

# Client Alert



## Pekin & Pekin

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### Corporate M&A

#### Amendments to the Law on Protection of Personal Data

In accordance with the Law on Amendments to the Criminal Procedure Law and Other Laws (published in the Turkish Official Gazette dated March 12, 2024 and numbered 32487), amendments have been made to the Law on Protection of Personal Data numbered 6698 ("**Data Privacy Law**") which are to be effective on June 1, 2024.

The amendments pertain to the processing of sensitive personal data, transfers of personal data outside of Turkiye and administrative fines with respect to violations of the Data Privacy Law.

Firstly, the applicable legal basis for processing sensitive personal data shall be amended as follows:

- i. The explicit consent of the data subject has been obtained,
- ii. Processing of the sensitive personal data is expressly provided by the laws,
- iii. Processing of sensitive personal data is necessary for the protection of life or physical integrity of the person themselves or any other person, who is unable to explain their consent due to the physical disability or whose consent is not deemed legally valid.
- iv. The sensitive personal data has been made public by the data subject and the processing purpose is in alignment with the intention of the data subject to make such data public,
- v. Processing of sensitive personal data is necessary for the establishment, exercise or protection of any right,
- vi. Processing of sensitive personal data by persons subject to confidentiality obligation or competent public institutions and organizations is necessary for the purposes of protection of public health, operation of preventive medicine, medical diagnosis, treatment and nursing services, planning and management of health-care services as well as their financing,

- vii. Processing of sensitive personal data is necessary for the fulfillment of legal obligations in the areas of employment, occupational health and safety, social security, social services and social assistance,
- viii. Processing of sensitive personal data of current or former members of foundations, associations and other non-profit organizations or formations established for political, philosophical, religious or trade union purposes, or persons who are in regular contact with these organizations and formations, provided that they comply with the legislation to which they are subject and their purposes, are limited to their fields of activity and are not disclosed to third parties.

In light of the foregoing, we expect the above amendments to affect the obligation of employer data controllers to obtain the explicit consent of the employee data subjects.

For clarity, the currently in force version of the article governing processing of sensitive personal data indeed makes it compulsory for certain employer data controllers to obtain the explicit consent of their employee data subjects for mandatory health information. For completeness, currently in force version of this article provides that sensitive personal data relating to health and sexual life may only be processed, without seeking explicit consent of the data subject, by the persons subject to confidentiality obligation or competent public institutions and organizations, for the purposes of protection of public health, operation of preventive medicine, medical diagnosis, treatment and nursing services, planning and management of health-care services as well as their financing. Therefore, as of June 1, 2024 employer data controllers may obtain the mandatory health information of employee data subjects as such is indeed necessary for the fulfillment of legal obligations in the areas of employment, occupational health and safety, social security, social services and social assistance.

With respect to transfers of personal data outside of Türkiye, the currently in force version of the regulations stipulate that the principle rule in order to conduct personal data transfers outside of Türkiye was to obtain the explicit consent of the data subject. As a deviation from this principle rule, the Data Privacy Law provided for several alternative transfer mechanisms where obtaining the explicit consent is not possible or is too burdensome. Namely, (i) the existence of an adequate level of protection in the country of which personal data shall be transferred (*Kindly note that the Personal Data Protection Board (the "Board") is authorized to announce the list of countries which adequate level of protection exists, however, such list is yet to be published*), (ii) a written undertaking to be approved by the Board is utilized or (iii) Binding Corporate Rules for Türkiye to be approved by the Board is utilized for intra-group data transferring activities. It is important to note that approval decisions of the Board with respect to the undertaking applications made by data controllers are very limited for the time being. In other words, there have only been eight approvals for written undertakings thus far. Moreover, an approval for Binding Corporate Rules for Turkey has yet to be announced by the Board. Therefore, the cross-border transfers of personal data may only be conducted with the explicit consent of the data subjects, provided that there are no approvals for written undertakings nor Binding Corporate Rules for Türkiye.

However, with the envisaged amendments, Turkish personal data protection regime indeed adopts more safeguards and legal basis to conduct personal data transfers outside of Türkiye without obtaining the explicit consent of the data subject. In this respect, these amendments shed hopeful

light on the practical challenges for personal data transfers outside of Türkiye, when compared to the currently in force provisions of the Data Privacy Law.

To illustrate, as of June 1, 2024, personal data transfers outside of Türkiye may be conducted if:

- i. The legal basis stipulated within Articles 5 and 6 of the Data Privacy Law exists, along with an adequacy decision on the recipient country, sectors within the recipient country or international organizations,
- ii. In the absence of an adequacy decision, one of the following safeguards are utilized by the parties while the legal basis stipulated within Articles 5 and 6 of the Data Privacy Law exists and the data subject has the opportunity to exercise their rights and apply for effective legal remedies in the recipient country:
  - a. The existence of an agreement amongst recipient public institutions and organizations or international organizations and public institutions and organizations in Türkiye or professional organizations classified as public institutions and the Board permits such transfer;
  - b. The existence of Binding Corporate Rules inclusive of provisions on protection of personal data which the respective companies participating in a joint economic activity are obligated to comply with and are approved by the Board,
  - c. The existence of a standard agreement announced by the Board, which are inclusive of data categories, purposes for transfer, recipients and recipient groups, technical and organizational measures undertaken by the recipient and additional safeguard undertaken for sensitive personal data;
  - d. The existence of a written undertaking inclusive of provisions ensuring adequate protection and approval of such transfer by the Board.
- iii. In the absence of both an adequacy decision and additional safeguards, one of the below conditions are met:
  - a. The explicit consent of the data subject is acquired, provided that they are informed of potential risks,
  - b. The transfer is necessary for the performance of an agreement amongst the data subject and data controller or for the implementation of pre-contractual measures as per the request of the data subject,
  - c. The transfer is necessary for the establishment or performance of an agreement amongst the data controller and third party, for the benefit of the data subject,
  - d. The transfer is necessary for prevailing public interest,
  - e. The transfer is necessary for the establishment, exercise or protection of a right,
  - f. The transfer is necessary for protection of life or physical integrity of the person themselves or of any other person, who is unable to explain their consent due to the physical disability or whose consent is not deemed legally valid,
  - g. The transfer is conducted from a registry which is public or accessible to persons which legitimate interest, upon the request of a person with a legitimate interest and provided that the conditions to access the registry within the relevant legislation have been met.

In the same vein, if the parties would proceed with the standard agreements that are published by the Board, such agreement shall be notified to the Board within 5 days following the date of execution.

Moreover, the safeguards set forth above shall be provided by the parties for subsequent transfers of personal data and transfers to international organizations.

Further, notwithstanding the provisions of international agreements, personal data transfers may be conducted only with the permission of the Board by way of obtaining the opinions of the relevant public institutions or organizations in the event the interests of Turkiye or the data subject may be seriously harmed.

Please note that the previous version of the article governing personal data transfers outside of Turkiye will also be in effect, along with the amended version of the article until the date of September 1, 2024, with the aim of easing the transition period.

The above procedures and principles of transfers of personal data outside of Turkiye are expected to be governed by a regulation which is yet to be published. In the same vein, we expect the Board to publish the standard agreement in order for the parties to personal data transfers to familiarize with the same and execute the agreements, if need be.

As for the administrative fines, the amended Data Privacy Law stipulates an additional administrative fine for failure to notify the execution of a standard agreement to the Board within 5 days following the execution. It is also important to note that this administrative fine may be subjected to both data controllers and data processors.

To discuss how these developments affect your business interests please contact:

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