

A NEW ERA FOR TRANSFER OF PERSONAL DATA ABROAD: GDPR-BASED AMENDMENTS TO DATA PROTECTION RULES

Turkish data protection rules governing the transfer of personal data abroad were amended with the Law on Amendments to The Criminal Procedure Law and Certain Other Laws No. 7499 (“Amendment Law”), together with conditions for processing special categories of personal data, penalties and remedies.

A. Introduction

Law on the Protection of Personal Data No. 6698 (“**PPDL**”), based on Directive 95/46/EC, was adopted in Türkiye in 2016. After the General Data Protection Regulation (“**GDPR**”) was adopted and proved its well-established jurisprudence and practice; Türkiye announced its objective to amend PPDL **(i)** based on EU standards, **(ii)** based on provisions of GDPR regarding the transfer of personal data abroad, and **(iii)** to bring a judicial remedy against Personal Data Protection Board (“**Board**”) decisions by the Human Rights Action Plan and Economic Reforms Action Plan declared in 2021.

Legislative activities were accelerated by the Twelfth Development Plan and the Presidential Annual Program for 2024, aiming to complete the GDPR amendments based on the impacts on the goods and services export and by prioritizing the matters that have urgency for direct investments. The Amendment Law was adopted on 2 March 2024 and published in the Official Gazette on 12 March 2024 and set forth structural changes to transfers of personal data abroad and processing conditions of special categories of personal data, along with penalties and remedies. The entry into force date of PPDL provisions is 1 June 2024.

B. Amendments on the Transfer of Personal Data Abroad

The new amendment brings three alternatives gradually and respectively applicable to transfers of personal data abroad; namely, transfers based on **(i)** adequacy decisions, **(ii)** appropriate safeguards, and **(iii)** exceptions for specific situations.

(i) Adequacy Decisions

The data controllers and processors can transfer personal data abroad in the existence of a condition of legal grounds indicated in Articles 5 and 6 of the PPDL for processing personal data or specific categories of the same; and the existence of the adequacy decision granted by the Board regarding the country, sectors in a country or international organizations in the new transfer regime.

Adequacy decisions will be based on regulations of the country or organization that the personal data be transferred such as having independent and effective data protection authority, having judicial administrative remedy, being a signatory/member of international conventions on data protection and reciprocity principles.

(ii) Appropriate Safeguards

In the absence of an adequacy decision, the data controllers and processors can transfer personal data abroad if appropriate safeguards are established. However, there are two prerequisites to transfer personal data based on appropriate safeguards: (a) the existence of a condition of legal grounds indicated in Articles 5 and 6 of the PPDL for processing personal data and (b) the ability of data subjects to exercise their rights and apply to effective remedies in the country that personal data is transferred to. Provided that the prerequisites are fulfilled, the data controllers and processors can transfer personal data abroad based on one of the following appropriate safeguards:

- **Agreements:** The existence of an agreement (*not an international convention*) between the public/international institutions with Turkish public institutions and/or public professional organizations and the Board's permission to data transfer.

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- **Binding Corporate Rules:** The existence of binding corporate rules of group companies, containing provisions on the protection of personal data and the Board’s approval of the binding corporate rules.
- **Standard Contracts:** The existence of a standard contract including data categories, purposes of data transfer, the recipient(s), technical and administrative measures to be taken by the data recipient, and additional measures taken for special categories of personal data, based on the template to be announced by the Board. Additionally, the contract shall be notified to the Personal Data Protection Authority (“**Authority**”) within 5 business days following its execution.
- **Letter of Undertaking:** The existence of a written undertaking with provisions to ensure adequate protection and the Board’s permission to data transfer.

(iii) Exceptions for Specific Situations

In the absence of an adequacy decision and appropriate safeguards, the data controllers and processors can transfer personal data abroad only in the following circumstances:

- Explicit consent of the data subject, provided that the data subject is informed accordingly regarding the risks that may arise from personal data transfer.
- In case the transfer is mandatory;
 - to establish or perform a contract between the data controller and data subject or implementation of pre-contractual measures taken at the request of the data subject,
 - to establish or perform a contract between the data controller and third person(s) on behalf of the data subject,
 - for an overriding public interest,

- for establishment, exercise, or protection of a right,
- to protect the life or physical integrity of the person who is unable to grant consent due to actual impossibility or due to the consent being not legally valid.
- Transfer from a public registry accessible to the public or to persons with a legitimate interest, provided that the conditions required to access the registry in the relevant legislation are met and the person with a legitimate interest requests transfer.

C. Amendments on the Processing Special Categories of Personal Data

Processing special categories of personal data under the PPDL was strictly dependent on obtaining explicit consent before the amendment. However, the hierarchy between explicit consent and other legal grounds was removed by the Amendment Law and new legal grounds are adopted in line with Article 9 of the GDPR, allowing processing special categories of personal data becomes applicable without explicit consent under Turkish law.

The new legal grounds for the processing of special categories of personal data include, in addition to explicit consent, explicit provisions in laws, the necessity for protection of life and physical integrity in case of legally invalid consent or inability of granting consent, data being made public, the necessity for the establishment, exercise, or protection of a right, legal obligations in the field of employment, occupational health and safety, labor and social security or social services and social assistance and special processing grounds for foundations, associations, or other non-profit organizations or entities established for political, philosophical, religious, or trade union purposes.

D. Amendments on the Penalties and Remedies

In addition to the major changes above, please find below the updates to penalties and remedies:

- a) With the Amendment Law, data controllers and data processors who transfer personal data abroad using standard contracts will be subject to an administrative fine of up to 1,000,000

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Turkish liras if they do not notify the Authority within 5 business days of signing the standard contracts.

- b) Prior to the amendment, there was a dual review procedure against the Board's decisions. Administrative fines imposed by the Board could be appealed to the criminal court of peace, while other decisions could be appealed to the administrative judiciary. Since resolutions of the criminal judgship of peace did not turn into case law, it led to a lack of case law that would shed light on the implementation of the PPDL. By the Amendment Law, it is regulated that administrative fines imposed by the Board are also appealable before administrative courts.

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