ÇAKMAK

Significant Amendments to the Personal Data Protection Law

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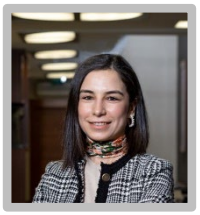
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The long-awaited amendments to the Personal Data Protection Law No. 6698 ("Law") were promulgated in the Official Gazette dated 12 March 2024. The respective amendments will enter into force as of 1 June 2024.

To resolve the problems in the implementation of the Law and by taking into consideration the European Union General Data Protection Regulation (GDPR), comprehensive amendments were introduced especially to the conditions for processing special categories of personal data and the conditions for transferring personal data abroad. The important amendments made to the Law are summarized as follows:

The legal grounds for the processing of special categories of personal data have been expanded.

What are the special categories of personal data?

Data relating to race, ethnic origin, political opinion, philosophical belief, religion, sect or other beliefs, appearance and dress, membership to associations, foundations or trade unions, health, sexual life, criminal convictions and security measures, and biometric and genetic data are defined as special categories of personal data.

With the amendment made in the Law, no changes have been made to the definition of special categories of personal data mentioned above; only the processing conditions of such data have been modified.

What was the situation before the amendment and what were the problems in practice?

In principle, special categories of personal data could not be processed without the explicit consent of the data subject and the exceptions to this rule were regulated in a very limited manner in the Law. In this respect, there was a dual distinction: Without the explicit consent of

the data subject;(i) personal data relating to health and sexual life could only be processed for a limited number of purposes, such as the provision of health services, etc., and only by authorized institutions and organizations or persons with confidentiality obligations, and (ii) other special categories of personal data could only be processed in cases stipulated by the law.

This situation was causing difficulties in practice, especially in the processing of health data (e.g. disease information). Employers were, on one hand, obligated to process their employees' health data in accordance with the occupational health and safety legislation. On the other hand, according to the Law, this data could only be processed by workplace physicians. In workplaces without workplace physicians, obtaining explicit consent from the employee was required to keep such data in the personnel file. Therefore, employers were compelled to steer employees towards giving explicit consent to fulfil their legal obligations, which was not in line with the principle of providing consent with “free will”.

What has changed in the conditions for processing special categories of personal data?

Firstly, the dual distinction referred to above among the special categories of personal data has been eliminated. Instead, the Law now allows that in the limited cases set out below, such data can be processed without obtaining the explicit consent of the data subject.

- If it is explicitly stipulated in laws,
- If it is necessary to protect the life or physical integrity of the data subject or another person when the data subject is physically or legally incapable of giving consent (e.g. processing of blood type data for protecting the life of an individual who cannot express consent due to unconsciousness),
- If it is related to the data made public by the data subject and in accordance with their intention of publicizing (*e.g.* processing of blood type and allergy information shared in a publicly accessible area for emergency use),
- If it is necessary for the establishment, exercise or protection of a right (e.g. storing the health data of the former employee in order to exercise the right of defense in lawsuits that may be filed after the termination of the employment relationship),
- By authorized institutions and organizations and persons under the obligation of confidentiality, when it is necessary for the protection of public health, preventive medicine, medical diagnosis, carrying out treatment and care services, and the planning, management, and financing of health services (e.g. the data processed by the Ministry of Health and all kinds of health institutions and the Social Security Institution for these purposes),
- If it is necessary for the fulfillment of legal obligations regarding employment, occupational health and safety, social security, social services and social assistance (e.g. processing of health data to fulfill the obligation of employers to employ disabled persons as per the Labor Law No. 4857),
- If foundations, associations, and other non-profit organizations established for political, philosophical, religious or trade union purposes are processing special categories of personal data of their current or former members and persons with whom they are in regular contact, subject to compliance with their incorporation objectives and the applicable legislation, and limited to their areas of activity, without disclosure to third parties (e.g. processing of personal data of persons who donate to these organizations limited and related to the activities of these organizations).

Considering the established practice of the Personal Data Protection Authority (“KVKK”); processing of special categories of personal data should only be pursued with the explicit consent of the data subject in cases where any of the above conditions are not present.

Transfer of personal data abroad has been facilitated.

What was the situation before the amendment and what were the problems in practice?

Although the Law stipulated that the transfer of personal data to countries with adequate protection could be carried out without the explicit consent of the data subject provided that the legal requirements for processing data are met, countries with adequate protection had not been announced by the Personal Data Protection Board ("Board") thus far.

This has left the data controllers, who wanted to transfer data abroad, with two options: (i) obtaining the explicit consent of data subjects individually, and (ii) data controllers in Türkiye and in the country where the data will be transferred undertaking to providing adequate protection in writing and obtaining the Board's permission to the undertaking. Nevertheless, as also stated in the preamble of the amendment, only around eighty applications have been made to the Board so far, and very few of them have been granted permission by the Board. As a result, in practice, the only option for data controllers to transfer data abroad has been to obtain explicit consent from data subjects.

With the amendments made to the Law, the conditions for data transfer abroad have been facilitated. Also, it is stipulated that secondary legislation will be enacted to govern the procedures and principles of data transfer abroad.

What has changed in the conditions for processing special categories of personal data?

First and foremost, the Board has been granted the authority not only to decide on the adequacy of protection in the country to where the personal data will be transferred but also to make adequacy decisions concerning an international organization and specific sectors within a country (adequacy decision). For example, it is now possible to issue an adequacy decision only for the automotive sector in a foreign country with whom the Turkish automotive sector has extensive trade relations, rather than for the entire foreign country. The Board will re-evaluate the adequacy decisions every four years at the latest and may revoke, suspend, or modify it if deemed necessary.

Data transfer abroad where there is an adequacy decision

In the presence of legal grounds for processing personal data set out in Article 5 (Article 6 for the special categories of personal data) of the Law, personal data may be transferred to a foreign country, international organization, or specific sector within a foreign country, for which the Board has issued an adequacy decision, without a need for obtaining explicit consent of data subject.

Data transfer abroad where there is no adequacy decision

In the absence of an adequacy decision, data controllers will be able to transfer data abroad without the explicit consent of the data subject, provided that the following conditions are met cumulatively:

- With the condition that one of the legal grounds for processing personal data set out in Article 5 (or Article 6 for special categories of personal data) of the Law exists,
- Data subjects have the opportunity to exercise their rights and seek effective legal remedies in the country to where the transfer will be made, and
- One of the following appropriate safeguards is provided;
    - Data can be transferred between public institutions; if a cooperation protocol is signed between a public institution or professional organization with public institution status in Türkiye and a foreign public institution or international organization
    - Data can be transferred between group companies; if companies have binding corporate rules containing provisions on the protection of personal data that they are obliged to comply with, and these rules are approved by the Board,

- If the standard contract published by the Board is signed between the data controllers in Türkiye and in a foreign country, personal data may be transferred abroad without a need for obtaining additional permission from the Board.
- If a written undertaking containing provisions to ensure adequate protection is signed, data may be transferred abroad provided that the permission of the Board is obtained.

Exceptions

In cases where there is no adequacy decision and one of the appropriate safeguards listed above cannot be provided, data may be transferred abroad on a one-time or occasional basis, provided it will not occur in a continuous manner. However, such data transfer can occur only under the following circumstances:

- The data subject has explicitly consented to the transfer, after having been informed of the possible risks of such transfers.
- The transfer is necessary for the performance of a contract between the data subject and the data controller or the implementation of pre-contractual measures taken at the data subject's request.
- The transfer is necessary for the conclusion or performance of a contract concluded in the interest of the data subject between the data controller and another natural or legal person.
- The transfer is necessary for an overriding public interest.
- The transfer is necessary for the establishment, exercise or defense of legal claims.
- The transfer is necessary for the protection of life or physical integrity of the data subject or another person when the data subject is physically or legally incapable of giving consent.
- The transfer is made from a register that is available to the general public or persons with a legitimate interest, but only to the extent that the requirements under the applicable legislation for accessing the register are met and upon the request of the person with a legitimate interest.

How long will the current practice (data transfer abroad based on explicit consent) can continue?

Until 1 September 2024, it will be possible to continue transferring data abroad based on the explicit consent previously obtained or to be obtained after the amendment to the Law.

A new type of breach subject to administrative fine has been introduced, alongside modifications to the appeal procedure concerning administrative fines.

In cases where data transfer abroad is conducted through the signing of the standard contract published by the Board, the data controller or data processor is required, as a separate obligation, to notify the KVKK within five business days from the signing of the standard contract. It is stipulated to impose an administrative fine ranging between TRY 50,000 and TRY 1,000,000 (to be valid for the year 2024) on data controllers or data processors who breach the notification obligation.

Moreover, considering the nature of administrative sanction decisions given by the Board, it is stipulated that instead of resorting to penal courts of peace, lawsuits will be filed before administrative courts. Pursuant to the transitional provision added to the Law, the files before the penal courts of peace as of 1 June 2024 will be finalized by these courts.