THE Fine PRINT

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October 2023
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Critical Changes from TCMB for Payment and Electronic Money Institutions

Central Bank of the Republic of Turkey (**TCMB**) published the "Regulation Amending the Regulation on Payment Services and Electronic Money Issuance and Payment Service Providers" (**Amendment Regulation**) and the "Communiqué Amending the Communiqué on Information Systems of Payment and Electronic Money Institutions and Data Sharing Services of Payment Service Providers in the Field of Payment Services" (**Amendment Communiqué**) in the Official Gazette dated 7 October 2023.

The relevant regulations include detailed and comprehensive regulations on plenty of topics. In particular, the regulations on the definition of digital wallet service and remote identification of payment institutions are critical.

We have compiled the main changes in the Amendment Regulation for you below:

Digital Wallet Services

Pursuant to the Amendment Regulation, the procedures and principles regarding "digital wallet" services were regulated for the first time in the legislation. Accordingly, a digital wallet is defined as "*a payment instrument that is offered as an electronic device, online service or application where the information related to the payment account or payment instrument defined by the customer is stored, and which enables the customer to perform payment transactions using the information related to the payment account or payment instrument defined by the customer*".

The Amendment Regulation also regulates that digital wallet services can be offered by payment service providers (**PSPs**) and the services that are not considered as digital wallet services.

In this context, providers wishing to offer digital wallet services must at least be authorized for "issuance of payment instruments". In addition, specific wallet services that must also be authorized for "electronic money issuance" and "payment order initiation services" were also specifically regulated.

Pursuant to the Amendment Regulation, payment and electronic money institutions offering digital wallet services but **not authorized** by TCMB **before 7 September 2023** must apply to TCMB and obtain the necessary authorization **by 7 September 2024.**

In addition, payment and electronic money institutions offering digital wallet services before 7 September 2023 and **authorized** by the TCMB are required to comply with the relevant provisions until **7 September 2024**.

Payment Order Initiation Service

Payment order initiation services were regulated under payment services. With the Amendment Regulation, certain situations that should or should not be considered as payment order initiation services are regulated. Hence, some uncertainties in practice have been eliminated. In this context, in order for a payment transaction to be considered as a payment order initiation service, the party initiating the payment transaction must use a PSP other than the PSP where its payment account is located.

However, for payment transactions initiated by the sender through the payee, if the sender does not use a PSP other than the PSP where its payment account is located to place the payment order, but only through the custody of a payment instrument issued by another PSP for the purpose of loading funds into the payment account at the PSP providing the service and the payment instrument issued by that PSP, this service will not be considered as a payment order initiation service.

Account and Infrastructure Services to be Provided to Other Payment Service Providers

The Amendment Regulation introduces several restrictions in the event that another payment service provider wishes to use the payment account or payment infrastructure services offered by a PSP, depending on the "controlling" status of the providers. In this context;

- In cases where the PSP is used by other PSPs, including a PSP over which it has control, it is required to provide services to all relevant PSPs under the same terms and conditions and with the same remuneration policy.
- In cases where a PSP offers payment account and infrastructure services, it will not be able to direct or coerce its customers to receive services from the PSP it controls in a way that would disadvantage the PSP it controls.
- Except for the services offered as an interface provider, the receiving PSPs will not be able to use expressions that may give the impression that they are acting on behalf of the controlled PSP in all kinds of documents, announcements, advertisements and public statements regarding the services they will offer.

Scope of Activities of Payment and Electronic Money Institutions

The Amendment Regulation expands the scope of activities of payment and electronic money institutions. Accordingly, institutions can offer services within the framework specified in the Amendment Regulation, including the provision and intermediation of transactions related to the purchase and sale of precious metals and precious stones and foreign exchange listed in the Decree No. 32 on the Protection of the Value of the Turkish Currency, and the provision of services as an interface provider regulated in the service model banking legislation.

Protection of Payment Funds

Pursuant to the Amendment Regulation, payment and electronic money institutions cannot pledge payment funds as collateral. However, all kinds of administrative and judicial requests such as injunctions, attachments and similar administrative and judicial requests regarding the rights and receivables of payment service users before the institution will be fulfilled exclusively by the institution.

In addition, institutions will monitor the funds collected in return for payment and electronic money by segregating them from other funds and will be able to use them only for the purpose of realizing the payment transaction. In addition, it is also regulated that the funds against electronic money will be provided by the payment and electronic money institution in a way to ensure customer-based tracking.

Additional Obligations Related to the Payment Instrument

Pursuant to the Amendment Regulation, the following additional regulations have been introduced for the mutual rights and obligations of the payment service provider and the customer:

- In case of issuance of a payment instrument compatible with more than one card issuer, the customer will be asked which card issuer the payment instrument will be issued compatible with, including all alternatives; the payment instrument will be issued compatible with the card issuer of the customer's choice.

- Before and after the issuance of the payment instrument, the customer shall not be subjected to different practices according to the card issuer; the customer shall not be discriminated against based on the card issuer; the customer shall not be directed or forced to issue the payment instrument in compliance with a particular card issuer.
- It is stated that the payment service provider that accepts card-based payment instruments shall ensure that the devices, hardware and software used in acceptance activities are compatible with the card systems established by payment system operators authorized to carry out card system establishment activities and that payment instruments issued in compliance with these infrastructures can be used in the merchants to which it provides services.

These obligations of payment service providers will enter into force on 31 March 2024. You can reach the full text of the Amendment Regulation here (*only available in Turkish*).

The significant changes brought by the Amendment Communiqué are as follows:

Audit Trail Recording Systems

Audit trails refer to the records that will enable a financial or operational transaction to be tracked from the beginning to the end, and the records that show who accessed or attempted to access information assets and what transactions the user performed. Accordingly, the Amendment Communiqué stipulates that the records to be kept in audit trail recording systems should also include "the application, communication network protocol, time and source, and destination port and IP information where the access or transaction took place".

External Service Procurement Process for Information Systems

Pursuant to the Amendment Communiqué, a supervised credit institution or financial institution, as well as its subsidiaries that provide information systems services, will be able to provide community cloud services to the parent, its subsidiaries and the subsidiaries of the parent.

In addition, it is regulated that the minimum elements of the outsourcing contract will be applied to the extent appropriate for service procurements that do not have the potential to affect the confidentiality, integrity and accessibility of data, do not cause sensitive customer data to be shared with the outsourcing service provider, and are not designed and offered specifically for the organization.

The Amendment Communiqué also stipulates that in the event that products and services to be procured within the scope of critical information systems and security are outsourced, utmost care should be taken to ensure that they are produced in Turkey or that the R&D centres of their manufacturers are located in Turkey. In addition, such providers and manufacturers are required to have response teams in Turkey, even if they are not located in Turkey.

Identification and Contract Processes to be Conducted via Remote Communication Tool

Pursuant to the Amendment Communiqué, the stages to be followed in remote identification and verification in the processes of identification and establishment of the contractual relationship to be carried out by means of remote communication have been re-regulated and their scope has been expanded. Accordingly, the Amendment Communiqué regulates the conditions for remote identification through "near field communication (NFC)", how biometric data will be used, how white light control, and liveness tests will be performed and many details regarding security elements and clarifies the steps for remote identification.

Another significant change is that the information systems used in the processes to be carried out with remote communication tools are considered as "critical information systems".

Compliance Process

Pursuant to the Amendment Communiqué, two separate compliance periods are envisaged, one for 30 June 2024 and one for 31 December 2025, varying according to the characteristics of the services offered by the service providers. In this context, relevant providers are obliged to comply with the Amendment Communiqué until the deadline is set for them, according to the characteristics of the services they offer.

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

Guidelines on the Processing of Genetic Data Published

Nowadays, genetic data is used in many fields, particularly in the healthcare sector. As a matter of fact, the diagnosis and treatment of prenatal or postnatal diseases, and analyses to determine parentage and offspring are the most used areas in the healthcare sector. However, it is also feasible to use this data for purposes such as genetic predisposition in nutrition, sports or talent, depending on the preference of individuals.

The legal basis of the issue is that; according to the Law on the Protection of Personal Data (**Law**), which is the main legislation on personal data, genetic data of individuals are considered as special categories of personal data. However, while there is no definition of genetic data in the Law and secondary regulations, the European Union's General Data Protection Regulation (**GDPR**) defines genetic data as "*personal data relating to inherited or acquired characteristics of a natural person which provide unique information relating to the physiology or health of that natural person and which result in particular from the analysis of a biological sample taken from that natural person*".

At this stage, on 13 October 2023, the Personal Data Protection Authority (**Authority**) published the Guidelines on Matters to be Considered in the Processing of Genetic Data (**Guideline**). Guideline includes explanations under various headings, including (*i*) the processing of genetic data and its principles, (*ii*) the obligations of data controllers, and (*iii*) the security of genetic data.

In this regard, the Authority emphasizes the sensitivity of genetic data due to not only the person themselves, but also their ancestors, relatives and even national connections through genetic data. At the same time, it emphasizes the criticality of this data type due to the fact that unlimited information can be obtained through genetic data and new information can be acquired with new technologies as long as genetic data is retained.

Pursuant to the Guideline, the Authority particularly emphasizes the following regarding the processing of genetic data:

- Processing activities carried out through genetic data processing must be carried out without prejudice to the essence of the right, in compliance with the principle of proportionality and by taking measures regarding data security. Under all circumstances, utmost attention should be paid to proportionality, necessity and purpose-limited processing. In this context, no additional personal data should be processed after obtaining the amount and type of genetic data suitable to fulfill the purpose.

- The processed genetic data must be kept for the required period of time, and after the necessity is no longer required, the data in subject must be destroyed without delay in accordance with the personal data storage and destruction policy.
- Authority emphasizes the difficulty of anonymizing genetic data and draws the boundaries of how and in what way this can be achieved with the Guideline.

In the Guideline, the conditions to be sought in order for the explicit consent to process genetic data to be valid were also mentioned. In this respect, the Authority once again emphasized that explicit consent must be given primarily for a specific subject and be limited to that subject, and that explicit consent for the processing of genetic data cannot be required for the provision of any service.

Moreover, the Guideline also addressed the issue of the transfer of genetic data abroad. Due to the sensitivity of these data and their capacity to jeopardize even national security, even if the legal conditions for transfer abroad are met, it is recommended that data processing activities should be carried out domestically when they are possible.

In addition, the technical and administrative measures that data controllers must take to ensure the security of genetic data are also explained in detail in the Guideline.

Authority also referred to the Regulation on Genetic Diseases Evaluation Centers, the UNESCO International Declaration on Human Genetic Data and many other legislations that regulate genetic data, and draw the legal boundaries of genetic data processing activities.

It is also understood that with the Guideline, the Authority aims to increase the awareness and consciousness of the data subjects or data processors. In this context, the Guideline is also quite crucial for the Authority's approach to genetic data and the assessments it will make in the coming period.

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

AYM's Decision Affecting the Provision of Geographic Data License

The Constitutional Court (**AYM**) issued a decision on case no E.2020/42 K.2023/99, which was filed for the annulment of some of the provisions in Law No. 7221 on Making Amendments in Geographical Information Systems and Some Laws (**Law**), on 18 May 2023. The decision was published in the Official Gazette on 4 October 2023.

Among the provisions in the Decision, there are "collaborations for revenue sharing in the field of data mining and new data generation in the case of appropriate opinions were allowed, provided that national security provisions, laws related to intellectual, industrial, and commercial rights, and the Personal Data Protection Law were not violated" as stated in the Law. The part stating that these collaborations can be carried out free of charge with data-producing institutions, organizations, and universities, with the approval of the relevant opinions, was subject to an annulment lawsuit.

The grounds for the annulment request include allegations that the relevant regulation violates the right to personal data protection. Additionally, it is argued that these rules are inconsistent with international agreements, the details of sharing are unclear, lack objective criteria, and are in violation of various articles of the Constitution.

AYM, following a detailed assessment of the definitions and scope of geographical data in relation to the annulment request, concluded that geographical data contain location and spatial information, do not contain any form of personal data, and therefore, during the collection and generation of geographical data, there is no access to data that qualify as personal data, and personal data is not being collected. Consequently, it decided that the relevant regulation "does not restrict the right to demand the protection of personal data." Furthermore, AYM determined that the regulation being challenged clearly defines the types of collaborations in which geographical data can be shared free of charge and the conditions under which such sharing is subject, making the regulation neither vague nor unpredictable. Therefore, AYM concluded that the regulation is not in violation of the Constitution.

However, the assessment of the second sentence in the second paragraph of Article 1 of the Law attracted attention. This provision stipulates that individuals and private legal entities who want to collect, produce, share, or sell geographical data within the scope of the National Geographic Data Responsibility Matrix of Türkiye must be subject to legal regulations related to intellectual, industrial, and commercial rights and the Personal Data Protection Law. It also states that these individuals must have the necessary documents to carry out their commercial activities and that these transactions are subject to the approval of the Ministry of Environment, Urbanization, and Climate Change (**Ministry**). AYM annulled the part of the provision stating that the approval period and the procedures and principles related to data would be determined by the Ministry, as it found this to be contrary to the Constitution.

In this context, AYM stated that it is unconstitutional to introduce another regulation on matters that should be regulated by law. AYM stated that, in accordance with the principle of legal certainty, legal regulations should be clear, understandable and predictable in a way to provide assurance to individuals and the administration, and that the freedom of enterprise protected by the Constitution is possible for real or private legal entities to carry out economic and commercial activities in the fields they prefer and to carry out their activities in the manner they wish without interference from the state or third parties. In this context, AYM found that the regulation subject to the annulment case restricted the freedom of enterprise as it did not determine the conditions and objective criteria for the permissions to collect, produce, share or sell geographical data and regulated the freedom of enterprise, which should be regulated by law, through an administrative act and decided to annul the regulation.

The annulment decision will enter into force nine months later (on 4 July 2024). With the enforcement of the Decision, secondary provisions of the regulations issued by the Ministry regarding permission and licensing obligations will lose their legal basis. However, the removal of the legal basis for secondary regulations issued by the Ministry alone is not sufficient to halt these processes.

Therefore, the fate of these secondary regulations will become clear in the coming period, depending on how they are assessed after the matter is brought before the Council of State.

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

Advertising Board's "We Asked ChatGPT" Decisions

Recent breakthroughs in technology have also started to have an impact on advertising. Accordingly, we are encountering statements in various advertisements where AI can be seen to confirm or support the claim in the advertisement and promotion.

As known, on 13 September 2023, the Advertising Board (**Board**) announced for the first time that it had taken into its agenda advertisements created using artificial intelligence together with behaviors that victimize citizens and manipulate consumer perception. In the past weeks, the Board published a bulletin and decided that 3 advertisements created using ChatGPT could mislead consumers.

In this context, as a result of the Board's review, the claims in the advertisements containing the following statements were found to be problematic:

- *"**According to ChatGPT**, … is the biggest fashion retail brand in Turkey"*
- *"**We asked ChatGPT** and got the only right answer! Meet … now for all your fast, secure and cost-effective logistics transactions to any point in the world."*
- *"**According to ChatGPT**, the most popular chatbot based on artificial intelligence, Turkey's most iconic private television channel is …!"*

In the review conducted by the Board, it was stated that the answers given by ChatGPT were not up-to-date, precise, objective and verifiable. In some decisions, it was also emphasized that the answer could change if the questions were asked in different ways. In addition, it was stated that these statements did not include research results obtained from the relevant departments of universities or accredited or independent research, testing and evaluation organizations; and it was once again emphasized that artificial intelligence-based questioning is not safe and will not be accepted by the Board and the advertisements were suspended.

As seen, the Board decided that the advertisements in subject, which were created with data that is not up-to-date and accurate and not based on objective research results, violate the legislation as they contain expressions that contain the perception of superiority over competing products or companies. Accordingly, the Board revealed that the data obtained through any artificial intelligence program, specifically the popular artificial intelligence application ChatGPT, is not accurate.

You can reach the bulletin containing the relevant decisions of the Advertising Board here (*only available in Turkish*).

Turkish Parliament Debates the Draft Law on Renting Houses for Tourism Purposes

As of the date this article has been prepared, at the General Assembly of the Grand National Assembly of Turkey, the first 16 articles of the first part of the Law Proposal on the Leasing of Houses for Tourism Purposes and Amendments to Certain Laws (**the Proposal**) were adopted.

This initiative means that various regulations/restrictions are being applied to the rental methods that have been frequently talked about in the tourism sector in recent times.

Within the scope of the adopted articles, the procedures and principles regarding the rental of residences to real and legal persons for tourism purposes were determined. Accordingly, leases for more than 100 days at a time were excluded from the scope.

In order to rent houses for tourism purposes, a permission certificate must be obtained from the Ministry of Culture and Tourism before a tourism rental agreement is signed. In these applications, it is also mandatory to submit the unanimous approval decision taken by all floor owners of the building where the relevant independent section is located.

The obligation to obtain the permit belongs to the lessor or Group A travel agencies certified in accordance with the Law on Travel Agencies and the Association of Travel Agencies.

The rental activities of high-quality housing can also be carried out by the housing enterprise. In this case, the permission certificate will be issued in the name of the housing company.

The Proposal also sets out administrative sanctions for unauthorized rental activities and permit holders. Accordingly, those who rent out houses rented for tourism purposes without a permit will be imposed an administrative fine of 100,000 TL for each rented house and will be given 15 days to obtain a permit to operate. At the end of this period, an administrative fine of 500,000 TL will be imposed on those who continue to rent for tourism purposes without obtaining a permit, and another 15-day period will be given to operate by obtaining a permit. An administrative fine of 100,000 TL will be imposed for each contract on those who rent out the tourism housing rented from the permit holder to third parties on their behalf and account.

An administrative fine of 100,000 TL for each contract will be imposed on those who rent out the dwelling for tourism purposes on their own behalf and account, and those who mediate the rental of dwellings without a permit for tourism purposes.

Intermediary service providers, which enable the electronic commerce and promotion of unauthorized rental activities and do not remove the content within 24 hours despite the warning made by the Ministry, will be subject to an administrative fine of 100,000 TL for each residence. In addition, if this decision is not complied with, an administrative fine of 100,000 TL will be imposed on intermediary service providers for each residence.

An administrative fine of 1 million TL will be imposed on those who continue their rental activities for tourism purposes without a license, and those who rent out the same residence more than 4 times within one year from the date of the first contract, although they make a lease contract for more than 100 days each time.

In cases where the location, quality and physical characteristics of the housing rented for tourism purposes are misleadingly introduced to the user through articles, advertisements, posters, brochures, social media, web pages and similar tools, or the conditions promised are not provided or the housing rented for tourism purposes is allocated to the user for a shorter period than the period specified in the contract, the administrative fine will be 100,000 TL.

An administrative fine of 100,000 TL will be imposed if the housing rented for tourism purposes is not delivered to the user in accordance with the contract, and an administrative fine of 200,000 TL will be imposed in the event that the payment received is not refunded within the given 15-day period.

Permit certificates can be cancelled in some cases. Accordingly, the permit certificate will be cancelled in cases where the holder of the permit certificate requests the cancellation of the permit certificate, it is determined that the tourism rental activity has been terminated, the application is not made by the new lessor of the tourism rental housing for the transfer of the permit certificate within the 30-day period to be given, or the obligations are not fulfilled despite the change of the permit certificate holder is deemed appropriate, and the authorized public institutions and organizations report that the tourism rental housing is used in violation of public order, public security and public morality. The rights of the users of the residences whose permission certificate is cancelled will continue until the end of the contract period.

The regulation will enter into force on 1 January 2024. Those who are engaged in tourism leasing activities on the date of entry into force of the regulation will be obliged to apply to the Ministry to obtain a permit within one month from the date of entry into force of the relevant article. The procedures for issuing a permit certificate will be finalized within 3 months from the date of application. Those whose applications are not accepted will not be able to operate, but the rights of the users of these houses will continue until the end of the contract period.

You can access the full text of the Proposal here (*only available in Turkish*).

eIDAS 2.0 Efforts Gain Momentum at the European Commission

Electronic Identification, Authentication and Trust Services Regulation (Regulation (EU) No 910/2014), known as the **eIDAS Regulation**, is a regulation that brings a set of rules and standards for electronic identification and trust services in European Union member states. This regulation has been under revision for some time and a new version, known as eIDAS 2.0, has been expected to be published. This update aims to renew and improve the first eIDAS Regulation to adapt it to technological developments and the new needs of the EU digital market.

According to statements made by senior officials of the European Parliament on 16 October 2023, the technical work on eIDAS 2.0 has been completed. As a result of the negotiations on technical issues in recent months, the necessary work on the texts has been carried out with the contributions of EU2023ES and the European Commission.

In addition, the statement indicated that negotiations have resumed to reach a consensus and address all other pending issues, including matters such as Wallets, QES (Qualified Electronic Signatures), open-source solutions, unique data sources, verification mechanisms, and certification. Accordingly, the eIDAS 2.0 regulation is expected to be voted in the General Assembly in the first quarter of 2024.

THE Fine PRINT
Gökçe
October 2023
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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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