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SOURCE CODE ESCROW

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What Is It?

In general, escrow agreement may be defined as a contract concluded between a debtor of a contract which requires an escrow relationship and escrow holder for the purposes of ensuring the performance of debts arising from the main contract, and depositing movable property to the escrow holder.

Source code escrow agreement on the other hand may be explained as a contract in which the source code of a software is stored by a third party escrow holder and is agreed to be delivered to the user in accordance with the terms set forth in the contract depending on the main contract which grants right of use of a software or transfers such right.

Why Is It Needed?

Source code is a set of codes which are written using the relevant programming language, regarding a computer program. A software can be developed, updated and modified in any way through source code. Another term that should be explained together with the source code is "object code". Object code is generated by compiling the source code text file, and thus it is the translation of the source code into commands that the computer can understand. In cases where the right of use of a software is granted to a third party, object code of the relevant software is delivered to the new user through a flash drive or online methods. However, if the third party has the authorization to maintain, improve, update or develop the relevant software, such interventions are possible only by accessing the source code. Hence, source code is the main and fundamental element of the relevant software. Therefore, the source code of a software is stored as a rule, and delivered to the software users almost never. Keeping the source code confidential is very essential for the benefit of the right owner, and delivering the source code to the user is not preferable method.

Although the source code is not shared with anyone else in principle, in specific cases of the relevant software it may need to be known for the third parties in order to maintain, develop or improve this software. Additionally, in cases where the company owned the software is transferred or merged with third parties, it may need to be ensured the security or prevented from being damaged in any way until these processes are completed. Similarly, those who make large investments in various software or build their business model on this software may wish to ensure the maintenance of the software. In such circumstances the source code may be delivered to the escrow holder who is deemed as the third party of this relationship, with the purposes of both meeting the demand of the software owner regarding keeping the source code confidential, and also protecting interest of the software user or abovementioned third parties regarding ensuring the maintenance of the software.

What Is the Subject and Purpose of It?

Source code escrow agreement is based on a main contract (**Main Contract**) that its subject is software and grants one party to the right of use of the software, and puts other party under obligation to continuously update, maintain and provide support services, and that is generally a license contract. The source code escrow agreement aims to ensure the parties to fulfill their obligations under Main Contract. To that end, source code of the software is stored by an escrow holder and it is agreed that source code to be delivered to the user specified under the Main Contract when circumstances determined in the agreement occurs.

Source code escrow agreement is a contract independent of the Main Contract. Therefore, it may be conducted before, after or together with the Main Contract.

Subject of the escrow agreement is a movable property which is agreed to be delivered to the escrow holder. Whereas, in the source code escrow agreement this property shall be a movable property which carries the source code in the digital form by nature.

What Should Be Considered?

Right owner of the software is obliged to deliver the source code in whole, complete and readable format to the escrow holder. In the event of other documents being needed in order to read the source code, the delivery of such documents is obligatory as well. Right owner of the software is obliged to update the source code in agreed basis, and to pay the escrow service fee determined under the agreement.

The most essential obligation of the escrow holder is to protect the source code and deliver it when circumstances determined under the agreement are met. Escrow holder may also be obliged to investigate whether source code is complete, functional and virus-carrying and its readability.

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Escrow holder is an independent, impartial and reliable third party with regards to the parties of the Main Contract. It would be appropriate that escrow holder was not instructed by the parties and is not representative or agent of the parties in accordance with the spirit of the agreement. Escrow holder may be selected by the right owner of the software as well as the common will of the parties.

Due to the proper preservation of the source code which requires certain technical infrastructure and possibility of the escrow holder under the obligation to control the technical features of the code such as readability and virus status, it is essential for the escrow holder to have a certain technological infrastructure. There are technology companies providing software escrow service in this regard. Furthermore, this service is provided by organizations such as National Software Certification Center (NSCC) of Istanbul Technical University.

In the source code escrow agreements, the subject of the escrow should be described in detail and completely. The movable property in which the source code is delivered and additional documents submitted, if any, should be clearly stated in the agreement. Moreover, once the source code is delivered to the escrow holder, the obligation of the right owner of the software does not end, and depending on the improvements and updates the obligation to deliver the latest version in accordance with the Main Contract remains in effect. Therefore, escrow agreement may also include relevant software update periods.

Circumstances requiring the delivery of the source code should be specified clearly in the agreement as they constitute the basis of the agreement.

As a result, the source code escrow agreement is a practice that is foreseen as a solution for the conflict of interest between the owner of the software wishing to keep the source code confidential and the software user wanting to guarantee the continuity of services of maintenance, support and update in an agreement that grants the right of use of the software. Considering the growth rate of the technology, it would not be wrong to state that the need of such service is increasing day by day. However under all circumstances, escrow holder should be selected carefully, conditions stipulated the source code to be delivered should be specified clearly for the avoidance of doubt, and if the escrow service is demanded as a software user it must be stated during the negotiations of the Main Contract with the right owner of the software.

Decision on VERBIS Registration Obligation of Turkish Branches and Liaison Offices of Non-Resident Legal Entities

The decision numbered 2019/225 relating to the opinion request regarding the VERBIS Registration Obligation of Turkish Branches and Liaison Offices of Non-resident Legal Entities was published on the date of 07.10.2019 on the website of the Turkish Personal Data Protection Authority.

In accordance with the assessments conducted by the Turkish Personal Data Protection Board (**Board**); as per the Law on Protection of Personal Data (**Law**), in order to be obliged to register to the Data Controllers Registry Information System (**Registry**), it is required to fulfill the criteria of having the capacity of data controller and being a "real or legal entity". It is considered that the branches of the non-resident legal entities are being registered as the local commercial enterprises regardless of having a separate legal entity pursuant to Article 40 of Turkish Commercial Code. It is also taken into account that being a "legal entity" is not foreseen as a criterion in respect of being a data controller as per Article 4 of the European Union General Data Protection Regulation. Therefore, it is concluded that these branches which act independently from the headquarter in Turkey upon the criteria of the data controller regarding personal data processing procedures are considered to be data controllers.

In addition, it was decided that the liaison offices are not obliged to register to the Registry since the liaison offices do not have branch characteristics and they are established for the purpose of carrying out operations other than commercial activities.

Although there is not any clear definition of liaison offices in the legislation; a definition can be made as ''the institutions established by non-resident companies for the purposes of communication, market and sector monitoring and job opportunities provided that they do not engage in commercial activities''.

In accordance with this decision;

1. Non-resident data controllers who process personal data directly or by means of their branches in Turkey are under the obligation of registration to Registry.

2. According to the data controller definition in the Law, in case the branches of non-resident legal entities in Turkey determine the purposes and means of the processing of the personal data and in case they are responsible for establishing and managing the registration systems, these branches will be evaluated separately from the non-resident legal entity and as a data controller residing in Turkey. The decision on whether such branches of the non-resident legal entities in Turkey are under the obligation to register to the Registry will be made according to the evaluation made at the end of the year with respect to the criteria of "annual employee number" and "annual financial balance sheet total" stated in the decisions numbered 2018/88 and 2019/265 of the Board. The branches of the non-resident legal entities which are not in this scope are not obliged to register to the Registry.

3. Moreover, in order to establish a liaison office in Turkey, the legal personality of the company shall be incorporated in

accordance with the foreign legislation and the established liaison offices should not engage in commercial activities. Apart from the commercial activities, the liaison offices are established in order to carry out activities such as communication, feasibility research, social and cultural studies, preparation for mergers and acquisitions between companies, promotion and advertising, monitoring the business opportunities in the country and providing information to the headquarters and they do not have branch characteristics. Thus, it was decided that the liaison offices are not obliged to register to the Registry.

For the full text of the relevant decision: **https://www.kvkk.gov.tr/Icerik/5545/2019-225**

Answers. Not theories.

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About our firm

Gokce Attorney Partnership is an Istanbul-based law firm offering legal services across a broad range of practice areas including mergers and acquisitions, joint ventures, private equity and venture capital transactions, banking and finance, capital markets, insurance, technology, media, telecoms and internet, e-commerce, data protection, intellectual property, regulatory, debt recovery, real property, and commercial litigation. Please visit our web site at www.gokce.av.tr for further information on our legal staff and expertise.

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