

Turkey

Sıdika Baysal Hatipoğlu, Gökhan Uğur Bağcı, Benan İlhanlı

B+B Law Firm

General

1 How can the government's attitude and approach to internet issues best be described?

The government approaches the internet issues in three diverse aspects: content, taxation of the revenue generated from advertisements and e-commerce. The first two are matters where the government is sensitive and protective. It has adapted a 'safe internet filter' for those electing to have a limitation of accessible websites selected by governmental agencies. Further, ministers and high-profile civil servants frequently complain about companies offering services to Turkish entities that do not pay income tax in Turkey. Following recent amendments to internet legislation, the government adopted a strict approach towards internet-related matters and websites based on tax issues and protection of personal data. Now, finally, the government is about to reorganise the e-commerce regulations in order to have a more complete legislation.

Legislation

2 What legislation governs business on the internet?

Business on the internet is mainly governed by the Code of Obligations (completely revised in 2012), which provides the main points regarding contracts for business to business (B2B) and the Law on the Protection of Consumers related to business to consumer (B2C) transactions. On the other hand, the Law on the Protection of Consumers has been completely renewed and the new law came into force in 28 May 2014. Accordingly, this law has provided specific provisions in order to regulate e-commerce and distant sale contracts in particular. Its secondary regulation, namely the Regulation on Distant Contracts, has recently been published and entered into force on 27 February 2015. The Regulation on such matter provides specific points in connection with B2C business.

Further, the Law on Content Published on the Internet (Law on CPI) No. 5651 of 2007 regulates the content of websites, even though it is not strictly related to the business. Hence, the following should not be on any website: content leading to suicide, sexual abuse of children, facilitating the use of drugs, providing material dangerous to health, pornography, or that provides an opportunity and grounds for gambling (categorical crimes).

Finally, the Turkish parliament has published a law on e-commerce which came into force on 1 May 2015. The law provides some important regulations on promotional messages and data privacy, since it obliges e-commerce companies to obtain prior authorisation (with an opt-in mechanism) from the consumers in order to send them such messages and further limit the sharing of consumers' data with third parties. Further, draft version of the secondary legislations which are the Regulation on the Commercial Electronic Messages and the Regulation on Contracts and Orders in E-commerce has been shared by the relevant Ministry in order to receive comments and suggestions for the content. It is expected that these two secondary regulations which give more detailed information for the application of the e-commerce law will enter into force in late June.

Regulatory bodies

3 Which, (if any), regulatory bodies are responsible for the regulation of e-commerce, data protection and internet access tariffs and charges?

There are currently two regulatory bodies responsible for the regulation of internet issues: the Ministry of Customs and Commerce is directly responsible for the customers' protection and application of the regulations, while the Institution of Information and Communications Technologies Authority (ICTA) is responsible for the regulation of access traffic and charges, control of the irregularities against the categorical crimes and determination of the white list. Law No. 5651 has been recently amended and the powers of ICTA have been widely extended, as explained in the questions below.

Since the draft law on the Protection of Personal Data, parallel with the provisions of the Data Protection Directive (EU Directive 95/46/EC), is still awaiting the approval of parliament, Turkey still does not have a specific legislation which regulates the data protection and its regulatory body. However, the draft Law on the Protection of Personal Data introduces a Personal Data Protection Board under the Ministry of Justice. This committee will be entitled to make direct investigation and inspection in order for monitoring control whether personal data of the customers are being used and protected in accordance with the law. It is expected that the draft law will be in the parliament agenda for the next legislative year.

Jurisdiction

4 What tests or rules are applied by the courts to determine the jurisdiction for internet-related transactions (or disputes) in cases where the defendant is resident or provides goods or services from outside the jurisdiction?

While the Consumer Law and its secondary regulations are silent on this matter, Turkish Code on International Private and Procedural Law ('International Civil and Procedural Law') provides a specific clause on its Article 26. Accordingly, the applicable law on the contracts stipulated between a Turkish person and a foreign person may be defined within the contract. On the other hand, the Article 26 distinctly reserves the rights of the Turkish person provided by Turkish laws and regulations on the consumer protection. In other words, the applicable law defined within the contract shall not override the minimum protection provided by Turkish law.

Contracting on the internet

5 Is it possible to form and conclude contracts electronically? If so, how are contracts formed on the internet? Explain whether 'click wrap' contracts are enforceable, and if so, what requirements need to be met?

Concluding contracts electronically is possible under different circumstances. The Obligations Code provides that contracts with strict form requirements, such as signature by hand, may be stipulated with an electronic signature. The electronic signatures are provided by certified providers enabling the holders of such signature to prove their identity.

On the other hand B2C contracts, which are subject to the new Law on Consumers' Protection and its secondary Regulation on Distant Contracts, may be stipulated electronically – in a 'click wrap' form – without the requirement of an electronic signature.

In order to conclude a legally valid e-commerce transaction by using a click wrap form, the law stipulates two different documents, a preliminary information form and distant contract, must be clearly submitted for the customer's confirmation before the conclusion of the transaction. Within the context of these documents several subjects such as contact information of customer service, withdrawal right, return and shipping policy, must be stated by the merchant. These two forms must explicitly appear on the last stage of the transaction before the payment and confirming them by clicking the box must be made obligatory in order to proceed to the payment stage. Further, the new secondary Regulation on Distant Contracts has imposed a new obligation for the merchants. Accordingly, apart from the preliminary information form and distant contract, merchants are obliged to state clear information about features and price (including additional expenses such as shipping) of the product and terms of withdrawal right on the last web page before the payment. Besides, the new law regulates that the merchant must provide a statement to the customer at the very last stage before the order. This information notice must explicitly state that the approval of the purchase order in question will burden a payment obligation to the customer. Without this statement, the customer cannot be held responsible from the order.

6 Are there any particular laws that govern contracting on the internet? Do these distinguish between business-to-consumer and business-to-business contracts?

The main provisions related to contracts stipulated in electronic means may be found in the Code of Obligations for B2B contracts and in the Law on Consumers' Protection for B2C contracts. The B2C contracts are distinguished based on the requirement of the protection of the consumers who purchase goods and services without being in direct contact with the good or merchant itself, by providing a withdrawal right to be used within 14 days.

7 How does the law recognise or define digital or e-signatures?

The Law on Electronic Signatures No. 5070 of 2004 defines the use and modalities of e-signatures. The law provides a structure based on the issuance of digital certificates by third-party providers, which are subject to several obligations. Once a person obtains an e-signature, he or she is able to conclude contracts electronically on the internet or even conclude procedures in governmental portals.

8 Are there any data retention or software legacy requirements in relation to the formation of electronic contracts?

The merchants contracting the sale of goods and services on the internet are under an obligation to keep consumers' electronically stipulated contracts for three years. Further, the merchants shall keep those contracts accessible to consumers during this period. On the other hand, according to the new secondary Regulation on Distant Contracts, intermediary service providers are also obliged to keep electronic data related to the transactions that have been carried out with merchants.

Security

9 What measures must be taken by companies or ISPs to guarantee the security of internet transactions?

The companies or ISPs are not legally required to guarantee the security of internet transactions; however, the banks require that companies use globally accepted standards (eg, the https protocol) to provide virtual point-of-sale systems.

10 As regards encrypted communications, can any authorities require private keys to be made available? Are certification authorities permitted? Are they regulated and are there any laws as to their liability?

There are currently no regulations in connection with the encrypted communication. The subject has been discussed by ICTA for Blackberry devices and its BBM service several years back; however, there has not been any request from the Turkish government, nor any other governmental bodies, for such issue.

Domain names

11 What procedures are in place to regulate the licensing of domain names? Is it possible to register a country-specific domain name without being a resident in the country?

The country-specific domain names, with a '.tr' ccTLD, are currently regulated by a semi-independent body named NIC.TR Domain Name Administration (NIC.TR) formed within the Middle-East Technical University in Ankara. NIC.TR provides different rules for different top level domain names, such as .com.tr, .net.tr, .org.tr, .name.tr; however, they do not apply a first-come first-served principle for any of them. The applicant

for a desired domain name must provide a document demonstrating that it has a right on such name. For example, NIC.TR requires the companies to provide a registered trade name or trademark before registering a '.com.tr' domain name. On the other hand, there is no requirement to be resident in Turkey. It should be noted that in accordance with the rules published by NIC.TR, for the transfer of a domain name with a '.tr' ccTLD, the document demonstrating the right on the wording that has been used for the registration (i.e. trademark) shall be transferred as well.

The control of '.tr' domain names shall pass to ICTA in a still not declared date, until the passage is over, NIC.TR will have sole control over these domain names.

12 Do domain names confer any additional rights (for instance, in relation to trademarks or passing off) beyond the rights that naturally vest in the domain name?

Domain names are considered the intellectual property of their holders and might be used in legal actions against the violators of such rights. However, since the top-level domain names with a '.tr' ccTLD require a document such as a trademark, the holder of the domain name and the trademark coincide to be the same entity very often.

13 Will ownership of a trademark assist in challenging a 'pirate' registration of a similar domain name?

Dispute resolution on '.tr' domain names is handled by a working group formed by NIC.TR. However, this group assembles every three to four months and do not provide effective dispute resolution. Further, since the owner of a '.tr' domain name will have the same trade name or trademark, the original holder of the trademark is generally obliged to file a suit related to the cancellation of the trademark or trade name registered by the 'pirate'.

Advertising

14 What rules govern advertising on the internet?

There are no specific rules governing online advertising apart from the rules for conventional advertising.

15 Are there any products or services that may not be advertised or types of content that are not permitted on the internet?

The normal restrictions on the conventional advertisement, such as tobacco, drugs, legal and medical services, also apply for advertising on the internet. Further, Law No. 6,487 (published on 11 June 2013) has restricted the advertisement of alcohol in published materials such as magazines and newspapers and on the internet.

Financial services

16 Is the advertising or selling of financial services products to consumers or to businesses via the internet regulated, and, if so, by whom and how?

The advertising or selling of financial services, both via the internet or conventional ways, are regulated by the Capital Markets Board in Turkey. The Board examines whether an activity should be subject to a licence and, if so, determines if the advertising entity is a holder of a licence. Otherwise, the entity acting without a valid licence from the Board is subject to administrative and penal fines. The last discussion on this matter is the foreign exchange market, which has been included in the board's competence and the companies operating in this market are now being warned to cease the advertising and sale of these services.

Defamation

17 Are ISPs liable for content displayed on their sites?

The Law on CPI defines three types of providers: access providers (ie, ISPs), hosting provider and content providers (ie, websites). The ISPs are not directly liable for content displayed on their sites as are content providers; however, there is a restriction on some content and they will restrict access to such content.

18 Can an ISP shut down a web page containing defamatory material without court authorisation?

ISPs must restrict access to a web page containing defamatory material – defined in the Law on CPI – and information leading to suicide, or constituting sexual abuse of children, facilitating the use of drugs, providing material dangerous to health, pornography, or providing opportunity and grounds for gambling – upon the request of the courts or the ICTA. Following the recent amendments of 2014 made on Law No. 5651, ICTA has been given the authority to block the access to a web page without court authorisation where a complaint regarding to violation of privacy is received. On the other hand, ICTA shall still apply to the court and obtain approval in respect to blocking decisions for the reasons other than privacy. ISPs that fail to comply with this restriction are subject to a fine of between 10,000 and 100,000 Turkish lira and their licence may be revoked.

Intellectual property

19 Can a website owner link to third-party websites without permission?

There is no specific regulation on providing links to third-party websites, provided that the website owner does not infringe the third-party's intellectual property rights. In other words, the website owner must make it clear to users that the third-party websites are linked but not owned by the website owner.

20 Can a website owner use third-party content on its website without permission from the third-party content provider?

If the content being used on a website is subject to the intellectual property rights of a third person, the website owner shall specifically cite the name of the original owner. If the website owner plans to amend the content (modification of an image, text, etc), then he or she will request permission from the third-party content provider.

21 Can a website owner exploit the software used for a website by licensing the software to third parties?

The software used for websites is purely subject to the owner of such software, meaning should the website owner not be the owner of the software, he or she may not license it to third parties without the prior authorisation of the owner.

22 Are any liabilities incurred by links to third-party websites?

Links displayed on websites are not regulated in a detailed way; however, a content provider is liable for all the content displayed on the website including the links. Thus, we may accept that all the liabilities defined in the Law on CPI might be incurred even for links to third-party websites.

Data protection and privacy

23 How does the law in your jurisdiction define 'personal data'?

'Personal data' is currently defined only in the Regulations on Processing and Protecting the Privacy of Personal Data in the Electronic Communication Sector dated 24 July 2012 and published by ICTA. It is defined as all data of real or legal persons whose identities are determined or determinable. The draft law on the Protection of Personal Data dated 2008, which is still awaiting the approval of parliament, provides the very same definition.

Furthermore, under the new Law on e-commerce, the merchants are responsible for the preservation and protection of the personal data acquired from the consumers within scope of the e-commerce transactions. In addition, personal data cannot be used for different purposes or transferred to third parties without the prior consent of the customer.

24 Does a website owner have to register with any ~~controlling body~~ regulator to process personal data? May a website provider sell personal data about website users to third parties?

This question shall be addressed considering two different cases: personal data legally collected with the consent of the users; and personal data illegally collected without the consent of the users.

For legally collected information, it should be noted that since the draft law on the Protection of Personal Data has not yet been enacted, a website owner is not required to register with any regulator to process personal data. For the same reason, the transfer of a website's users' data collected with the users' consent to third parties is also not regulated; however, it is advisable to process and transfer only anonymous data to third parties.

On the other hand, the Turkish Penal Code of 2004 provides that the illegal registration of personal data is punishable with six months to three years of imprisonment. Further, illegally selling or transferring personal data to third parties is punishable with one to four years of imprisonment. However, personal data are not clearly defined in the Penal Code.

25 If a website owner is intending to profile its customer base to target advertising on its website, is this regulated in your jurisdiction? In particular, is there an opt-out or opt-in approach to the use of cookies or similar technologies?

At present there are no regulations on profiling the customer base to target advertising, or the opt-in or opt-out approach to the use of cookies.

26 If an internet company's server is located outside the jurisdiction, are any legal problems created when transferring and processing personal data?

The draft law on the Protection of Personal Data restricts the transfer of personal data abroad, unless certain conditions, such as the warranty of the same or a similar protection being provided in the target country, are met. However, since the draft law has not yet been enacted, there is currently no restriction.

27 Does your jurisdiction have data breach notification laws?

There are no data breach notification laws in Turkey.

28 Does your jurisdiction recognise or regulate the 'right to be forgotten'?

At present there are no regulations or court decision on the right to be forgotten.

29 Does your jurisdiction restrict the transfer of personal data outside your jurisdiction?

It is expected that the Law on the Protection of Personal Data, which has not been enacted yet, the jurisdiction would restrict the transfer of personal data outside of Turkey, unless certain conditions, such as the warranty of the same or a similar protection being provided in the target country, are met.

30 Is the sale of online products subject to taxation?

All products and services, including those offered online, are subject to VAT in Turkey, which is mostly 18 per cent of the value of the product or service. It should be noted that VAT does not change according to the regions or cities in Turkey so that websites generally publish prices including VAT.

31 What tax liabilities ensue from placing servers outside operators' home jurisdictions? Does the placing of servers within a jurisdiction by a company incorporated outside the jurisdiction expose that company to local taxes?

Turkish law does not differentiate the tax obligations based on the location of the servers but on the residence of the company and the location where the goods or services have been consumed and where revenue is generated. In other words, the Turkish tax authorities collect taxes from all entities operating in Turkey and benefiting from the sales of goods or services in terms of returns. Thus, the location of servers does not have a role in taxation issues.

32 When and where should companies register for VAT or other sales taxes? How are domestic internet sales taxed?

It should be noted that internet sales are taxed as conventional sales. The entities will register all shares for their corresponding VAT and return the taxes collected from consumers to the tax authority. On the other hand, an interesting regulation provides that consumers in Turkey purchasing a product or service from a company resident abroad (typical in e-commerce) must pay the correspondent VAT as the company will not be paying it as it is based overseas. On the other hand, the fiscal authorities declared that the sales on online marketplaces might be subject to 'internet sales taxes' with a future regulation; however, there is no regulation on this matter.

33 If an offshore company is used to supply goods over the internet, how will returns be treated for tax purposes? What transfer-pricing problems might arise from customers returning goods to an onshore retail outlet of an offshore company set up to supply the goods?

It is important to note that goods shipped from abroad to a postal address in Turkey are exempt of customs tax only if the value of the good does not exceed €75 (or its equivalent). Goods exceeding this value are subject to custom taxation and might be retained by customs until all taxes and duties are paid. Further, the shipment of cosmetic products are prohibited, even if the value is below €75. This regulation forces such businesses to operate onshore. On the other hand, it should be noted that in normal cases the offshore company should be invoicing the onshore retail store for goods that they have sold to them. If the onshore retail store is located in Turkey the offshore company should be sending a credit note for returns or a Turkish onshore company should be selling the goods back with a proper invoice. Otherwise, a transfer pricing issue may arise if there is no sale agreement with a sale price higher than cost.

Gambling

34 Is it permissible to operate an online betting or gaming business from the jurisdiction?

Online betting (eg, sports betting, lotteries) in Turkey is only permitted by the state-controlled National Lottery Administration and Iddaa, an online betting website. The only way for third parties to get involved in this market is through a deal with these administrations, which is currently the case for several Turkish online betting companies. On the other hand, online gambling (eg, casinos, poker), as well as conventional gambling, is strictly forbidden in Turkey and websites that permit online gambling tend to get blocked by the ICTA or court orders.

35 Are residents permitted to use online casinos and betting websites? Is any regulatory consent or age, credit or other verification required?

Residents of Turkey are permitted to use online betting websites, but not online casinos or other online gambling websites. Age verification, as the user must be more than 18 years of age, is required for the online betting system.

Outsourcing

36 What are the key legal and tax issues relevant in considering the provision of services on an outsourced basis?

Outsourcing is legally recognised for the matters not directly relevant to the core business of a company. This means that, for instance, cleaning, food services and the accounting of an e-commerce company may be considered as side work and may be outsourced. However, the management of products to be sold on a website or supplier relations would be considered as a core business and must be handled by in-house employees.

37 What are the rights of employees who previously carried out services that have been outsourced? Is there any right to consultation or compensation, do the rules apply to all employees within the jurisdiction?

If an employee ceases to have a direct employment relationship with a company due to being outsourced, then he or she would terminate the previous contract and begin a new one, meaning that the company should pay a severance payment, a notification period payment and other rights to the employee. In any case, if the outsourced work still remains as the core business of the company, then the employee may have a right to ask for reintegration to the company.

Online publishing

38 When would a website provider be liable for mistakes in information that it provides online? Can it avoid liability?

The Law on CPI provides that a website provider providing access, hosting or content is liable for the content published in its website. The only way

of avoiding this liability for the access provider and hosting provider would be to block access to such content; however, the original liability of the content provider (ie, the person who created the content) is unavoidable.

39 If a website provider includes databases on its site, can it stop other people from using or reproducing data from those databases?

Databases are protected within the extent of copyrights only if such database falls under the scope of the Law on Intellectual Property. The Law provides that the databases organised in a distinctive way will be protected; however, the content of such databases is not subject to the same protection.

Thus, should a website include databases protected by the Law, it can stop other people from using or reproducing the same database, even though it cannot stop them from using the material included in the database.

40 Are there marketing and advertising regulations affecting website providers?

The marketing and advertising regulations affecting website providers are the same as for conventional media, meaning that website providers are not exempt from the regulations prohibiting the advertisement of tobacco and alcoholic beverage products, nudity, gambling, etc.

UPDATE & TRENDS

Are there any emerging trends or hot topics in e-Commerce regulation in the jurisdiction? Is there any pending legislation that is likely to have consequences for e-Commerce and internet-related business?

The most hot topic in e-Commerce regulation in Turkey is the law on e-commerce which came into force on 1 May 2015. The law provides important regulations on promotional messages and data privacy and obliges e-commerce companies to obtain prior authorisation (with an opt-in mechanism) from the consumers in order to send them such messages and further limit the sharing of consumers' data with third parties.

The secondary legislations (namely the Regulation on the Commercial Electronic Messages and the Regulation on Contracts and Orders in E-commerce) are still in draft versions and published by the Ministry of Customs and Commerce. It is expected that these two secondary regulations to provide more detailed information for the application of the e-commerce law and that they will enter into force in late June 2015.

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