

GÜN + PARTNERS
AVUKATLIK BÜROSU

MEDIA AND ADVERTISING LAW IN TURKEY

KEY DEVELOPMENTS
AND PREDICTIONS - 2020



FIRM OVERVIEW

We are one of the oldest and largest business law firms in Turkey and are ranked among the top tier legal service providers. We are widely regarded as one of the world’s leading IP law firms.

Based in Istanbul, we also have working and correspondent offices in Ankara, Izmir and all other major commercial centers in Turkey.

We advise a large portfolio of clients across diverse fields including life sciences, energy, construction & real estate, logistics, technology media and telecom, automotive, FMCG, chemicals and the defence industries.

We provide legal services mainly in Turkish and English and also work in German and French.

We invest to accumulate industry specific knowledge, closely monitor business sector developments and share our insight with our clients and the community. We actively participate in various professional and business organisations.

Key Developments and Predictions for Media and Advertising Law in Turkey

In Turkey, the central piece of legislation on advertising law compliance issues is Turkish Consumer Protection Law numbered 6502 ("CPL"), the Regulation on Commercial Advertisements and Unfair Commercial Practices (the "Advertising Regulation"), prepared in line with the CPL and Broadcasting Law No. 6112.

Broadcast media advertising is ruled and supervised by the RTUK, which is an autonomous and impartial public legal entity. The RTUK regulates and supervises the radio, television and on-demand media services, and examines broadcasts, as well as advertisements, in light of the provisions of Law No. 6112. Another regulatory entity, namely, the Advertisement Board, which was established under the Turkish Ministry of Trade, and is the main authority controlling advertisements for all media, including broadcasts on TV, radio, and on the internet in Turkey. The Advertising Self-Regulatory Board ("ROK") is the primary advertising self-regulatory body in Turkey.

This paper provides an outline of the key aspects of media and advertising law in Turkey, and the most important or challenging issues in Turkish media and advertising law.

This paper provides an overview on the following topics:

- Comparative Advertising under Turkish Law
- Testimonial Advertisement and the Burden of Proof
- Restricted Advertising of Certain Categories of Foods
- Free Items Are Not Allowed for Certain Food Categories
- Alcohol Advertising in Turkey
- Advertising in Social Media and Influencer Marketing
- Plain Packaging for Tobacco Products
- RTUK's Supervision over Internet Broadcasts
- Contests and Sweepstakes

Comparative Advertising under Turkish Law

Comparative advertising under Turkish Law has been allowed for many years. However, the definition of comparative advertising has been introduced into Turkish law for the first time as “advertisements used for the promotion of goods or services, in which elements concerning goods or services of a competitor are directly or indirectly used,” by the Regulation on Commercial Advertising and Unfair Commercial Practices (“Advertising Regulation”), which entered into force after being published in the Official Gazette numbered and dated January 10, 2015.

Comparative advertising is mainly subject to regulatory rules applicable to all kinds of advertisements, and it is specifically very important that comparative advertisements should not be misleading, should not give rise to unfair competition, the compared goods or services should be of the same nature, and should meet the same requests and needs.

On the other hand, explicit comparative advertising, meaning explicit comparison using the name, trademark, logo or other distinct shapes or expressions, as well as commercial and trade names of rivals, is not allowed.

In 2015, the new Advertising Regulation, which was enacted based upon Consumer Protection Law numbered 6520, allowed explicit comparative advertising, ruling that the name, trademark, logo or other distinctive signs or expressions, commercial and trade name of rivals can legally be used.

However, the enforcement date of this provision was preliminarily postponed for one year after the enforcement date of the Advertising Regulation, and then it was postponed to January 1, 2019. This provision was totally abolished on December 28, 2018 and, therefore, explicit comparative advertising is not legally applicable under Turkish law, and it is considered as unlawful advertising acts under the current legislation.

Currently, under Turkish law, comparative advertisements where rivals’ names, trademarks, and distinctive signs are not referred to. In addition, as a specific rule, comparative advertising for food supplements is prohibited. In food advertising, comparisons of elements that are considered to be within the scope of health claims are prohibited from being compared.

Testimonial Advertisement and Burden of Proof

It is the main principle that all advertisements should be accurate, honest, and the accuracy of claims is required to be proven. In practice, it is crucial to determine whether the advertisement is accurate and is not misleading. There is no legal definition under Turkish Law for misleading advertising, while misleading advertising is strictly prohibited. Within general practices, misleading advertising is interpreted as advertisements giving false information to consumers and advertisements against the good faith principle.

Claims in advertisements should be proven with scientific information and data. The advertiser may use its own research, information, and data that are scientifically acceptable. There is no legal obligation to present, along with the advertisement, the scientific data that proves the claims asserted in the advertisements. However, verified scientific reports and documents should be presented to the Advertisement Board upon complaint, or in the case of a possible ex-officio examination by the Advertisement Board.

In terms of comparative advertising, an advanced level of burden of proof is required for comparison between competitors and the products. Accordingly, every claim in comparative advertisements should be proven with reports obtained from universities, accredited testing institutions, or independent research institutions.

There is no type of advertising where the requirement of proof does not exist. However, it is acknowledged that some abstract claims are not expected to be proven. Yet, it should be noted that the Advertisement Board adopts an extremely strict approach in relation to abstract and superlative claims in advertisements. The Advertisement Board imposes sanctions upon statements such as, "The best, the number one in the world, etc.," on the grounds that these claims exceed abstract claims, and should be proven.

In terms of testimonial advertisements, the accuracy of the advertisements, and the proof of the claims in the advertisements are very important. In testimonial advertisements, testimonies or confirmation statements that are not based on real experiences, knowledge or research of the experts, institution, or organization should not be used in advertising.

Restricted Advertising of Certain Category of Foods

In Turkish advertising legislation, there is detailed and restricting rules for advertisements intended for children. The aim for these rules is to protect children against any kind of advertising that abuses their lack of knowledge and experience. It is clearly stated in the Advertising Regulation that advertisements that are likely to abuse children's lack of knowledge and experience are strictly prohibited. The Advertisement Board attaches high importance to the protection of children in supervising the advertisements, it imposes sanctions of cease and desist, monetary fines are imposed on advertisements that abuse parents' sensitivities towards their children, such as affection, compassion, and emotional attachment, advertisements that involve messages implying that possession or use of a particular product, alone, will provide a child with physical, social or psychological advantages in comparison with other children of the same age, or that possession of a product will produce a contrary effect.

Furthermore, more significant restrictions apply to broadcasts of advertisements of foods intended for children. In 2018, the Ministry of Health prepared the Nutrition Profile Guide, which separated foods and drinks into three categories: red, orange and green.

The red category was determined as foods and beverages, such as "candy, chocolate,

and coke," which are not allowed to be advertised during children's programs; the orange category was determined as foods and beverages, such as "nuts, crackers, breakfast cereal, and full-fat dairy products," which are allowed to be advertised during children's programs, if the specified criteria are satisfied; and the green category was determined as foods and beverages, such as "fresh fruit, vegetables, meat, fish, eggs, etc.," which are allowed to be advertised during children programs.

In accordance with the Regulation on Procedures and Principles of Broadcasting Service, advertising of foods and beverages that are in the red category as per the Nutrition Profile Guide is prohibited at the beginning and at the end of children's programs, or during these programs. If the specific criteria determined for the orange category products is not satisfied, these cannot be advertised before, during and after children's programs. The foodstuffs that are in the green category may be advertised during children's programs and other programs. The advertisement of products under the red category are allowed during other programs, provided that they are broadcast with written warnings (prepared by the Ministry of Health) in the form of a flowing tape at the bottom of the screen, which can be easily read by the viewers, and contains statements encouraging regular and balanced nutrition.

Free Items Are Not Allowed for Certain Food Categories

Within the scope of advertising restrictions on the foods that are not recommended for excessive consumption, on December 28, 2018, the Advertising Regulation introduced a new restriction stating that gifts that would appeal to the interests and taste of children shall not be given, and other similar marketing techniques that target children shall not be applied within the scope of practices which aim to increase the sales of foods of which excessive consumption is not recommended.

This rule has been highly criticized because of the ambiguity of the terms. Indeed, this rule provided no definition for the terms, “gift” and “marketing techniques.” The term “gift” was assumed to contain any items, such as toys, free product coupons, etc. The term “marketing techniques” was not defined either. Since this term is quite broad and open to misinterpretation by the relevant authorities, jurists argued that “marketing techniques” could be defined as any acts and promotional activities with an aim towards advertising, encouraging, and attracting the sale of goods and services.

While this rule was clear for fast food kids’ menus with toys, as well as potato chips products that give free coupons, coins, and collectible items, this rule mainly poses risks for food products sold as a combination of foods and toys, such as chocolate eggs that

contain a toy inside. It was ambiguous in this rule as to whether or not these products, themselves, may be considered as marketing techniques of the manufacturer company to sell their chocolate products, or if the product, itself, could be considered as a unique combination of food product and toy, since the product does not provide gifts, separately, to increase its sales.

Because of this incertitude, the Ministry of Trade made an amendment on October 12, 2019. In the amended rule, the term, “marketing techniques,” was removed, and it was clearly stipulated that “no additional products” that would appeal to the interests and, as well, particular tastes of children, shall be given as a gift along with the main product. Upon these changes, it seems that the ambiguousness posed by the aforementioned restrictions was cleared. It can be said that the food products sold in combination with toys inside, like chocolate eggs containing a toy, inside should be excluded from the scope of these new rules.

Alcohol Advertising in Turkey

Law No. 4250 on Alcohol and Alcoholic Beverages, as well as the Regulation on the Procedures and Principles of the Sale and Marketing of Tobacco Products and Alcoholic Beverages, prohibits every type of advertisement and presentation of alcoholic beverages, prohibits campaigns, promotions, and any activity that encourages the consumption and sale of alcoholic beverages in any kind of media. This ban includes broadcasts on TV and radio, ads in the cinema, product replacement, printed media, etc., as well as social media and any digital platform.

The advertising ban also includes that trademarks, logos, and signs of alcohol brands cannot be put on business signs of points of sale, sales units, refrigerators, and coolers, any other portable and stable materials. Exceptions are signs and logos of alcohol brands that could solely be used on service materials in restaurants and cafes that have licenses to serve alcoholic beverages. Service materials are only limited to glass, corkscrews, ice buckets, bottle openers, etc. Even tablecloths, napkins, stools, chairs, menus, salt cellars, and plates are not allowed to bear any trademark, or sign of alcohol brands, as those are considered not to be directly used for the purpose of serving alcoholic beverages.

Alcoholic beverage manufacturers, importers and marketers cannot support, cannot sponsor any activity by using the brand, logo, or sign of their products. If an alcoholic beverage firm sponsors an event or program, it can only use the name of its company with no brand or logo implication. In light of this, no event or program sponsoring seems legally possible for alcoholic beverage firms, as it is prohibited to do this by using brands, logos or signs. The producers, exporters, and marketers of alcoholic beverages, regardless of the purpose, cannot give alcoholic beverages as promotions, gifts, or for free.

Brand stretching is prohibited. The names, brands and other distinctive elements of alcoholic beverages cannot be used on non-alcoholic products nor any other products. Tasting activities by consumers is not allowed. Only tasting activities intended for persons possessing a sales certificate in workplaces of importers and wholesalers and facilities of manufacturers, as well as to their assigned employees, are allowed.

Although the above restrictions have been in force since 2013, supervision of the restrictions over the internet was less strict. The recent restrictions within the scope of a total advertising ban for alcohol was applied to Twitter and Instagram pages of brand owners. The official Twitter and Instagram pages of alcoholic brands are not accessible for residents in Turkey.

Advertising in Social Media and Influencer Marketing

In Turkey, there are no special laws relating to advertising through social media and influencer marketing via social media. General advertising rules and principles apply. Influencer marketing should also adhere to rules regarding conformity to public order, fair competition, public/moral values, and accuracy, which are main principles regulating advertising in Turkey.

Influencer marketing can be categorized as a particular form of testimonial advertising. The Regulation on Commercial Advertisements and Unfair Practices ("Advertising Regulation") provides certain rules and limitations on testimonials. Testimonials generally consist of written or spoken statements of individuals who have used the product that is being advertised, communicating the quality and superiority of the product. The Advertising Regulation stipulates that advertisements shall not include or refer to any testimony or endorsement that is not authentic, nor based on the experience of the testifier.

Regarding influential marketing, the problem arises when the social media influencer is sharing an experience that is fictional, pursuant to his/her advertising agreement with the brand owner. Another issue of law regarding influential marketing is when the social media influencer, who is financially supported by a brand, does not explicitly communicate this affiliation or the fact that its

post essentially serves as an advertisement for the brand. Such behaviour is contrary to the prohibition of hidden advertisements.

The Advertising Regulation sets forth the basic principles to be considered, including that an advertisement should be clearly distinguishable, regardless of the format, or the broadcasting media. When an advertisement is broadcast in a medium that contains news and editorial elements, it shall be clearly stated that it is an advertisement. If a tweet or any other post on a social media platform contains advertorial content, without being clearly understood to be an advertisement, it is legally possible that an administrative fine may be imposed on the grounds of hidden advertisements. An influencer marketer, including hidden advertisements, or advertisements of prohibited products, such as tobacco/alcohol products, might be considered as circumvention of the law and should be banned.

The Advertisement Board's duties are not restricted to reviewing any particular form of media. Therefore, all forms of social media advertisements are legally subject to review. However, the control is weakened due to the lack of specific rules for advertising and marketing via social media. However advertising rules should be firmly observed by advertisers even in social media.

Plain Packaging for Tobacco Products

The amendments made in Law No. 4207 on Prevention and Control of Hazards of Tobacco Products ("Law No. 4207"), as well as the Regulation on Manufacturing, Labelling and Supervision of Tobacco Products ("Regulation"), which was prepared by the Ministry of Agriculture and Forestry, introduced the plain packaging principle for tobacco products, and amended the rules to be applied concerning health warnings on tobacco products.

The amendments in Law No. 4207, as well as the new Regulation, have very detailed and technical rules for implementation of plain packaging for tobacco products. According to those tobacco products manufactured in Turkey, or imported into Turkey, they shall be offered for sale with plain and standardized packages that marks the writing style, font, type size, and location on the package, and the color of the packages, other texts, phrases and shapes must be designed in the same way. These rules also apply in tobacco cases that include multiple packages. It is compulsory that the packaging of tobacco products should be in Pantone Craft Brown color, and the manufacturer's brand on the packaging should be in Pantone Cool Gray color. None of the tobacco products, including the parcel and content elements, should have the manufacturer's brand, logo, icon, or any other signs thereon. The brand may only be written in plain text with determined color and font size.

Special attention has been paid to health warnings printed in certain sizes on tobacco products for many years. Upon the amendments made in the legislation, the size of the health warnings incorporating visuals and Turkish text that are applied on tobacco product packages and hookah bottles, were increased to eighty-five percent from sixty-five percent, and on both sides of the packages.

In an aim to restrict the access by consumers, it has been ruled that tobacco products must be offered for sale in closed cabinets that people cannot directly access or see at tobacco sale points (package stores, grocery stores, buffets, etc.). The use and display of tobacco products or their images in movie theatres or theatres, as well as in TV programmes, movies, TV-series, music videos and advertisements, is prohibited.

The transition period for removal of the existing tobacco products, and for re-launch of the products that must comply with the new amendments, ended on 05.01.2020. Hence, plain packaging rules are now entirely in force in Turkey.

RTUK's Supervision over Internet Broadcasts

The amendments dated 27.03.2018 to Law No. 6112 on the Establishment of Radio and Television Enterprises and Their Media Services ("RTUK Law") introduced Article 29/A to the RTUK Law, basically ruling that media service providers that make online broadcasting, and platform operators, which transmit these broadcasts via the internet, are required to obtain broadcasting licenses from the Radio and Television Supreme Council ("RTUK"). As per the same provision, media service providers and platform operators that are domiciled abroad, but make online broadcasting in Turkey, are also now obliged to comply with the above principles.

The Regulation on Online Broadcasting via Radio, Television and On-demand Services ("Regulation"), which sets forth the implementing procedure and rules for obtaining a broadcast license, was published in the Official Gazette numbered 30849 and dated 01.08.2019; this entered into force on the same date.

As per the amendments made to the RTUK Law, and as per the Regulation, online media service providers that make online broadcasting in Turkey must obtain online broadcasting licenses from the RTUK in Turkey. The online broadcasting license is only granted to joint stock companies established in accordance with the provisions of the Turkish Commercial Code for the purposes of providing radio, TV, and

on-demand broadcast services. These online broadcasting licenses are valid for 10 years. Hence, online media service providers that broadcast in Turkey must have a physical presence in Turkey in order to obtain a broadcasting license and to make broadcasts in Turkey.

The Regulation sets forth the fee for obtaining an INTERNET-RADIO broadcasting license as TRL 10,000.00; whereas, the applicants are required to pay a fee of TRL 100,000.00 for INTERNET-TV or INTERNET-ON DEMAND licenses. In addition to the licensing fee, broadcasters that offer media services to their subscribers/users for a certain fee, or are subject to conditional access fees, will be required to pay 0.5% of their net annual sales to the RTUK until April of the subsequent year. The transition period was regulated for media service providers that were making online broadcastings in Turkey at the time of the date of entry of the relevant provisions. The deadline to apply for broadcasting licenses was set as September 1, 2019. Where official applications were made, online media service providers were authorized to continue their online broadcasting services until the broadcasting licenses had been granted. Broadcasting without a proper license is subject to monetary fines and blocking orders, as well as criminal sanctions.

The amendments made in the RTUK Law extended the authority of the RTUK to online broadcasting services under same principles of the RTUK Law that apply to radio, television, and on-demand broadcasts through terrestrial, satellite, and cable platforms. In terms of advertising rules, the most important impact may be with respect to product placement. Prior to this Law, online media enjoyed a certain degree of freedom due to lack of clear rules. With the enactment of the new rules to RTUK Law, the same rules and principles applied to TV are also applicable to online broadcasts. As per the RTUK Law, product placement is only permitted in movies made for cinema and tv, tv serials, sports and general entertainment programs; it is not permitted in news, child programs and religious programs. Product placement is forbidden for the products and services of which the advertising is prohibited. There are strong restrictions in relation to duration and quantity of the products shown and advertised via product placement. These rules are applicable to internet broadcasts that were exempted from such restrictions in the past. However, concerning the new procedure very recently entered into force, there is no decision related to supervision practice of the RTUK to date.

The new licensing obligation is not applicable to video-sharing websites and platforms, such as YouTube, Vimeo, etc. The new implementation also does not govern personal communication, and this is considered to exclude platforms, such as Twitter.

Contests and Sweepstakes

Chance-based sweepstakes (i.e. random-draw promotions, instant-win games) and skill-based contests are generally permissible in Turkey. Chance-based sweepstakes where cash is given as a prize, may only be conducted by the National Lottery Administration ("NLA"), which is the sole authority to organize lotteries and draws with a cash reward. Chance-based sweepstakes and skill-based contests, where the prize is non-cash, can be conducted by real or legal persons under specific legal requirements.

If the winners of the promised prizes are determined by a draw depending on a chance factor, the promotion will be deemed as a draw. If the monetary value of the non-cash prize exceeds TL 141,2 (approximately EUR 20) for 2020 in a prize draw, then such promotion will be subject to the official permission of the NLA. For skill-based contests, there is no need for to obtain permission from the NLA.

In running contests and promotions, all of the advertising materials, websites, and rules must be provided in Turkish. Any prize awarded may not be different than that promoted, and must satisfy the average consumer's expectation. If any gift is awarded, together with the promoted goods and services market price, then the terms of the promotion should be disclosed. The manner in which the winners are announced, and how

the award will be delivered, must be published. Since the participants will be deemed "consumers" within the meaning of the Turkish Consumer Protection Law, the strict and protective approach thereof applies. If the prize draw is subject to the official permission of the NLA, the advertising of such prize draw must incorporate information as to the NLA authorization, including the authorization number, and the date when the authorization was granted. Since it is forbidden for minors to participate in prize draws, the advertisement of prize draws should explicitly note that minors cannot participate, and that prizes are not awarded in the event of accidental or unauthorized participation, based on age.

Other than the above rules that apply to sweepstakes, there are no specific rules governing sweepstakes and contests conducted through the social media. Since scrutiny over social media contests and sweepstakes are not as strict, it is possible to observe many prize draws, which should actually be subject to NLA's permission, being drawn via social media platforms without such authorization, and without complying with the advertisement restrictions. The NLA has recently started monitoring non-compliance over social media platforms, and has issued warnings to those who conduct unauthorized prize draws via their social media pages and webpages.

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TECHNOLOGY, MEDIA AND TELECOM

We provide regulatory, transactional and dispute management services in TMT business sectors involving all aspects of Turkish telecommunication and internet law, private broadcasting legislation, electronic communication services and infrastructure, wireless equipment rules and regulations and the structuring of telecommunication projects.

We represent clients before regulatory bodies including the Information Technologies and Communication Authority, Radio and Television Broadcasting Authority, the Advertisement Board, Advertisements Self Auditing Committee, and the National Lottery Administration.

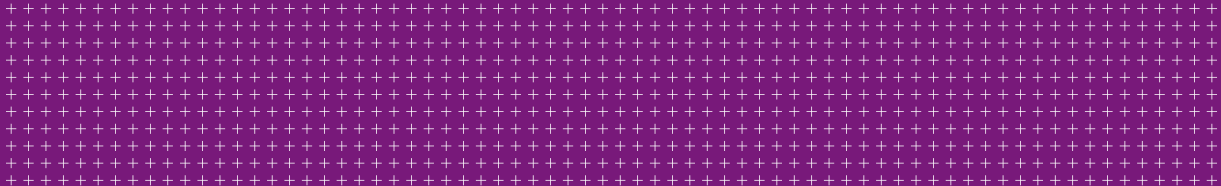
We assist clients on regulations relating to advertisements, promotional campaigns, product labelling and packaging, including advertisement clearances, sweepstakes, competition, and prize related promotional campaigns, product liability and warranty.

We also provide data protection advice, including compliance with data protection legislation, inter-company data transfers and consolidation agreements, transfer of data to third parties or abroad, website privacy policies and terms of use under Turkish law.

We have particular expertise in corporate deals and transactions in the TMT sector and represent multinational investors in Turkey including advising on direct establishment, M&A and corporate advisory services.

Our dispute management services in the TMT sector includes representing clients before the civil and administrative courts and authorities. Our clients benefit from our experience in all types of intellectual property and commercial litigation.

We also represent leading technology companies in relation to their trademark prosecution work and represent them in trademark opposition proceedings before the Turkish Patent and Trademark Office.



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