

Proposed Opt-in System for Electronic Commercial Communications in Turkey

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The Draft Law on Regulation of Electronic Commerce ("Draft Law") proposes significant changes in relation to electronic commercial communications, along with many other novelties for electronic commerce. This includes both SMS, as well as e-mail messages.

The Draft Law is expected to be enacted soon as part of Turkey's European Union adaptation process. While the adoption date and further parliamentary consideration of the Draft Law remains uncertain, the substantive legal framework which the Draft Law currently proposes is aligned with European Union standards. Therefore, it seems unlikely that the framework outlined by the Draft Law (discussed below) will change through the enactment process.

In brief, among other topics, the Draft Law proposes important regulations on promotional e-mail and SMS messages by introducing an "opt in" permission system, whereby the recipient's permission to receive communications must be obtained before the first message is sent.

Background to the Draft Law on Regulation of Electronic Commerce

The information accompanying the Draft Law explains that with the development of information technologies, new legal concepts have developed in relation to the internet with regard to access, content providers and service providers. New concepts and mediums have resulted in a rise of new legal problems which are very different from those previously experienced and which cannot be effectively resolved through old systems or legislation. The Draft Law introduces new legal arrangements to better address these novel problems.

Introducing these arrangements is also consistent with European Union directives which require member countries to regulate these matters under their local laws.

Current legal framework - Pre Draft Law

Under current Turkish law, sending electronic messages is largely unregulated. The current legal requirements may apply in specific circumstances:

- The Electronic Communication Code numbered 5809 states that subscribers or users have the right to reject receiving direct marketing messages, simply and free of charge (Article 50(5)). However, under the current wording of the Electronic Communication Code, users or subscribers may only exercise their right to reject messages after they have begun to receive unsolicited and unwanted messages. Therefore, this is an "Opt out" framework.
 - The Code on Consumer Protection numbered 4077 currently regulates the contents of commercial advertisements, requiring advertisements to be fair and true (Article 16). The Code on Consumer Protection numbered 4077 will be superseded on 28 May 2014 by the Code on Consumer Protection numbered 6502. However, the new Code will also adopt the same principle.
 - Liability under the unfair competition provisions of the Turkish Commercial Code and Turkish Code of Obligations could exist if the sender is a merchant and the e-mails or messages include

misleading advertisements.

- A person whose personality rights are violated may request protection from a Judge under the Turkish Civil Code (Article 24). This provision is applicable to unsolicited e-mails in two ways:
 - Sending unsolicited e-mails which include advertisements is considered to be a violation of personality rights, allowing the recipient to request protection from the court on this basis.
 - A recipient's e-mail address is considered to be personal data. Therefore, if senders obtain such addresses illegally, the court may deem this to be a violation of the recipient's personality rights.

Definition of "Commercial Electronic Message" in the Draft Law

The Draft Law defines "commercial electronic message" as messages "containing data, sound, and image sent for commercial purposes in an electronic environment by using means such as telephone, call centers, fax, autodial machines, smart audio recorder systems, electronic mail, and short message systems" (Article 2).

Therefore, SMS and e-mail communications would both be included in this definition under the Draft Law.

The Draft Law Proposes an "Opt-In" System for Electronic Messages

The Draft Law states that "Commercial electronic messages can only be sent to the receivers by obtaining their prior consent. This consent can be obtained in writing or with all kinds of electronic communication devices" (Article 6).

Therefore, the Draft Law proposes an "opt in" permission system whereby the recipient's permission to send e-mails must be obtained before the first e-mail.

To ensure consistency between the pieces of legislation, Article 14 of the Draft Law proposes an amendment to the Electronic Communication Code, which currently regulates electronic commercial messages. Under the Draft Law's proposal, Article 50(5) of the Electronic Communication Code will be amended so that communication with subscribers via electronic communication means is prohibited and subject to receiving prior subscriber approval. Therefore, the "opt-in" mechanism introduced by the Draft Law will also be adopted for the Electronic Communication Code.

The Draft Law goes on to state that messages must include information to allow the recipient to determine the sender, as well as the sender's contact information (Article 7).

Exception - "Opt-Out" System for Electronic Messages Sent to Craftsmen and Tradesmen

The Draft Law proposes a specific exception which allows commercial electronic messages to be sent to craftsmen and tradesmen without obtaining prior consent. Under the proposed exemption, commercial electronic messages may be sent to tradesman and merchants without obtaining their prior approval (Article 6(2) of the Draft Law). Thus, an "opt-out" system would apply for sending commercial electronic messages to tradesmen and craftsmen.

Messages to craftsmen and tradesmen would still be required to contain sufficient information to allow the recipient to contact the sender and opt out of receiving further communication (Article 7).

The Receiver May Refuse to Receive Further Messages at Any Time Without Giving a Reason

The Draft Law proposes to regulate the receiver's right to refuse to receive commercial electronic messages and states that receivers "can refuse to receive the messages at any time without providing any reason"(Article 8(1)).

Senders must ensure that receivers are able to easily send a refusal request free of charge, as well as provide related information on how to do so (Article 8 (2)). Article 8(3) goes on to state that the sender would be obliged to stop sending messages to this receiver within three business days of receiving a refusal request.

Receivers Who Gave Consent Prior to the Draft Law Would Not Be Required to Opt In Again

The Draft Law also proposes to regulate databases of permissions which were gathered from receivers before the Draft Law came into force (Temporary Article 1). The Draft Law says the requirement for receivers to opt in (outlined in Article 6(1) of the Draft Law) would not apply to existing databases which were gathered by obtaining receiver consents to receive commercial electronic messages. Therefore, senders who obtained consents from receivers prior to the enforcement date of the Draft Law would not be required to seek this consent again.

Other provisions in the Draft Law regarding sending commercial electronic messages will still apply.

Practical Considerations for Senders of Electronic Commercial Communications

Assuming that the "opt in" system for electronic messages is adopted as described above, this raises some practical considerations which senders of electronic commercial communications must also address.

- *Verification process for compiling a database of recipients*

Senders can choose to receive recipient information through a range of sign-up mechanisms. However, whichever method is used, the sender must decide whether to implement a single or double verification process for receiving the recipient's information. The Draft Law is silent regarding this topic and the sender may decide which method to use.

Single opt-in - This involves the receiver submitting their details to the sender through some sign-up mechanism and these details are added straight into the sender's database. The receiver is not required to take any further steps to confirm their subscription.

Double opt-in - This involves the receiver submitting their details to the sender through some sign-up mechanism and then the sender actively contacts the recipient to confirm that they wish to be added to the database. The receiver's details would not be added to the sender's database until the receiver has actively agreed to this.

Arguably, double opt-in ensures recipients have subscribed from a working address (without spelling mistakes) and also ensures the sender has a record showing the receiver's consent to receive electronic commercial communications.

- *Maintaining a database of recipients - Data protection and privacy requirements*

Protection of personal data in Turkey is not currently governed by a specific law enacted solely for this purpose. However, general provisions of the Turkish Criminal Code and Turkish Constitutional Law apply to the protection of personal data and the privacy of individuals.

The Regulation Concerning Processing Personal Data and Protecting Privacy in The Electronic Communications Sector (dated 24 July 2012) also applies. This Regulation includes provisions regarding the protection of personal data, data processing and protection of privacy for the electronic communications sector. Under this Regulation personal data must be processed fairly and lawfully, upon consent of the data subject, adequate, relevant and not excessive, kept in relation to the purposes for which they are collected, accurate and kept up to date. Operators must implement appropriate technical and organizational measures to ensure the security of their networks, personal data of their subscribers/ users and services they provide. The regulation outlines administrative sanctions for breaches.

The Draft Law discussed above will also regulate aspects of data protection issues. According to Article 10, senders will be responsible for the retention and protection of the personal data they obtained within the scope of the Draft Law. Article 10 goes on to state that personal data must not be sent to third parties or used for other purposes, without the receiver's approval.

The Protection of Personal Data Draft Law ("Personal Data Draft Law") was prepared by the Ministry of Justice in accordance with the related European Union directives and is currently waiting for enactment by the Turkish parliament. It exclusively focuses on protection of personal data. The Personal Data Draft Law contains more detailed regulations regarding personal data protection than are proposed by the Draft Law, discussed above. These include several protection methods for processing and securing personal data. Under Article 5 of the Personal Data Draft Law, personal data will be required to be:

- Processed fairly and lawfully,
- Accurate and kept up to date
- Kept in a form which permits identification of data subjects
- Kept for no longer than is necessary for the purposes which the data was collected, or for which they are further processed.

Under the Personal Data Draft Law, personal data will be required to only be processed with the person's approval. The Personal Data Draft Law further states that data about a person's race, political view, philosophical belief, religion, health and private life must not be processed.

The Personal Data Draft Law states that personal data which is deemed unnecessary will be required to be anonymized, or deleted (Article 9 of the Personal Data Draft Law).

The Personal Data Draft Law also proposes establishment of an independent authority to regulate issues regarding data protection: the "Personal Data Protection Board". The Board would have seven members, elected by the Council of Ministers for terms lasting six years. The Personal Data Protection Board would be authorized to make decisions about applications regarding breaches of personal rights, as well as take the necessary precautions (Article 26 of the Personal Data Draft Law). It also contemplates a "Datafile Registry", to be established by the Personal Data Protection Board. Companies would be required to register with the Datafile Registry in order to be permitted to process personal data (Article 16 of the Personal Data Draft Law).

Until both the Draft Law and the Personal Data Draft Law enter into force, the Regulation Concerning the Processing of Personal Data and The Protection of Privacy in The Electronic Communications Sector is the only specific regulation for the protection of personal data and privacy in the electronic communications sector.

- *Purchasing or using purchased marketing lists*

It is possible to purchase marketing and e-mail lists which contain the personal details of recipients, including phone numbers and e-mail addresses. Senders of electronic commercial communications should exercise caution purchasing or using such lists under the Draft Law. In practice, it is unlikely that the recipients contained in such lists have agreed to their inclusion (opted in).

Article 10 of the Electronic Commerce Draft Law will prohibit the exchange of personal data which has been obtained by senders within the limits of the Draft Law. Thus, where senders obtain personal information in a manner allowed by the Draft Law (including recipient e-mail addresses and phone numbers), senders will not be permitted to sell this information to third parties without the recipients' prior approval.

Consequences for Non-Compliance - Penalties Under the Electronic Commerce Draft Law

The Draft Law on Regulation of Electronic Commerce outlines a range of penalties for breaching its provisions, including administrative fines between 1,000 TRY and 15,000 TRY (Article 12).

A specific aggravated fine is included for breaches of senders' obligation to obtain prior consent from the recipient for sending commercial electronic messages. This aggravated fine provides that, if an electronic commercial message is sent to more than one recipient without their prior approval, an administrative fine will be applied which amounts to ten times the fine applicable for a breach of Article 6(1). That is, the 1,000 TRY fine is multiplied by ten under the aggravated fine mechanism.

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