

THE

Gökçe

Fine PRINT

June/July 2020

85

DEADLINES FOR ELECTRONIC MESSAGE MANAGEMENT SYSTEM ARE POSTPONED



Turkish Data Protection Board's Recent Decisions Are Published

DEADLINES FOR ELECTRONIC MESSAGE MANAGEMENT SYSTEM ARE POSTPONED

Under Turkish law, commercial electronic messages are regulated within the scope of the Law on the Regulation of Electronic Commerce (**Law**) and the Regulation on Commercial Communication and Electronic Commercial Messages (**Regulation**). According to the legislation, commercial electronic messages are defined as messages with audio and video content and data sent to the recipients with commercial purposes, through various means with the aim of promoting, marketing goods and services, promoting business or increasing recognition through contents of celebration or wishes.

The subjects for sending commercial electronic messages are, **(i)** service providers engaged in electronic commerce activities, **(ii)** intermediary service providers (**e.g. platforms**) that provide the electronic commerce platform for conducting others' economic and commercial activities and **(iii)** the recipients acting for consumer, professional or other purposes. Pursuant to the Law and Regulation; while sending an electronic commercial message, service providers are obliged to obtain the recipient's consent in advance. The recipients may refuse to receive commercial electronic messages without any justification. In addition, the recipients have right to complain regarding the commercial electronic messages sent to their electronic communication address.

Essential amendments and regulations on practice of the electronic messages have been made with the Regulation Amending the Regulation on Commercial Communication and Electronic Commercial Messages (**Amending Regulation**), published in the Official Gazette dated 04.01.2020. Commercial Electronic Message Management System (**MMS**), which was envisaged in a provision added to the Law in 2017 but not implemented until the Amendment Regulation, was established. In scope of the Amending Regulation, the MMS serves purposes such as; recording consent and refusals in MMS, obtaining electronic commercial message consent from the recipients, exercising the right to refuse to receive commercial electronic messages by the recipient, managing the complaints process regarding commercial electronic messages quickly and effectively and enabling to use of the system by the intermediary service providers. In this context, The Union of Chambers and Commodity Exchanges of Turkey (**TOBB**) has been authorized to establish the technical infrastructure for MMS and to open the access of for the Ministry of Commerce. The Message Management System A.Ş. (**IYS A.Ş.**) has been established to serve the above-mentioned purposes within the authority of TOBB and services related to MMS are carried out through this company. For our another article on the main regulations regarding the MMS, please see. New Era in Commercial Electronic Messages: MMS.

In accordance with the regulations introduced regarding the MMS, service providers are required to register with the MMS and to transfer their current databases (**the consents already obtained from the recipients**) to the MMS in order to enable to exercise of consent and refusal rights and complaints processes through MMS. Then, it is regulated that the recipients will check the consents recorded in the MMS. According to the timeline placed in Amending Regulation, it was set forth that the consent obtained under the Regulation will be transferred to the MMS by the service providers until the date of 01.06.2020 and that these consents will be considered valid if not checked by the recipients from 01.06.2020 to 01.09.2020.

Since the Covid-19 outbreak (**Covid-19**) negatively affects daily life and there are significant disruptions in business operations; with the announcement published by the Ministry of Commerce on 23.05.2020, the deadlines determined by the legislation regarding the transactions to be carried out through the MMS were postponed. In this context,

- The service providers will complete the transfer of the consents already obtained from the recipients and the MMS register processes until 01.09.2020. In addition, service providers are obliged to harmonize their systems with the MMS in line with the instructions and directions of the MMS.

- The recipients will check the consents recorded in the MMS from 01.09.2020 to 01.12.2020. In case the recipients do not exercise their right to refusal after the expiry of this period, the commercial electronic messages sent will be deemed approved.

It should be noted that as of 01.09.2020, the consents which are not obtained via MMS will be recorded by the service providers in the MMS within three business days. In this case, if the electronic commercial message consent is obtained through other means, such consents will also need to be recorded in MMS.

MMS Service Packages and Prices Announced

The service packages and prices for the service providers have been announced by the İYS A.Ş. In this context; basic services which will be provided free of charge to all service providers regardless of the number of address, include **(i)** permission (**consent**) addition/amendment, **(ii)** permission inquiry, **(iii)** daily reporting, **(iv)** brand and dealer management, and **(v)** the transfer of current database of consents to the system, in accordance with the Amending Regulation. In addition to the basic services, provided that the prices increase as the number of addresses of the service provider increases, the provision of integration module and MMS path module services is envisaged and the prices are determined annually. For service providers with a number of addresses of 250,000 and above; additional service modules are also foreseen.

Conclusion

The MMS, which has been gradually implemented with the amendments in the Regulation, envisages substantial requirements for service providers and has a limited period of time, even the deadlines to fulfil the requirements are postponed. Accordingly, the completion of the registration process by the service providers; the transfer of the current recipient consents to the MMS in the upcoming period and completion of integration with the MMS by the service providers and intermediary service providers in this process have critical importance.

TURKISH DATA PROTECTION BOARD'S RECENT DECISIONS ARE PUBLISHED

Turkish Personal Data Protection Board (**Board**) has issued precedential decisions that closely concern data processors, data controllers and data subjects regarding personal data protection and data security since the day that the Personal Data Protection Law (**Law**) came into force. These decisions, which the Board sheds light on the practice of the protection of personal data, have great importance in ensuring the compliance of the practitioners. Board continued to publish various decisions regarding the protection of personal data during the outbreak period as well.

We have compiled the summaries of some decisions recently published by the Board, below.

For further information please contact us at contact@gokce.av.tr

Board's decision dated 27.01.2020 and numbered 2020/65 “regarding the personal data processed within the scope of a mobile application providing transportation services”

The applicant submitted his application due to him, as a data subject learning that the travels he made through a platform providing transportation services were scored by the drivers, the scores of his travels could not be reached by him and that no such information was made in the information policy of the data controller regarding this type of scoring and his application to the platform has remained unanswered.

Board has assessed the existing cases separately and decided as following; to instruct the platform to respond in a timely and complete manner in accordance with the Law and with the conditions announced by Board, to impose an administrative fine of 100,000 Turkish Liras on the platform pursuant to Article 18 of the Law due to the conclusion reached on violation of taking the necessary technical and administrative measures in order to provide the appropriate level of security. In addition, an administrative fine of 10,000 Turkish Liras was imposed since the data controller did not fulfil the obligation to inform. Full text of the summary can be reached at: <https://www.kvkk.gov.tr/Icerik/6717/2020-65>.

Board's decision dated 16.05.2019 and numbered 2019/138 “regarding a company owner obtaining employees' WhatsApp correspondence illegally”

An investigation has been made by the Board regarding the application of an employee who alleged that his own WhatsApp correspondence was obtained illegally and shared with third parties by his employer. As a result of the investigation, Board decided that the relevant application should be evaluated within the scope of the Turkish Code of Penalty (TCK), noting that the criminal complaint was filed before the Istanbul Anatolian Chief Public Prosecutor's Office within the scope of the relevant provisions of the TCK and the process is still in progress.

The basis of the Board's decision was Article 17 of the Law which sets forth that the provisions of Articles 135 to 140 of the TCK will be applied in terms of crimes related to personal data. Board has decided that the application will not be examined considering that Article 136 of the TCK issuing the person who handed over, disseminated or captured personal data to someone else illegally would receive imprisonment from two to four years. This decision of the Board is of a precedent in practice as it concludes that applications which are the subject of TCK will not be examined by it. Full text of the summary can be reached at:

<https://www.kvkk.gov.tr/Icerik/6708/2019-138>.

Board's decision dated 06.02.2020 and numbered 2020/86 “regarding the complaint about an air ticket sales company”

The applicant has requested an update/change on the e-mail address registered in the systems of the data controller. The data controller refused this request and stated that the data subject may open another account using a new e-mail address, but the e-mail address linked to the existing account cannot be changed. In the defence letter sent to the Board by the data controller, it was stated that the application was sent from an e-mail address not registered in the system and that application was rejected due to it being not made by any valid method listed in the Communique on the Procedures and Principles on Applications to Data Controllers.

At first, Board decided that due to the identity of the person not being identified because of non-compliant application, there occurs no action to be taken in accordance with the Law. However, in its decision, Board also instructed the data controller to take all necessary administrative and technical measures in order to conclude the applications made by the data subjects within the scope of the legislation in an effective, lawful, and honest manner. Following this decision, the applicant repeated his request through his registered e-mail address and his request was not answered within 30 days due to the work load.

Board firstly stated that although the data controller has an obligation to conclude the applications effectively and the data subject has the right to issue a complaint in case the data controller has not answered the applications or the answers deemed insufficient, there is no administrative sanction imposed due to not only answering the applications in the Law. Nevertheless, Board stated that considering that it had previously instructed the data controller on the same issue, registered e-mail address evidence presented in the complaint petition showing the clarity of the data controller reading the application of data subject seven minutes after the submission but data controller stating that they could not answer the application due to the work load; it is clear from this situation that data controller did not take the necessary administrative measures to respond to the applications effectively, in accordance with the Law and honesty rule, and did not comply with the instructions given by the Board. As a result, Board decided to impose an administrative fine of 50,000 Turkish Liras in accordance with the Article 18/1/c of Law against the data controller who violated its obligation to eliminate the unlawful acts determined by Board, within thirty days of receiving the relevant decision. With the decision, it can be seen that the results of the failure to fulfil the instructions of the Board by the data controller may be severe. Full text of the summary can be reached at: <https://kvkk.gov.tr/lcerik/6732/2020-86>.

Board’s decision dated 27.02.2020 and numbered 2020/167 “regarding the entrance-exit controls made by the data controller providing gym services, through processing biometric data”

Complaints were made to the Board by the data subjects for the company operating a gymnasium, processing certain special categories of its members’ personal data containing biometric data with using the hand-reading system at the entrance-exit control, and complaints were made after the suspicion on these information being kept safe.

Although biometric data is considered among the special categories of personal data in the Law, it is not defined separately. The Board, in its decision, included the definition made by the European General Data Protection Regulation (**GDPR**) as "personal data resulting from specific technical processing relating to the physical, physiological or behavioural characteristics of a natural person, which allow or confirm the unique identification of that natural person, such as facial images or dactyloscopic data". Board decided that processing of special categories of personal data took place through the hand-reading system subject to the complaint.

With the inclusion of the principle of proportionality in the decision, the Board emphasized that personal data not required for the realization of the personal data processing activity should not be collected and/or processed. Again, the Board stated that within the framework of the purpose of the data controller, in accordance with the principle of proportionality, minimum level of information should be requested from the data subject, and explicit consent will not legitimate the collection of excessive amounts of data, even if the processing of personal data is done depending on the permission of the data subject.

For these reasons, Board believes that the palm scanning system meets the definition of biometric data, and that, even if an optional right is presented, the use of a system containing biometric data at the entrance and exit of the facility is contrary to the principle of proportionality, which is among the general principles of the Law. Accordingly, the Board concluded that the data controller’s actions constitute a violation of the obligation to “prevent the processing of personal data illegally” as per 18/1/b., and decided to impose an administrative fine of 225,000 Turkish Liras on the data controller. The full text of the summary can be reached at: <https://www.kvkk.gov.tr/Icerik/6738/2020-167>.

Board’s decision dated 27.02.2020 and numbered 2020/173 “regarding the application with respect to Amazon Turkey Retail Services Limited Şirketi”

An application was submitted to the Board by the data subjects with the request to examine whether the Board's permission was obtained for transfer to abroad on the grounds that it was observed that there is no explicit consent obtained by Amazon, a Turkish company, one of the most recognized marketplaces worldwide, to send electronic commercial messages for advertising, campaigns or promotional purposes, and there is no explanation for the existence of a processing reason other than explicit consent; which seen that by visiting the website, the consent is automatically given to receive electronic communication, that the processed personal data had been transferred abroad, and that there was no explicit consent obtained in this regard.

As a result of the examination carried out by the Board, it concluded that the data controller did not obtain the express consent of the persons duly by processing the contact information of the relevant persons while sending a commercial electronic message, and that it did not rely on a processing reason other than the explicit consent. Considering that a proper consent was not taken duly, Board determined that there was a violation of the provisions of the Law on the transfer of personal data. Accordingly, due to the failure to fulfil the obligation to "prevent personal data from being processed unlawfully", it has decided to impose an administrative fine of 1,100,000 Turkish Liras on Amazon Turkey Retail Services Limited Company as per Article 18/1/b of the Law, and to impose an administrative fine of 100,000 Turkish Liras in accordance with Article 18/1/a of the Law, as the informing obligation has not been fulfilled. The full text of the summary, which envisaged to be discussed in practice for transferring abroad and whose effects are expected to continue for a while, can be reached at: <https://www.kvkk.gov.tr/lcerik/6739/2020-173>.

Board's Decision dated 12.03.2020 and numbered 2020/213 on "An Internet Service Provider's Data Breach Notification"

In the data breach notification made by the data controller to the Authority; Invoice payment could not be made due to a problem in the online transaction centre that allows the company to make certain transactions to its customers; a vulnerability occurred while working to fix the problem; statements were made as that the credit card information of the customers were displayed by third parties due to the vulnerability, and in this context, it was determined that the card information belonging to 69 people was viewed by 649 Company customers. In this context, the Board decided to impose an administrative fine of 300,000 Turkish Liras on the Company as per the Law, which "did not take the necessary technical and administrative measures to ensure data security"; considering the below:

- The change request verbally conveyed to the software developers was made in the real environment, not in the test environment, and that the changes made in the application indicate that the procedures related to the process of getting live (real / working environment) are not implemented, this situation is a lack of technical and administrative measures,
- The inadequacy of the testing processes has been stated by the data controller itself, which indicates that the data controller has not taken the necessary technical and administrative measures in terms of application security,
- Although it has been stated by the company that personal data are either not shown or masked at the system interfaces, it is a technical deficiency to display the identity and financial data of the customers as a result of the mistake made,
- The data controller has a data security policy, but the effective date of this policy is after the date of the data breach.

The full text of the summary can be reached at: <https://www.kvkk.gov.tr/lcerik/6743/2020-213>.

Answers. Not theories.

Gokce Attorney Partnership

Editors:



Assoc. Prof. Dr. Ali Paslı
ali.pasli@gokce.av.tr



Yağmur Yollu
yagmur.yollu@gokce.av.tr



Elif Aksöz
elif.aksoz@gokce.av.tr



Çağatay Aras Uçkun
cagatay.uckun@gokce.av.tr



Duhan Kurt
duhan.kurt@gokce.av.tr



Nimet Karaca
nimet.karaca@gokce.av.tr

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.

Please contact us at
contact@gokce.av.tr

0 212 352 88 33

The Fine Print is prepared and published for general informative purposes only and does not constitute legal advice or create an attorney-client relationship. Should you wish to receive further information, please contact Gokce Attorney Partnership. No content provided in The Fine Print can be reproduced or re-published without proper attribution or the express written permission of Gokce Attorney Partnership. While all efforts have been made to ensure the accuracy of the content, Gokce Attorney Partnership does not guarantee such accuracy and cannot be held liable for any errors in or reliance upon this information. The Fine Print was created for clients of Gokce Attorney Partnership and the possibility of circulation beyond the firm's clientele should not be construed as advertisement.

For further information please contact us at contact@gokce.av.tr