

MEMORANDUM

9 March 2017

This Memorandum has been prepared to provide information on the legal framework of the Law numbered 6698 on Protection of Personal Data (“**Law**”) which has been published in the Official Gazette dated April 7, 2016 and numbered 29677 and to evaluate the procedures to be followed by companies to be in compliance with the Law from the point of view of employment law and contractual law.

I. The Definitions Introduced by the Law on Protection of Personal Data

Under Article 3 of the Law, “personal data” is defined as any type of information of any real person whose identity is determined or may be determined. In this regard, defined real persons may appear as employees, business partners, clients, etc. “Data Controller” is also defined in the same Article as real or legal persons that determine the purposes and vehicles of data processing and that are responsible for the establishment and management of the data registration system. Accordingly, as of the effective date of the Law, the companies as “data controllers” shall be liable from the transfer of personal data within Turkey or outside of Turkey, processing of personal data, the methods used during the process of personal data, precautions taken during the transfer of personal data and from the legalization of the personal data that have been processed before the effective date of the Law.

Moreover, as per the Law, the companies as data controllers shall provide the processing of the personal data through their assigned “data processors”. Accordingly, data processors are defined as real or legal persons processing personal data on behalf of the data controllers as per the authorities provided to them.

II. The Obligations of the Data Controllers on Data Security

The obligations of the workplaces acting as data controllers are regulated under Article 12 of the Law. Accordingly, the data controllers shall:

- Prevent unlawful process of personal data,
- Prevent unlawful access to personal data,

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- Safeguard personal data and take all necessary technical and administrative precautions for safeguarding of such personal data,
- Carry out all necessary inspections for the implementation of the Law,
- Avoid from the unlawful disclosure of the known personal data and misuse of personal data other than means of processing,
- Notify the data subject and Board for the Protection of the Personal Data in the cases that the processed personal data is unlawfully acquired by others.

In addition to the above, the data controller is jointly liable with the data processors processing the personal data on its behalf in the unlawful process of personal data, prevention of the unlawful access of the personal data and in taking the measures for the safeguard of the personal data. The companies acting as data controllers shall also be registered to the Data Controllers Registry.

III. Evaluation in Terms of the Turkish Labour Law

The storing of the personal data of the employees are regulated under Labour Code numbered 4857 and Turkish Code of Obligations numbered 6098. Article 75 of the Labour Code is as follows:

“The employer shall prepare a personnel file for each of their employees. The employer shall keep all kinds of information, document and record that it should file by virtue of the Labour Code and other laws including the employee’s identification data and to submit those to the competent bodies and officers when requested. The employer is liable for usage of the personal data of the employee in accordance with the laws and the principle of good faith, and not to disclose any personal data of which the relevant employee has a rightful benefit in employer’s keeping such information confidential.”

As stated in the above article, the companies as the employers are under the obligation to keep the personal data of their employees included in their personnel file and to use such personal data to the extent permissible by the employment contracts and employment relationship.

The use of the personal data of the employees are also regulated under Article 419 of the Code of Obligations. According to such article, the employer may use any personal data pertaining to the worker only to the extent related to his aptitude to work or necessary for performance of service contract.

By taking into account the relevant articles of the Labour Code, Code of Obligations and the terms introduced by the Law, the steps that shall be followed by the employers to comply with the Law can be summarised as below:

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- (i) the employees shall be informed of the purpose, scope and methods to be used in the processing of their personal data and their explicit consent shall be taken,
- (ii) the employment agreements shall be reviewed and revised in terms of processing and storing of the personal data,
- (iii) revision of the confidentiality policies and consent mechanism especially for multi-national companies whose servers are located abroad or the personal data of their employees are transferred abroad due to their multinational status.

IV. Evaluation in Terms of Contract Law

As per the new provisions introduced by the Law, the current employment contracts in a workplace shall be revised to comply with the Law. New terms imposing liability requirements for the storing and processing of personal data shall be included to the new employment contracts or addendums to the current employment contracts shall be executed within this context. Moreover, it is essential to establish the necessary contractual structures in terms of confidentiality obligations and other liabilities especially in the transfer of the personal data to the servers located abroad.

In addition to the above, as per Article 7 of the Law personal data that is processed in accordance with this Law or relevant other laws shall be deleted, destroyed or anonymised either *ex officio* or upon request by the data subject in case the reasons necessitating their processing cease to exist. Accordingly, the relevant contractual structures shall also be established for such procedures.

V. Cases Where Explicit Permission is not a Requirement for the Process of the Personal Data

According to the Law, the personal data may only be processed by the explicit permission of the relevant individual. However, exceptional cases where the explicit permission is not a requirement are as follows:

- (i) If it is explicitly stipulated under the laws,
- (ii) If it is necessary for the protection of the life or physical integrity of a person who is incapable to give his/her consent or whose consent is legally invalid due to practical impossibility,
- (iii) If it is necessary to process the personal data of the parties of a contract, if it is directly related to the execution or performance of the contract,
- (iv) If it is imperative for the data controller to fulfil its legal obligations,
- (v) If the data has become public by the relevant person,
- (vi) If the data processing is imperative for the establishment, usage or protection of a right,

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(vii) If it is imperative to process data for the legitimate interests of the data controller provided that the fundamental rights and freedoms of the relevant person are protected.

VI. Transitional Provisions

According to the transitional provisions of the Law, data controllers shall be registered to the Data Controllers Registry within the term specified and announced by the Personal Data Protection Board. Moreover, the data which was processed before the publication date of the Law shall be rendered to comply with the provisions of the Law within two years as of the publication date.

It has been stated under the transitional provisions that the personal data which is determined to be contrary to the Law shall be immediately deleted and destroyed or anonymised. On the other hand, permissions which were legally obtained before the publication date of the Law will be deemed to be in compliance with the Law provided that there is no declaration of intent to the contrary made within the period of one year.

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Please do not hesitate to contact us should you have any queries.