
- d. those goods or services, which may include price;
- e. avoid creating confusion between traders, and should not discredit, imitate or take advantage of the trade mark or trade names of a competitor.

On the other hand, the United States regulates the comparative advertisements under the laws of false advertising and unfair competition. Under the principles of false advertising law, an advertisement should not use a competitor's name, mark, logo or likeness and contain disparaging, unfair, baseless, incomplete or false comments and comparisons of competitors' products, or should not make a false or misleading claim about its own or a competitor's products, ratings, benefits, services, or other characteristics. The regulation is not also parallel to the EU Directive and aims the same protection as to compared goods and services. However as the United States is a case law country, the specifics of the practice are actually determined by the court precedents, which is a different perspective when compared to the civil law countries of EU and Turkey.

On the other hand, apart from the rules dedicated to comparative advertising indicated above, the new regulation would also pave the way for new discussions and concerns mainly revolved around unfair competition and trademark legislation in the Turkish jurisdiction.

### **Unfair Competition Perspective**

One of the main legal issues that may come into question when considering the comparative advertising is certainly unfair competition.

Unfair competition is regulated under Turkish Commercial Code as a separate provision listing the circumstances that may be considered as unfair competition. That

being said, the list is not *numerus clausus* and is only there for guidance. All unfair commercial practices and commercial practices against good faith are prohibited under the Turkish Commercial Code.

This prohibition also covers comparing a competitor's goods, work products, activities or prices by misrepresenting the facts, in a way to mislead or to defame the competitor without a reason or to benefit from its reputation, and get ahead of that competitor in the business.

Although the Regulation provides certain protections for comparative advertising in the direction of the foregoing unfair competition prohibition, the unfair competition regulated under the Turkish Commercial Code is extensive and open-ended. Therefore the unfair competition rules under the Turkish legislation would have an important role in the discussions and disputes of comparative advertisements and may constitute a powerful argument for the competitors who are going after the advertiser claiming that their comparative ads constitute unfair competition.

### **Trademark Perspective**

The Regulation allows using competitors' trademarks, logos and distinctive designs and signs in advertisements. There is no doubt that this issue may raise trademark law related legal concerns and disputes.

The main legislation under Turkish laws as to trademark is the Decree Law No. 556 on Protection of Trademarks ("Decree Law"). Article 9 of the Decree Law determines the scope of the trademark rights. According to the article a trademark owner is entitled to cease use of its trademark regarding the goods and services which are subject to its trademark registration. Furthermore a trademark owner has the right to prohibit its trademark's use in business documents and advertisements.

This provision may apparently lead to a conflict with or raise disputes with respect to the Regulation's comparative advertising provision. The balance between the right on

the trademark and the competitor's right to comparative advertising is a candidate to be a serious discussion ahead and might be expected to be an issued which should be resolved by the Turkish courts.

### **Comment**

Allowing comparative advertising in the Turkish jurisdiction is definitely an important development for increasing the competition of the businesses conducting business in Turkey in favor of consumers and for allowing a transparent comparison of products before the consumers. The comparative advertisements may even impact consumers' consumption habits and choices. Another bright side of the Regulation is to have an equivalent commercial environment for the businesses operating around the globe which refrain using their comparative advertisements that they invest a remarkable amount of money in Turkey.

On the other hand, although the Regulation included a transition period of one year for implementation of the provision related to comparative advertising, there is still an ambiguity as to application of the provision as there have been no changes in the related legislations which might be controversy and lead to disputes as explained above. Nevertheless, even if the related legislations were to be amended accordingly, there would have still been an ambiguity in the application of the provision itself, until there are precedents to shed light unto the matter, since this is the first time that comparative advertising is introduced in Turkey. The application of the provision would take its form through the Advertisement Board decisions as well as the court precedents going forward.

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