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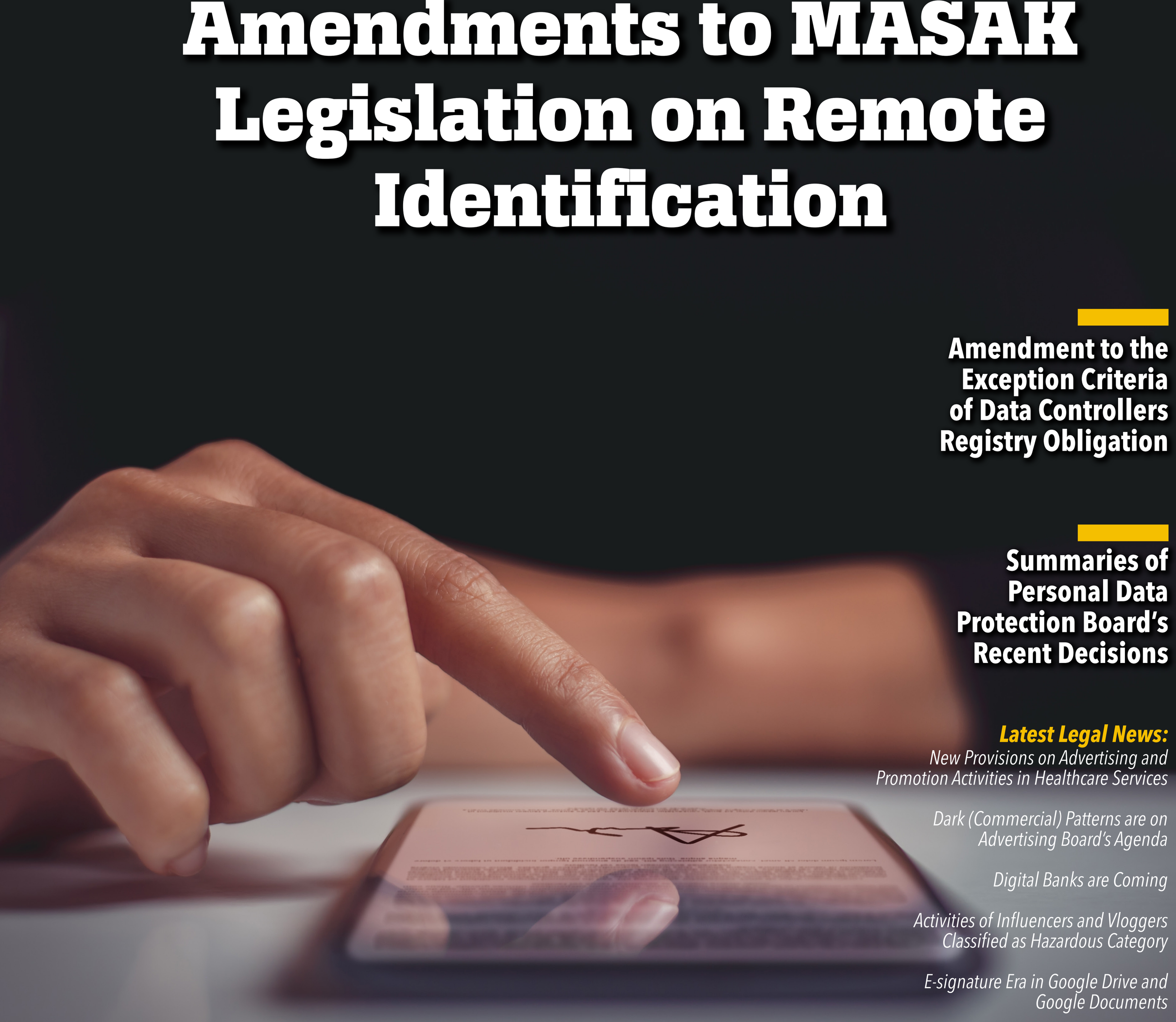
117

Amendments to MASAK Legislation on Remote Identification



Amendment to the Exception Criteria of Data Controllers Registry Obligation

Summaries of Personal Data Protection Board's Recent Decisions

Latest Legal News:

New Provisions on Advertising and Promotion Activities in Healthcare Services

Dark (Commercial) Patterns are on Advertising Board's Agenda

Digital Banks are Coming

Activities of Influencers and Vloggers Classified as Hazardous Category

E-signature Era in Google Drive and Google Documents

Amendments to MASAK Legislation on Remote Identification

The amendments regarding remote identification were made in the Financial Crimes Investigation Board (**MASAK**) legislation by the Communiqué Amending the Communiqué of the Financial Crimes Investigation Board (Serial No: 24) (**Communiqué**) which was published in the Official Gazette dated 11 August 2023.

As known, remote identification of legal entities by banks was made feasible recently. Although it was feasible for legal entities to become bank customers through remote identification, this was not yet feasible in terms of the MASAK legislation. In fact, since banks are also obliged to comply with the MASAK legislation, the definition of "customer" in the MASAK General Communiqué No. 19 on remote identification had to be amended to include legal entities.

With the Communiqué, legal entities were included in the definition of "customer." Thus, legal entities are added to the list of "persons who can be identified remotely". The activities of MASAK-obliged entities, especially banks that are able to conclude contracts with legal entities through remote identification methods in their legislation, have also become compliant with MASAK regulations.

The significant changes in Communiqué are as follows:

- Under the definitions section, methods for verifying the identity document during remote identity verification were defined as "Near Field Communication" (NFC) and "Security Elements." It was stipulated that identity verification primarily must be carried out using the identity document and verified through near-field communication. If this method cannot be applied, the security elements present on the identity document will be verified in terms of their form and content.

- In case of remote identification, the process must be carried out online, uninterrupted, video and real-time. It is also stated that the entire remote identification process must be recorded and stored in a way to includes all steps of the process to ensure that it is auditable. Some changes are also included in the regulation on how remote identification will be performed technically.

- In the case that the remote identification process is carried out partially or entirely through service procurement, it is obligatory for the service providers to have a TS EN ISO/IEC 27001 Information Security Management System certificate.

- It is stated that the transactions performed by the customer representative in remote identification can also be performed partially or entirely by online and artificial intelligence-based methods. Details regarding the use of artificial intelligence in the relevant processes were also determined in Communiqué.

Communiqué entered into force on 11 August 2023. The processes regarding the implementation of the Communiqué are a matter of curiosity for everyone.

You can reach the full text of the Communiqué here (*only available in Turkish)*.

Amendment to the Exception Criteria Regarding the Obligation to Register with Data Controllers Registry

Under the Protection of Personal Data Law, which has been in force since 2016, data controllers who process personal data are required to register with the Data Controllers' Registry Information System (**VERBIS**) before starting to process personal data (*with some limited exceptions*).

According to Article 16 of the Regulation on the Registry of Data Controllers, an exception to this registration obligation can be granted by the Personal Data Protection Board (**Board**). As per the Board decision numbered 2018/87 published in the Official Gazette dated 18.08.2018, criteria were introduced for the data controllers exempted from the obligation to register with VERBIS.

At this stage; in accordance with the Board decision (**Decision**) published in the Official Gazette dated 25.07.2023, these criteria have been amended considering that the enterprises have grown in terms of economic indicators and their business volumes have expanded since 2018.

In this context; although criteria will be included below, the limit of 25 million Turkish Liras taken as basis in 2018 for the obligation to register to VERBIS pursuant to the relevant Board decision is low compared to the current annual financial balance sheet totals; therefore, as a result of the evaluation made, it has been decided to increase the exemption limit from 25 million Turkish Liras to 100 million Turkish Liras.

In accordance with the relevant Decision, the data controller who fulfils any of the following criteria is obliged to register to VERBIS within 30 days from the date of fulfilment of this criterion.

i. Annual number of employees is more than 50; or

ii. The total of the annual financial balance sheet exceeds 100 Million Turkish liras; or

iii. Even if none of these two conditions are met; the main field of activity is to process special categories of personal data.

Administrative fines shall be imposed by the Board on data controllers who are obliged to register with VERBIS but act contrary to the registration and notification obligation. Accordingly, the limits of administrative fines for 2023 will be between 119,428 TL and 5,971,989 TL.

In the relevant Board decision, there is no special provision regarding the deletion of the registry records of the data controllers who had the obligation to register with VERBIS before the amendment and completed their registration. However, it is unclear when the registration obligation of the data controllers whose annual financial balance sheet totals exceed 25 million Turkish Liras will be cancelled for those whose annual financial balance sheet totals do not exceed 100 million Turkish Liras. In order to clarify the issue, the Board's statements on the subject are crucial.

You can reach the relevant Board decision here (*only available in Turkish*) and the Board's statement on the subject here (*only available in Turkish*).

Summaries of Personal Data Protection Board's Recent Decisions

We compiled below the summaries of two new decisions published by the Personal Data Protection Board (**Board**) regarding health data within the scope of the Personal Data Protection Law (**Law**) and secondary legislation.

The decision that it is unlawful for a hospital to obtain explicit consent from patients regarding the processing of personal data, including health data, within the scope of advertising and promotional activities:

A complaint was filed to the Personal Data Protection Authority (**Authority**) with the allegation that; within the consent forms submitted by private hospitals, explicit consent of the patients to share the images and videos of the patients with the media organs contracted by the private hospital for advertising and promotional purposes were obtained.

In the examination conducted by the Board, it was determined that in the images shared on social media, patients generally provide information about the health problem they are experiencing and the relevant doctor's explanations about the disease and the result of the treatment applied.

The private hospital obtains the explicit consent of the patients within the scope of the "Informed Consent Form on the Protection of Personal Data Specific to Photograph/Video Shooting". In the relevant consent form, it is stated that the photo/video shootings to be carried out within the scope of the marketing, advertising and promotion processes will be recorded and can be transferred to third parties from whom services are received, cooperated or contracted, national, local and international press organs and social media platforms.

Pursuant to Article 60 of the Regulation on Private Hospitals, private hospitals are prohibited from advertising. In this respect, Board stated that although private hospitals are prohibited from advertising, it is clear that the data controller processes special categories of personal data by the private hospital for advertising purposes, but the processing activity is not in accordance with the law and also does not have a legitimate purpose. In this respect, it is stated that the data controller made video shootings in line with the explicit consent of the patients in order to raise public awareness about diseases that are rarely known by society, and to provide information about the characteristics and treatment process of these diseases. However, Board has stated that it is not mandatory to process personal health data in order to achieve the purpose. As a matter of fact, the Board stated that it is also feasible to provide information only about the relevant diseases without processing any personal data. Therefore, the personal data processing activity is contrary to the principle of proportionality.

Based on this assessment, the Board decided;

i. to impose an administrative fine of 250,000 Turkish liras on the data controller private hospital,
ii. that the processing of personal data for such purposes is terminated; and
iii. that the personal data processed and retained to date is destroyed in accordance with the provisions of the Regulation on Erasure, Destruction or Anonymisation of Personal Data, and if personal data is transferred to third parties, to notify the relevant third parties of the transactions regarding the destruction.

You can reach the full text of the relevant decision summary here (*only available in Turkish*).

Decision on the condition of explicit consent for health services provided by a private health institution

In the notification submitted to the Authority; it was stated that during the filling of the form to make an appointment on the website of the data controller health institution, consent was requested to contact individuals to be informed about the services and announcements of the health institution.

In the examination conducted by the Board; it was determined that the personal data processing for promotional purposes was based on the explicit consent condition regulated in paragraph 1 of Article 5 of the Law and the appointment process is not completed without ticking the checkbox. Although this practice was fixed after the application, it was understood that the appointment procedures were carried out until that date in this way.

In the relevant decision, Board stated that the explicit consent has lost these qualifications for the data subject, who must fulfil the conditions of "being related to a specific subject, being based on information and being expressed with free will". In addition, Board assessed that it is deceptive and an abuse of the right to base the personal data to be processed in the appointment form on the explicit consent processing condition when it can be based on processing conditions other than the explicit consent.

Based on this assessment the Board decided;

i. to impose an administrative fine of 300,000 Turkish liras on the data controller,
ii. the fulfillment of the obligation to inform by removing the phrase "*I have read the privacy notice regarding the processing of my personal data. I consent to the processing of my data in accordance with the Personal Data Protection Law.*" under the appointment application form on the grounds that the phrase "*I give my consent*" creates the impression that the data subjects give consent to the privacy notice; to make an arrangement in the form of ticking a box indicating that the privacy notice has been read in parallel; and
iii. In case there are personal data processed by the data controller within the scope of explicit consent, it has been decided that the explicit consent texts regarding this data shall be regulated separately.

You can reach the full text of the relevant decision summary here (*only available in Turkish*).

New Provisions on Advertising and Promotion Activities in Healthcare Services

The Regulation on Promotional and Informative Activities in Healthcare Services (**Regulation**) was published in the Official Gazette on July 29th by the Turkish Ministry of Health (**Ministry**). The main purpose of Regulation is to determine the basic principles and criteria for promotional and informative activities in healthcare services. Regulation outlines the procedures and principles for the supervision of these activities and the sanctions that will be applied. The main points of Regulation are summarized below:

- Regulation defined and regulated "advertising" and "promotional activities" as two distinct concepts.

- Regulation prohibited "covert or overt advertising in healthcare service provision". In this context, while advertising is directly prohibited, it is explicitly stated that the use of before-and-after images in healthcare service presentations and the utilization of sponsored content are also prohibited.

- Principles to be followed in promotional and informative activities were established. It is stipulated that promotional and informative activities can only be conducted in compliance with the principles outlined in the Regulation. Although provisions regarding this existed before, Regulation provides clearer and more precise boundaries.

- It is required that promotional and informative activities conducted on social sharing and internet platforms adhere to the principles outlined in Regulation. It is stated that those who engage in activities that contradict these principles, as well as those who share such content, are equally responsible.

- Concerning healthcare-related promotional and informative content disseminated through social sharing and internet sites, it is stipulated that if elements constituting a criminal offence endangering human health, negatively affecting diagnosis and treatment processes, or obstructing these processes are identified, a criminal complaint will be filed in accordance with Internet Law No. 5651 to block access to the relevant content.

Regulation imposes stringent obligations on both healthcare professionals and facilities providing healthcare services, as well as those involved in promotional and informative activities on the internet. We will be monitoring developments related to the implementation of the Regulation. It is a matter of curiosity for everyone how this Regulation will be implemented in the sector.

Regulation entered into force upon publication. You can access the full text of Regulation here (*Only available in Turkish*).

Dark (Commercial) Patterns are on Advertising Board's Agenda

Digitalisation and technological developments have been creating significant legal problems recently, specifically for consumers. Since consumers are in a relatively weaker position in terms of knowledge and experience compared to those who engage in commercial practices, it is highly significant that they are legally protected. Otherwise, many unfavourable situations may arise, such as the deterioration of the economic behaviour of the consumer who is under the influence of unfair commercial practices, and the influence of their free will decision-making.

Accordingly, unfair commercial practices are regulated in detail by the Law on Consumer Protection and the Regulation on Commercial Advertising and Unfair Commercial Practices (**Regulation**). Pursuant to the Regulation, a commercial practice directed to the consumer is considered unfair in case it does not comply with the requirements of professional care and significantly disrupts or is likely to disrupt the economic behaviour of the average consumer regarding a good or service.

Recent developments in digital markets have led to an increase in unfair commercial practices referred to as "Dark (Commercial) Patterns" and in Türkiye as "Dark (Commercial) Designs". As a matter of fact, these practices, which have a significant impact on the economic behaviour of consumers, have also come under the radar of the Advertising Board and constituted the main focus of this month's meeting. Advertising Board, in its announcement on the subject, referred to the relevant provisions in the Regulation and shared with the public that dark designs that affect consumers' will to choose and aim to direct consumers to certain preferences will be monitored more closely.

Pursuant to Article 22 of Annex-A of the Regulation, which is also mentioned in the Advertising Board's announcement, dark designs are defined as *"methods that adversely affect the will of consumers to make a decision or choice by means of tools such as guiding interface designs, options or expressions regarding a good or service on the internet, or that aim to cause changes in favour of the seller or provider in the decision they would make under normal conditions"*. Dark designs can appear in many ways such as presenting pre-selected options to consumers, making options difficult to direct consumers to certain preferences, using misleading headlines, hiding advantageous situations, and highlighting disadvantageous situations.

The decisions of the Advertising Board on the subject have not been published on the website yet. However, this step towards dark designs is an important development specifically for the field of legal design.

You can reach the Ministry of Trade's announcement on the subject here (*only available in Turkish*).

Digital Banks are Coming

Banking Regulation and Supervision Agency (**BRSA**) authorized the establishment of a digital deposit bank with a capital of 2 billion Turkish liras and with the trade name "Colendi Bank Anonim Şirketi" in its decision published in the Official Gazette on 5 August 2023 (**Decision**). It is expected that digital banks will take more place in our lives with similar permissions granted by the BRSA under the Regulation on Operation Principles of Digital Banks and Service Model Banking (**Regulation**).

The financial sector is becoming more and more digitalized with each passing day just as many other fields. In particular, digital banking is one of the most significant manifestations of the digitalization of the financial sector. The Regulation which was effective as of 1 January 2022 sets the legal frame of digital banking within the scope of the *fintech* sector. As per the Regulation, a "digital bank" is defined as a credit agency that provides banking services through electronic banking distribution channels instead of physical branches. Thus, digital banks can be summarized as organizations established as branchless banks.

The transformation of banks, which many people in Türkiye associate with physical branches, into completely digital and branchless entities, is a topic that needs to be closely monitored for its impact on customers. Despite the increasing use of electronic and mobile banking, the percentage of transactions conducted in branches still holds its significance. In this context, there is a curious anticipation regarding how digital banks will impact the banking and financial sector.

The full text of the Decision can be found here (*only available in Turkish)*.

Activities of Influencers and Vloggers Classified as Hazardous Category

The Communiqué Amending the Communiqué on Workplace Hazard Classes for Occupational Health and Safety (**Amending Communiqué**) was published in the Official Gazette on August 11. Amending Communiqué updated the "List of Workplace Hazard Classes" in the relevant regulation.

The changes introduced classify the video content creation and broadcasting activities of influencers and vloggers under the "hazardous" category.

According to experts' opinions reflected in the public, this change was made due to the risk of ergonomic diseases for individuals who spend a long time in front of screens, as is the case with video production and broadcasting activities.

You can reach the full text of the Amendment Communiqué here (*only available in Turkish)*.

E-signature Era in Google Drive and Google Documents

An electronic signature (e-signature) refers to electronic data that is attached to another electronic data or has a logical connection with the electronic data and is used for authentication. In this context; e-signature consists of letters, characters or symbols that indicate that information is transmitted in an environment close to the access of third parties, with its integrity intact and by verifying the identity of the parties.

In today's technology, e-signature, which is used for authentication in transactions carried out in digital environments, is very critical in terms of ensuring security and confidentiality in many online transactions, especially digital agreements. Various applications such as DocuSign and Adobe Acrobat have been offering e-signature support for a long time.

The latest development on the subject came from Google. Google has started to integrate e-signature technology into its products and announced the open beta version of the e-signature feature in Google Workspace. Screenshots shared by Google demonstrate that Docs and Drive users can request signatures or initials from recipients, and the signature date section can be automatically filled in. At the same time, Google also offers the ability to check whether the requested signatures have been received.

Further, it remains to be seen how Google will comply with the e-signature legislation both in Türkiye and globally and what steps it will take in this direction.

You can reach the full text of the announcement made by Google here.

THE Fine PRINT
Gökçe

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117

Answers. Not theories.

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