

Briefing Note

Data Protection

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International Data Transfer Regime in Türkiye

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With amendments to the regulations in recent years, data transfer regime in Türkiye is converging to the practices of European Union (namely, General Data Protection Regulation), with certain localization differences arising from Turkish laws and the practices of the Personal Data Protection Authority. We hereby present you this briefing note regarding the Turkish international data transfer regime including transfers to international institutions outlined under (i) Legislative Framework, (ii) Definition: International Transfer of Personal Data, (iii) Transfer Mechanisms, and (iv) Subsequent Transfers.

1. Legislative Framework

General framework in Türkiye for international transfers of personal data is set through the Personal Data Protection Law No. 6698 (the “PDPL”). The Regulation on the Procedures and Principles Regarding the International Transfer of Personal Data (the “Regulation”) clarifies the details of the international transfers whereas the Guidance of International Transfer of Personal Data (the “Guidance”) sheds light to the practice of the transfer regime, both introduced by the Personal Data Protection Authority (the “PDPA”).

2. Definition: International Transfer of Personal Data

The scope of international data transfers is provided with the Regulation instead of PDPL; accordingly, international transfer of personal data refers to “the transmission of personal data from a data controller or data processor under the PDPL to a data controller or data processor established abroad, or making such data accessible to them by any other means”.

The definition sets forth the three criteria below for a data transfer to be considered as international:

- i. The data transferor (*data controller or processor*) shall be subject to the PDPL for the personal data processing activity in question. When determining whether the data transferor is subject to PDPL, “*impact principle*” has been used by the Board of PDPA (the “**Board**”) instead of “*territoriality principle*”. Accordingly, even an entity established abroad might be extraterritorially subject to PDPL.
- ii. The personal data processed by the data transferor shall be transmitted or otherwise made accessible. Opening an account, permitting remote access, deploying a hard drive, etc. can be regarded as examples. In case the data subject transmits or makes available the personal data themselves, this will not constitute an international transfer of personal data.
- iii. The controller or processor, to whom the data is transferred, whether it is subject to the PDPL or not, shall be in a third country.

3. Transfer Mechanisms

The new regime regarding international transfer of personal data brings three alternatives gradually and respectively applicable to transfers, in the absence of provisions in any relevant international agreements or other laws (*e.g. anti money laundering laws*).

As a first mechanism, the country to which the transfer will be made shall be declared by the Board as a country with adequate protection (*adequacy decision mechanism*). Secondly, in the absence of an adequacy decision, appropriate safeguards regulated in the PDPL shall be implemented (*appropriate safeguard mechanism*). Thirdly and lastly, in the absence of adequate protection and appropriate safeguards, the existence of one of the exceptional circumstances shall be required (*exception mechanism*).

3.1. Adequacy Decision

Principally, personal data processing conditions determined in PDPL are required to be able to international transfer of personal data based on adequacy decisions.

Adequacy decisions may have been resolved by the Board on a country, sectors in the country, or international organization basis. In such a case, data controllers and processors will be able to transfer personal data abroad without further procedures. It shall be highlighted that as of the date of this briefing note, there is not any adequacy decision resolved by the Board yet.

An adequacy decision by the Board shall be published in the Official Gazette, and it shall be evaluated every four years at the latest. Notwithstanding the re-assessment period specified, the Board may, if deemed necessary, review the adequacy decision and amend, suspend or revoke it with prospective effect.

3.2. Appropriate Safeguards

In the absence of an adequacy decision, personal data may be transferred abroad if one of the appropriate safeguards listed below is implemented by the parties, provided that the person concerned has the opportunity to exercise their rights and to apply for effective legal remedies in the country of transfer, in addition to the presence of personal data processing conditions determined in PDPL.

3.2.1. Agreement and Authorization

Personal data may be transferred abroad if there is an agreement related to public institutions and organizations or international organizations, which cannot be categorized as an international contract and if the transfer is authorized by the Board.

According to the Regulation, the Board's opinion is required throughout negotiations of the agreement that shall be executed between the parties of transfer and in all cases, transfer of personal data based on the agreement cannot be initiated without the Board's authorization.

3.2.2. Binding Corporate Rules and Approval

Personal data may be transferred abroad in the presence of binding corporate rules approved by the Board, that contain provisions on the protection of personal data, with which companies within the group of undertakings engaged in joint economic activities are obliged to comply.

The following points are specifically taken into consideration by the Board while evaluating binding corporate rules:

- a) Binding corporate rules shall be legally binding and enforceable on each relevant member of the group of undertakings engaged in joint economic activity, including its employees;
- b) A commitment shall exist in the binding corporate rules that the rights of the person concerned can be exercised; and
- c) Binding corporate rules shall include the matters specified by the Regulation.

It shall be noted that the Board is entitled to expand the context above and that transfers can only be executed upon the Board's approval.

3.2.3. Standard Contracts and Notification

Personal data may be transferred abroad by executing a standard contract announced by the Board, which contains matters such as data categories, purposes of data transfer, recipients, technical and administrative measures to be taken by the data recipient, and additional measures taken for special categories of personal data.

It is mandatory to execute the standard contracts announced by the Board without any modification except on the points where indicated the content is optional or has alternatives. The prevailing language of the standard contract is Turkish; accordingly, even if the parties execute standard contracts in different languages, their signatures shall be present in the Turkish version. After due execution, standard contracts shall be submitted to PDPA with supporting documents.

Standard contracts include four standard sections which might be slightly changed depending on the contract type, namely:

- a) General provisions, that include provisions regarding the purpose, scope, impact and characteristics of the standard contract and its

status against other agreements between parties, scope of the rights of persons concerned, and interpretation of the contract;

- b) Obligations of parties, that include provisions regarding the protection of personal data depending on the type of contract, remedies, liabilities, and the power of the Board;
- c) Obligations under national law and access by public authorities; and
- d) Final provisions that include actions taken in case of noncompliance and rules regarding termination and return or destruction of personal data, governing law, and jurisdiction.

The details regarding the transfer of personal data subject to the standard contract shall be included in the annexes to the standard contract and these shall form an integral part of the same.

The execution of the standard contracts and, if any, the amendments regarding the information contained therein shall be notified to the PDPA within 5 (five) business days following the execution.

3.2.4. Letter of Undertaking and Authorization

Personal data may be transferred abroad in the presence of a written undertaking containing provisions framed by the Board to ensure adequate data protection.

Undertakings are not completely predesigned like standard contracts and offer extensive useability contrary to binding corporate rules. Accordingly, undertakings allow for a wider range to structure specific international transfer. However, it shall be highlighted that transfers through a letter of undertaking can only be executed upon the Board's authorization.

3.3. Exceptional Situations

In the absence of an adequacy decision and if any of the appropriate safeguards cannot be provided, personal data may be transferred abroad only in the presence of one of the following exceptional and incidental¹ transfer situations:

- a) Explicit consent of the data subject who is informed about the possible risks.
- b) The transfer is mandatory for the performance of a contract between the data subject and the data controller or for the implementation of pre-contractual measures taken upon the request of the data subject.
- c) The transfer is mandatory for the establishment or performance of a contract between the data controller and another natural or legal person for the benefit of the data subject.
- d) The transfer is necessary for an overriding public interest.
- e) The transfer of personal data is mandatory for the establishment, exercise or protection of a right.
- f) The transfer of personal data is mandatory for the protection of the life or physical integrity of the person, or a third person, unable to disclose consent due to actual impossibility or whose consent is not legally valid.
- g) Transfer from a registry open to the public or 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 it.

Contrary to other transfer mechanisms, in transfers based on exceptional situations, it is not required to fulfil the generic personal data processing conditions, but the existence of exceptional transfer conditions is sought. Further, transfers based on incidental circumstances require neither authorization nor approval of the Board, nor any notification.

¹ Transfers, that are irregular, that occur only once or few times, that are not continuous and not in the ordinary course of business, are incidental.

| 4. Subsequent Transfers

New international data transfer regime also applies to subsequent transfers. Accordingly, initial foreign recipients of data shall be obliged to transfer data abroad only by ensuring sufficient protection and compliance with PDPL. Subsequent transfer shall rely on a valid transfer mechanism and maintain equivalent safeguards regardless of whether the subsequent recipient is a third country, a private entity, or an international organization.

| 5. Conclusion

Compliance with data transfer regulation converged to more clear and structured grounds with new framework. Gradual regime for international transfers together with incidental basis transfer mechanism ensures protection of data subjects' rights and provides broadscale range for diversified transfer requirements. Data controllers and processors are advised to review the personal data transfer methods and select the most tailored mechanism for their cross-border transactions. Considering the obligations envisaged for subsequent transfers, data flows shall be periodically reviewed.

Should you have any queries on the matters above, please do not hesitate to contact us.

Yours faithfully,

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