

## Save The Date: New E-commerce Law to Take Effect May 1, 2015

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The Law on Regulation of Electronic Commerce (the "**E-Commerce Law**") was published in the Official Gazette numbered 29166 November 5 and will take effect May 1, 2015.

This article is aimed at providing information on the novelties introduced by the E-Commerce Law including the obligations and liabilities of the service providers and the E-Commerce Law's relation with current consumer protection legislation. This is a follow up to a previous article we wrote in May - ['Proposed Opt-In System for Electronic Commercial Communications in Turkey'](#). That article is worth referencing for further background on the E-Commerce Law.

## The E-Commerce Law Proposes an "Opt-In" System for Electronic Messages

As the above headline makes clear, the nucleus of the E-Commerce Law — the part getting the most attention — is the "opt-in" system introduced for the delivery of commercial electronic messages. What it means is that from May 1, 2015 service providers must obtain the recipients' prior consents before sending any commercial electronic messages including e-mails and SMS messages.

Those novel issues were discussed in our previous article, which remains relevant and up to date due to the parallel legal framework of the then existing Draft Law on Regulation of Electronic Commerce (the "Draft Law") and the E-Commerce Law. Therefore, the issues covered under our previous article regarding the newly introduced "opt-in" system will not be repeated here, save for the exceptions to the "opt-in" system.

## No Need for "Opt-In" for Electronic Messages Regarding Changes to, or Usage and Maintenance of Goods and Services Supplied

As was made clear in our previous article regarding the Draft Law, the "opt-in" permission system allows the delivery of commercial electronic messages to the recipients only by obtaining their prior consent (Article 6). The E-Commerce Law includes an exception to this rule by not requiring such permission for delivery of commercial electronic messages regarding any changes to, or usage and maintenance of the goods and services supplied to the recipients, provided that those recipients had previously shared their contact details for the purposes of being contacted (Article 1, paragraph 1).

This exception to the general "opt-in" permission system will enable service providers to send commercial electronic messages related to changes made in a product or service previously supplied to the recipient or regarding the usage and maintenance of the same. In practice, it is likely that the updated features of previously sold software or mobile applications will be regarded within the scope of this exception.

Still, service providers should be cautious when benefiting from this opportunity as the E-Commerce Law still requires that the recipient has previously provided contact details to the service provider for the purposes of being contacted. In other words, the service providers will not be allowed to deliver commercial electronic messages to a recipient who has never provided contact details for this purpose.

## Adoption of the Opt-In System is not the Only Requirement! What Else?

The E-Commerce Law imposes certain obligations on service providers to apply in the course of electronic commerce transactions, be it in the pre-contractual phase or during the ordering process. The allowed content of commercial electronic messages is also regulated under the E-Commerce Law, which has been subject of controversial discussions during the legislative process. Although the Draft Law on Protection of Personal Data has not been enacted yet, data protection is also raised as an issue and certain obligations have been imposed on service providers under the E-Commerce Law. Below is a summary of these important obligations.

- *Obligation to Inform*

The service providers are obliged to provide information with respect to their identity in a simple, accessible and up-to-date fashion, including the technical steps to be followed for the conclusion of the agreement, information on whether the agreement will be kept by the service provider and the accessibility thereof by the recipient, if so the period of accessibility, information regarding technical tools for the determination and fix of errors in data entry, the confidentiality provisions to be applied and alternative dispute resolution mechanisms, if any (Article 3(1)). The service provider is obliged to provide the aforementioned information to the recipient prior to the conclusion of the agreement via electronic communication devices.

If the service provider is a member of a professional association it should also inform the recipients of its membership in the association and the professional rules, as well as how to access them electronically (Article 3(2)).

The service providers must ensure that the terms of the agreement and the general terms can be kept by the recipient (Article 3(4)).

- *Obligations regarding the Order*

The service providers must ensure that the terms and conditions of the agreement, including the total price to be paid, are clearly seen by the recipient. This must be ensured at the time of approval of the order and prior to the entry of payment information by the recipient (Article 4(1)).

The service providers are obliged to confirm the receipt of the orders via electronic communication devices without any delay (Article 4(1)(b)). The order and the confirmation are deemed to be realized at the time when the parties have access to those declarations of order and confirmation.

Prior to the entry of the order the service providers must provide appropriate, effective and accessible technical tools for the determination and fix of data entry errors. It should be noted that this is a different obligation than the one stipulated under Article 3 above. Whereas the obligation under Article 3 requires the provision of information to the recipient about the technical tools to be used for error fixing purposes, this one pertains to the actual performance of the tools to the recipients.

- *Obligations regarding the Content of Commercial Electronic Messages*

A general principle of the E-Commerce Law is the compliance of the contents of commercial electronic messages with the consent obtained from the recipients (Article 7). This issue had been the subject of intense discussions at the commission during the legislative process due to the frequent delivery of e-mails and SMS messages by a variety of corporations containing promotional and marketing content about third parties who are in cooperation with them. The E-Commerce Law seeks the prior consent of the recipient for delivery of those messages. However, the format and content of the consent is expected to be regulated by an application regulation to be issued.

Furthermore, the identity and accessible contact details of the service provider must be included in commercial electronic messages for the purpose of enabling the recipient to see the information regarding the sender even without opening the message. Similarly the subject, purpose and the name of the third party (if the electronic message is being sent on behalf of a third party) must be provided in the message (Article 7).

- *Data Protection*

Our previous article already highlighted extensive information on data privacy obligations imposed on the service providers along with the other regulations in Turkish law on data protection issues. In order to prevent any redundancy, we simply refer to our [previous article](#) for detailed information.

In general, according to Article 10 of the E-Commerce Law, service providers and intermediary service providers will be responsible for the retention and protection of the personal data they obtained within the scope of the E-Commerce Law, which should not be sent to third parties or used for other purposes without the recipient's approval.

It should be stressed that the data protection obligation shall also apply to intermediary service providers by virtue of the E-Commerce Law. However, the remaining of the above listed obligations will be applicable to intermediary service providers in line with a separate regulation to be yet issued in accordance with Article 9 of the E-Commerce Law. For the purposes of clarity, the intermediary service providers are real persons and legal entities who provide electronic commerce platforms for e-commerce activities (Article 2(1)(d)).

## What Will be the Cost of Noncompliance?

Administrative fines varying between TRY 1,000 and TRY 15,000 shall apply to e-commerce actors who do not comply with certain obligations under the E-Commerce Law (Article 12).

The aggravated fine mechanism has been kept under the E-Commerce Law as it was proposed under the Draft Law.. To be more specific, if an electronic commercial message is sent to more than one recipient without their prior approval an administrative fine up to 10 times the individual fine (currently TRY 1,000) for a breach of Article 6(1) will apply.

# Last Note: For E-commerce Transactions with Consumers, Keep in Mind the Legislation on Consumer Protection

As known, distant agreements between business operators and consumers are already regulated under the Code on Consumer Protection numbered 6502 and its relevant regulations. Once the E-Commerce Law takes effect, its scope of application is likely to be questioned due to its parallelism with the legislation on consumer protection.

It should be noted that, in principle, the provisions of the E-Commerce Law are applicable to transactions entered into with both tradesmen and consumers. This means that where a distant agreement as defined under the Code on Consumer Protection also qualifies as electronic commerce, which is defined as "*online economic and commercial activities performed on an electronic environment and without the physical meeting of the parties*", the provisions of the E-Commerce Law will apply simultaneously to such distant agreement.

The above consideration practically means that the service providers will be obliged to comply with two different pieces of legislation, namely the E-Commerce Law and the Code on Consumer Protection when one party to the transaction happens to be a consumer.

This principle has two exceptions as the E-Commerce Law distinguishes between a consumer and a non-consumer party in two situations in terms of the application thereof.

- Article 3 of the Electronic Consumer Law imposes certain informative obligations on the service provider as detailed above. In this respect, Article 3(3) states that the parties are free to determine contrary to these obligations where the parties are not consumers. This means that where the receiving party is business operator, the service provider may not be obliged to provide the items of information determined under Article 3 in accordance with the freedom of contract.
- Article 4 of the Electronic Consumer Law imposes certain obligations on the service provider regarding the orders. Again, Article 4(3) states that the parties are free to determine, contrary to these obligations where the parties are not consumers. This means that where the receiving party is business operator, the service provider may not be obliged to perform the obligations determined under Article 3 in accordance with the freedom of contract.  
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