

Processing Personal Data Based on Legitimate Interest: A Comparison of Turkish Data Protection Law, the Directive 95/46/EC and the GDPR

Authors: Gönenç Gürkaynak Esq., Burak Yeşilaltay and Berk Doruk Ekinci, ELIG, Attorneys-at-Law

I. Introduction

Turkey's first and only law specifically dedicated to data protection and privacy, the Law No. 6698 on Protection of Personal Data ("Law No. 6698"), came into force on April 7, 2016 with certain transition periods. The Data Protection Board has been formed, but is not yet functioning. The secondary legislation is still pending, although certain sector-specific regulations have been put in place, and is expected to be completed by April 7, 2017.

The Law No. 6698 is essentially based on the EU Directive 95/46/EC ("Directive") with particular differences. As Turkey does not have a history of data protection laws and practice, the interpretations of the Directive in the EU will shed a light unto the interpretation of the Law No. 6698. That said, EU is in a period of transition to a new data protection regime and has recently introduced a game changer, the General Data Protection Regulation ("GDPR"), which will enter into force on May 25, 2018. Directive will no longer be applicable once the transition is over. Therefore the Directive should not alone be taken into account when construing the provisions and implementation of the Law No. 6698.

Among the provisions of the Law No. 6698, one of the most debated provisions and the one which is highly likely to lead to further discussions and disputes in the future, is Article 5/2(e) of the Law No. 6698. The article provides a legal ground for processing of personal data without the data subjects' explicit consent (which is the primary requirement for processing personal data), if the processing is necessary for the legitimate interests of the data controller. The provision corresponds to Article 7(f) of the Directive and Article 6/1(f) of the GDPR.

The next part of this article will demonstrate how this provision (Article 5/2(e) of the Law No. 6698) is articulated in these three different regulations separately and will be followed by a comparison, highlighting their similarities and differences. The final part will consist of conclusions on the possible impacts of these differences in the Turkish jurisdiction and a discussion on whether the reasons that led to changes in the Directive could be used as tools of interpretation of the Turkish data protection law as well.

II. Conditions for processing personal data based on legitimate interest under the Directive

Article 7(f) of the Directive states that personal data may be processed if it is necessary for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the interests for fundamental rights and freedoms of the data subject.

The Directive provides that personal data may be processed for the purposes of the legitimate interests pursued by (i) the data controller or by (ii) the third party or (iii) parties to whom the data are disclosed. Then requires an evaluation of interests of the data controller/third parties versus interests “or” (this has been mistyped in the English version of the Directive as “for” (Art. 29 WP’s Opinion 06/2014)) fundamental rights and freedoms of the data subject.

This evaluation is commonly referred to as a “balancing test”. In this balancing test, one should weigh the nature and source of the legitimate interests and the necessity of processing for pursuing those interests, against the impact of the processing on the data subjects.

As for the data subjects’ right to object such processing, the Directive requires the data subject to justify its objection (Article 14 of the Directive). If there is a justified objection, then the processing instigated by the data controller no longer involves those data.

III. Conditions for processing of personal data based on legitimate interest under the GDPR

Article 6(1)(f) of the GDPR states that processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests “or” fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.

GDPR articulates this complementary legal ground quite similar to the Directive and requires the same balancing test. That said, the GDPR brings a significant difference regarding the personal data that belongs to children and the data processing performed by public authorities.

GDPR expressly requires particular consideration onto children’s interests or fundamental rights and freedoms and information provided to them when processing of their personal data based on this provision. In practice this might lead to obtaining a parental consent before processing personal data of children or providing age restrictions as legal safeguards. Considering the purposes of this addition, the application might even be extended to the vulnerable segment of the population such as handicapped people or people who does not have or significantly lost their power of discernment for other reasons. Paragraph 75 of the GDPR’s recital also uses the term “vulnerable natural persons”, which is obviously broader and more comprehensive than “children”.

The other addition to the relevant provision in the GDPR is the second paragraph, which has not been mentioned above. According to this paragraph (Article 6/2 of the GDPR), Article 6/1(f) does not apply to processing carried out by public authorities in the performance of their tasks. This newly introduces exception prohibits public authorities from relying on their legitimate interests in processing of personal data, for the processing carried out in the performance of their tasks. The recital of the GDPR clarifies the reason of this amendment by stating that the legislators have the duty to provide legal basis through issuing laws for public authorities to process personal data in the performance of their tasks and prevents the public authorities from processing personal data based on their legitimate interest in the processing.

GDPR shifts the burden of proof, as to data subjects' objection to processing, from the data subjects onto the data controllers. According to the GDPR, if the data subject objects to processing of its personal data, which is processed based on legitimate interests of the data controller, the data controller may no longer process the personal data unless the data controller demonstrates compelling legitimate grounds for the processing which override the interests, rights and freedoms of the data subject or for the establishment, exercise or defense of legal claims.

IV. Conditions for processing of personal data based on legitimate interest under the Law No. 6698

Article 5/2(f) of Law No. 6698 also provides a quite similar provision which states that personal data may be processed without data subject's explicit consent, if processing is necessary for the purposes of data controller's legitimate interests, provided that the processing does not harm the data subject's fundamental rights and freedoms.

The reasoning of this provision issued by the legislator provided an example for implementation of this provision stating that owner of a company may process its employees' personal data for arranging their promotions, salary increases or social rights or determining their role in the restructuring of the company, which constitute legitimate interests of that company. The legislator also indicates that although the explicit consent of the data subject is not required in these cases, the fundamental principles as to protection of personal data should still be complied with and the balance of "interests" of the data controller and the data subject should be taken into account.

The wording used in the provision's reasoning is interesting considering that the provision does not mention the "interest" of the data subject but rather requires the processing not to harm the data subject's fundamental rights and freedoms. The reasoning provides a wider protection in favor of the data subjects, which would also be consistent with the Directive and the GDPR.

V. Comparison of the conditions provided under the Law No. 6698 with the Directive and the GDPR

The Law No. 6698 provides that personal data may be processed without obtaining consent, for the data controller's legitimate interests, whereas the Directive and the GDPR provides that personal data may be processed for the purposes of the legitimate interests pursued by (i) the controller or by (ii) the third party or (iii) parties to whom the data are disclosed.

The balance test provided under the Directive and the GDPR require an evaluation of interests of the data controller/third parties versus interests or fundamental rights and freedoms of the data subject. However the Law No. 6698 only requires an evaluation of interests of the data controllers versus fundamental rights and freedoms of the data subject, without including the "interests" of data subjects in this assessment. As mentioned above, the reasoning of the law emphasizes the balance between "interests". However this was not expressly articulated in the provision.

Besides, the GDPR expressly indicates emphasizes that data controllers should be more careful in processing data subject's personal data based on their legitimate interest where the data subject is a child. The Law No. 6698 does not put a special emphasis on protection of personal data in cases where the data subject is child or any other person which might be considered vulnerable.

GDPR excludes public authorities from relying on their legitimate interests in processing of personal data, for the processing carried out in the performance of their tasks. The Law No. 6698 does not provide such an exception and allows public authorities to process personal data in the performance of their duties, based on their legitimate interest as well.

Since the last two were not also included in the Directive, they might not have been consequently incorporated into the Law No. 6698. As for the data subjects' right to object, the Law No. 6698 does not include a provision particular to processing conducted based on legitimate interests, and is silent on the burden of proof.

VI. Conclusion

The legal ground provided under the Law No. 6698 for processing personal data based on legitimate interest is overall in line with the Directive and the GDPR. However there are particular differences in the wording of the provisions, which could lead to a significant deviation from the EU practice.

Turkish legislators excluded the legitimate interests of third parties and the parties to whom data are disclosed from the scope of this exception. This brings the question of whether the public's overriding interest in having access to certain information, for instance the public's interest in receiving information regarding the whistleblowing of irregularities in the public authorities or regarding felonies that concern the public or other information disclosed for transparency and accountability, will not be sufficient for disclosure and dissemination of such information to public or other groups (e.g. employees of a company) that are concerned. Would it be necessary to obtain the data subject's explicit consent even when there is an overriding public interest in the processing in Turkey?

This question might find its answer in the forthcoming days through Data Protection Board decisions and court precedents on the matter or in the secondary legislation to be issued. Nevertheless, there are currently a couple of other provisions in the Law No. 6698, which might serve for the same purpose through interpretation. For instance the Law No. 6698 provides a number of exemptions from the application of the law. Among these exemptions, one of them provides exemption to processing of personal data within the scope of freedom of speech, but only if the processing does not breach national defense, national security, public safety, public order, economic safety, privacy of private life or personal rights. This provision might be construed for the interests of the public and third parties, and might serve as a legal ground for processing of data when there is public's overriding interest, without requiring explicit consent of the data subject.

The Directive and the GDPR requires both "interests" and "fundamental rights and freedoms" of the data subjects to be considered when exercising a balancing test, whereas the Law No. 6698 does not mention the "interests" of the data subjects. Therefore the scope of application of the relevant exception provided under the Law No. 6698, in this respect, is broader when compared to the Directive. This would allow a wider area of processing personal data when there is a legitimate interest of the data controller, since data controller would be obliged to consider whether the data subject's fundamental rights and freedoms override, rather than also considering whether their interests override the data controller's legitimate interest in processing the data without the data subject's consent.

There has been a quite important change in the GDPR, which shifted the burden of proof as to objections regarding processing based on legitimate interests, from the data subjects onto data controllers. On the other hand, the Law No. 6698 does not include any provision as to cases where the data controller has legitimate interest in processing personal data but the data subject objects to such processing and remains silent as to burden of proof in such cases.

ELİG

Attorneys at Law

Adoption of a supra-national regulation (Directive) rather than a directly applicable law inevitably leads to certain gaps in the legislation for a civil law country. Nevertheless, the legislators could have at least addressed all the issues addressed in the Directive. This could have prevented further gaps and ambiguities in the legislation in addition to the ones inevitably borne.

Furthermore the supra-national regulation that the Law No. 6698 is based on, is older than twenty years. As the EU legislation evolves, the Turkish legislators and the Data Protection Board should make use of the past experiences of the EU and construe and implement the Law No. 6698 and issue the secondary legislation in light of the GDPR which was a result of the remarkable data protection history of EU.

Article contact: Gönenç Gürkaynak, Esq.

Email: gonenc.gurkaynak@elig.com

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