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Annulment Lawsuit Related to E-Commerce Law is Rejected

An annulment lawsuit was filed with the Constitutional Court (**AYM**) with the request to cancel certain provisions of Law No. 7416, which amends the Law on the Regulation of Electronic Commerce (**Law**) and was adopted in the Turkish Grand National Assembly in July 2022. Subsequently, a stay of execution decision was issued on 10.05.2023 for the provisions which are the subject of the annulment case. However, in the AYM decision dated 22.09.2023 and published in the Official Gazette on 13.07.2023, the annulment lawsuit request was rejected.

The provisions that were sought to be cancelled are the provisions added to the Law on the Regulation of Electronic Commerce (**E-Commerce Law**) with Article 8 of, which determine the obligations of electronic commerce intermediary service providers according to their net transaction volumes.

As per the provisions subject to the lawsuit, electronic commerce intermediary service providers cannot offer for sale or mediate the sale of goods bearing the trademark or having the right to use the trademark of itself or the persons with whom it has economic integrity in the electronic commerce marketplaces where it provides intermediary services. Furthermore, if these goods are offered for sale in different electronic commerce environments, they cannot provide access between these environments and cannot promote each other.

In the petition, in summary, it has been claimed that the E-Commerce Law is contrary to various articles of the Constitution, stating that the regulations in question do not have a public interest purpose, violate the freedom of undertakings, violate the principle of proportionality within the scope of competition law, violate the principle of equality, violate the principle of consumer protection, and are incompatible with international agreements.

In brief, AYM assessed in the reasoned decision the followings:

- The provisions in the case restricted the freedom of undertaking by restricting the electronic commerce intermediary service providers engaged in economic and commercial activities from carrying out certain activities in the electronic commerce marketplaces where they provide intermediary services, and from carrying out related works and transactions,
- That the restriction in question consists only of the inability to offer the goods for sale in the electronic commerce marketplace under the control of the electronic commerce intermediary service provider,
- The freedom of undertaking to sell, intermediate in the sale or promotion of these goods has not been eliminated, and this freedom has not been made significantly difficult, and in this context, the opportunity of the electronic commerce intermediary service provider to engage in economic and commercial activities continues,

- Consequently, the limitations envisaged in this situation will not unreasonably reduce the competitiveness of electronic commerce intermediary service providers and will not cause them to suffer a disproportionate economic loss,
- Regarding the provisions to be applied in transactions related to license fees, the obligors, subject, base, rate and time of payment of license fees are regulated in a clear, understandable, applicable and objective manner, and what should be understood from the concept of net transaction volume is clearly stated, therefore, the rules restricting the right to property and freedom of undertaking are specific, accessible and foreseeable in a way that does not allow arbitrariness and meet the criterion of legality.

In the reasoned decision, AYM stated that the restrictions imposed by the provisions in question did not impose an unreasonable burden on individuals and that in this framework, the reasonable balance between the public interest regarding the purpose to be achieved by the rules and the personal interest regarding the freedom of private enterprise was observed.

On the other hand, the dissenting opinion in the decision attracted significant attention. In the dissenting opinion, it was argued that the contested regulations provided excessive interference with freedom of enterprise and property rights for market-leading companies after surpassing transaction volume thresholds and therefore should be cancelled.

You can reach the full text of the detailed ruling [here](#) (only available in Turkish).

Google Advertising Granted with Permission to Transfer Data Abroad

Google Advertising and Marketing Limited Company (**Google**) had submitted an undertaking application for the transfer of personal data abroad in accordance with the Personal Data Protection Law (**Law**). According to the announcement published on the website of the Personal Data Protection Board (**Board**) on 01.09.2023, this application has been finalized.

Accordingly, the Board evaluated Google Advertising's application in terms of the conditions regulated under the heading "transfer of personal data abroad" of the Law and authorized the mentioned data transfer.

As it is known, according to the Law, it is unlawful to transfer personal data abroad without the explicit consent of the data subject. However, for the transfer of personal data abroad; in the presence of one of the situations in which the data can be processed without seeking explicit consent specified in the Law; if there is adequate protection in the foreign country where the data will be transferred, it can be transferred abroad directly, if there is adequate protection in the foreign country where the data will be transferred, in the absence of adequate protection, the data controllers in Turkey and in the relevant foreign country undertake in writing to provide adequate protection and with the permission of the Board.

In this context, the Board's authorization of Google Advertising's letter of undertaking application was a striking development in the sector.

You can access the Board's announcement [here](#) (only available in Turkish).

Companies Covered by the Digital Markets Act Announced

The Digital Markets Act (**DMA**) which entered into force in the European Union on 01.11.2022, has been introduced to regulate digital platforms serving as “gatekeepers” in the digital sector. The term “gatekeepers” is defined in the DMA as platforms with substantial influence on the internal market, acting as vital intermediaries for businesses to reach their users, and maintaining a dominant and durable position. Which companies qualify as gatekeepers are determined by the European Commission by selecting companies that meet the following criteria. Accordingly, in order to be selected as gatekeepers, a company must meet the following criteria:

- Having an annual turnover of at least €7.5 billion in the European Economic Area in the last three years, or a market capitalization of at least €75 billion in the last year, and provide platform services in at least three EU Member States,
- Having over 45 million monthly active users’ residents in the EU in the last year, or operates a basic platform service with more than 10,000 annual active commercial users resident in the EU,
- The company has met the second criterion in each of the last three financial years.

The main objective of the DMA is to prevent gatekeepers from imposing unfair conditions on businesses and end users and to ensure that critical digital services remain open. The DMA’s primary goal is to prevent gatekeepers from imposing unfair conditions on businesses and end-users while ensuring the openness of critical digital services.

Within the scope of the announcement published by the European Commission on 06.09.2023, the following platforms were designated as gatekeepers and included in the scope of DMA.

- Social Network: TikTok, Facebook, Instagram, LinkedIn
- N-IICS: WhatsApp, Messenger
- Intermediation: Google Maps, Google Play, Google Shopping, Amazon Marketplace, App Store, Meta Marketplace
- Video Sharing: YouTube
- Ads: Google, Amazon, Meta
- Browser: Chrome, Safari
- Search: Google Search
- Operating System: Android, iOS, Windows

Gatekeepers must comply with DMA obligations within six months of their inclusion as gatekeepers under the provisions of the DMA (by March 2024) and provide compliance reports requested by the Commission.

In the press release, the European Commission stated that it will monitor compliance with DMA obligations closely. Under the DMA, non-compliance can result in fines of up to 10% of a company’s global turnover (up to 20% for repeated violations), along with potential remedies like divestment or service acquisition bans for systematic non-compliance.

Designation as a gatekeeper brings added responsibilities for maintaining a fair, open online environment conducive to innovation, as outlined in the DMA. The DMA outlines specific “dos and don’ts” for gatekeepers, including:

- Allowing users to easily uninstall pre-installed apps or change default settings.
- Allowing third-party apps and app stores to interoperate.

- Enabling easy subscription and unsubscribing for users.
- Providing access to data generated by business users.
- Prohibiting the use of business users' data in competition with them.
- Banning preferential treatment of gatekeeper products.
- Prohibiting mandatory use of gatekeeper services by app developers.
- Restricting tracking of users without their consent.

By including these companies as gatekeepers, the DMA's aims to foster open, competitive digital markets, allowing companies to compete based on their merits and drive innovation. Companies' compliance with these obligations will be under scrutiny for a long time.

You can access the related press release [here](#) (available in EU languages).

New Era on Domain Names in the 'a.tr' Structure

Turkish Information Technologies and Communication Authority (**BTK**) published a decision regarding the "Principles and Procedures for Allocation of Domain Names in the 'a.tr' Structure" and the "Fees for Domain Names in the 'a.tr' Structure." (**Decision**) on 25.08.2023. The key importance of Decision is that BTK will now allow the allocation of domain names similar to "a.tr" under certain criteria.

Decision regulates the allocation procedures for domain names in the "a.tr" structure and the rules and procedures that will apply to the process.

Currently, domain names in structures like "gov.tr", "com.tr", "org.tr", etc., can be allocated. In addition to domain names in this structure, domain names in the "a.tr" structure (e.g., *google.tr*) will also be allocatable in the near future.

We have summarized significant aspects related to the allocation of domain names in the "a.tr" structure according to Decision:

- The decision establishes a prioritization order for the allocation of domain names with the '.tr' extension. During prioritization, allocation processes will be conducted in three different categories as follows:

1st Category: In the initial allocation processes, domain names allocated to public institutions and organizations and entities whose capital is more than half publicly owned as of the effective date will be prioritized. After BTK announces the completion of this process on its website, allocation processes for the second category will begin. Even though an announcement has not been made yet, it is known that this process has started and is still ongoing. An announcement by the BTK is expected regarding its completion and transitioning to the 2nd category.

2nd Category: Public-interest professional organizations with 'org.tr' domain names, public benefit associations and foundations, and worker and employer professional organizations will be prioritized. After BTK announces the completion of this process on its website, allocation processes for the third category will begin.

3rd Category: In this category, priority will be given to domain name owners based on extensions. Those who own domain names with extensions such as '**kep.tr**,' '**av.tr**,' '**dr.tr**,' '**com.tr**,' '**org.tr**,' '**net.tr**,' '**gen.tr**,' '**web.tr**,' '**name.tr**,' '**info.tr**,' '**tv.tr**,' '**bbs.tr**,' and '**tel.tr**.' will be prioritized.

- After the completion of the allocation processes for the aforementioned categories, the “first-come, first-served” rule will apply to domain names in the ‘a.tr’ structure.

The rules and procedures for the allocation of domain names in the ‘a.tr’ structure came into effect on 14.09.2023. Although the mentioned announcements have not yet been published, it is expected that BTK will make a statement or announcement on the subject in the near future. It is important to monitor the developments since the timing is determined by said announcements.

Decision from BTK: Confirmation Obligation for Internet/TV and Landline Phone Subscriptions

The Information and Communication Technologies Authority (**BTK**) has introduced a regulation on new subscriptions in order to prevent consumers from being harmed by providing incomplete, incorrect and misleading information to consumers who intend to receive electronic communication services. In this context, the “Procedures and Principles on Confirmation Procedures Prior to the Establishment of New Individual Subscriptions for Internet/TV and Fixed Telephone Services” (**Decision**) was published on the official website of the BTK dated 13.09.2023.

The scope of the Decision covers operators that provide internet/TV and, if applicable, fixed telephone services in addition to these services, which are provided under internet service provider, satellite and cable TV service, cable broadcasting service and satellite platform service authorization and do not involve a change of operator. However, Decision does not cover new individual subscriptions for landline services exclusively.

With the entry into force of the Decision, it has become mandatory to obtain confirmation from the consumer in new subscription processes. In addition, the Decision stipulates that consumers must first make a confirmation call during the new subscription process; afterwards, the same operator may establish a subscription in case the consumer was not contacted previously; and in case the consumer was contacted, this must be proved by the operator.

Pursuant to the Decision, the process of establishing a new subscription agreement cannot be initiated in the event that a confirmation call is not made, a confirmation call is not responded to, information is not provided in the content specified in the confirmation call, or the consumer does not give consent. Decision will enter into force 6 months after its publication in the Official Gazette. Accordingly, it is significant for the businesses within the scope of the Decision to make the necessary arrangements until this period.

You can reach the full text of the Decision published by the BTK [here](#) (only available in Turkish).

Significant Legislative Amendments for Immovable Property and Secondhand Motor Vehicle Websites

The Ministry of Trade introduced significant amendments regarding the sale of immovable property and second-hand motor vehicles. Accordingly, the “Regulation Amending the Regulation on the Trade of Immovable Property” and the “Regulation Amending the Regulation on the Trade of Second-Hand Motor Land Vehicles” (**Amendment Regulations**) were published in the Official Gazette dated 31.08.2023.

These amendments, which affect multiple laws, particularly the Protection of Personal Data and the Law on the Regulation of Electronic Commerce, are in parallel.

Amendment Regulations aim to eliminate practices that may cause consumers to be harmed, to prevent exorbitant price increases that do not reflect the reality, and to prevent unrealistic advertisements made through fake accounts by hiding the identities of individuals on advertisement websites. We have compiled the amendments within the scope of the Amendment Regulations below:

Persons who provide electronic environment for advertisements for the sale of immovable property or second-hand motor vehicles belonging to others are obliged to comply with the following:

- **(i)** Verify the name, surname, Turkish ID number or foreign ID number and telephone number of the **real person**; **(ii)** verify the title and telephone number of the **legal entity** before membership or publication of the advertisement and keep the verified information up to date and store this information.
- Verify **before publishing the advertisement** that the immovable/vehicle subject to the advertisement belongs to **(i)** the member placing the advertisement, or **(ii)** if the member is a real person, their first and second degree blood relatives or spouse, or **(iii)** the member placing the advertisement is authorized by the owner of the immovable/vehicle subject to the advertisement.
- Take measures to prevent advertisements that disrupt the market structure or mislead consumers and comply with the measures taken by the Ministry of Trade for the protection of consumers and effective and sustainable competition conditions.

Pursuant to the Amendment Regulations, administrative fines ranging from 10,000 Turkish Liras to 100,000 Turkish Liras will be imposed for each violation of the above-mentioned provisions.

The amendments introduced by the Amendment Regulations will enter into force on **31.10.2023**. Although these amendments aim to create a fair-trading environment for the sector, market actors and end-users, the impact of the amendments in practice remains to be seen.

You can reach the Amendment Regulations [here](#) (only available in Turkish) and [here](#) (only available in Turkish).

Turkish Advertising Board Examines Artificial Intelligence Advertisements

The Advertising Board (**Board**), operating within the Ministry of Commerce, has issued a public announcement addressing advertisements containing harmful deceptive practices affecting citizens, along with advertisements that manipulate consumer perceptions and those created using artificial intelligence. With this announcement, Board has introduced artificial intelligence into its agenda for the first time. Below are the key points from the announcement:

Advertisements created using artificial intelligence. Board stated that it has been examining content generated by artificial intelligence, which directly or indirectly influences consumers' purchasing decisions. Additionally, Board mentioned that it has reviewed advertisements created by an artificial intelligence application called "ChatGPT" and has imposed administrative sanctions on advertisements containing statements that convey a sense of superiority over competing products or companies.

Covert advertisements for prohibited products. It was noted that despite the ban on alcoholic beverage advertisements on social media platforms, covert advertisements for these products were being conducted. Board emphasized that it has taken administrative actions upon detecting such advertisements.

Precautions against advertisements that manipulating consumer perception. The announcement stated that administrative penalties are applied when advertisements lack clarity and comprehensibility and have the potential to manipulate consumer perception.

Administrative fines applied. During Board's meeting on 12.09.2023, it was mentioned that out of 138 cases, 120 were found to be in violation of regulations. As a result, these advertisements were halted, and a total of 12,231,507 Turkish Lira in administrative fines were applied.

You can access the full text of the announcement [here](#) (only available in Turkish).

Ministry of Treasury and Finance's Authority to Block Access is Revoked

Law No. 7194 on Digital Service Tax and Amendments to Certain Laws and Decree Law No. 375 (**Law**) introduced new taxes such as digital service tax, accommodation tax, and luxury housing tax. The Constitutional Court (**Court**) found certain provisions of the Law related to their taxes unconstitutional in its decision E: 2020/11, K: 2023/98 dated 18 May 2023 (**Decision**) following an application to the Court. Decision was published in the Official Gazette on 12.09.2023. Decision particularly highlighted assessments related to the Digital Service Tax. We have summarized it briefly below.

Article 7/2 of the Law had regulated that in case digital service taxpayers fail to submit the declarations and fulfill their payment obligations related to taxes falling under the Tax Procedure Law within the specified deadlines, the Ministry of Treasury and Finance (**Ministry**) could block access to the services provided by digital service providers until these obligations were met.

As the grounds for the cancellation request, it was alleged that essentially, it imposed a form of indefinite closure penalty which involves blocking access to the services offered by digital service providers who fail to fulfill their obligations. It was also emphasized that applying a sanction to digital service taxpayers that is not applied to the same taxpayers for other taxes and is not valid for all other taxpayers is contrary to the principle of equality. Furthermore, it was stated that the decision to block access to the services provided by digital service providers violates the freedom of communication, as it is required to have a court decision in accordance with the reasons and procedures specified in the Constitution in order to restrict communication. In this context, it is argued that the provision interferes with the freedom of expression and dissemination of thought, and for these reasons, it is claimed to be contrary to the principles of "equality" stipulated in Article 10, "proportionality" stipulated in Article 13, "freedom of communication" stipulated in Article 22, and "freedom of expression" stipulated in Article 26 of the Constitution.

Court evaluated this provision in the context of proportionality and the principles of freedom of work outlined in Article 48 of the Constitution. The Court stated that blocking access would impose significant restrictions on the operations of digital service providers, potentially resulting in serious commercial and economic losses for business owners. Furthermore, the Court emphasized the widespread use of the internet in daily life, its indispensable role in ensuring communication, and its significance as one of the most important channels for conducting economic and commercial activities in the digitalization process. In this context, Court emphasized that the sanction of blocking access should not impose an excessive and unbearable burden on business owners. For these reasons, Court found the relevant provision of the Law to be in violation of Article 13 and Article 48 of the Constitution.

In light of the above reasons, Court canceled the authority of the Ministry to block access to digital service providers, and this cancellation will take effect 9 months after the publication of the Decision in the Official Gazette.

You can access the full text of the Decision [here](#) (only available in Turkish).

Answers. Not theories.

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