THE Fine PRINT

Gökçe

MAY 2024
126

Critical Drafts on the Transfer of Personal Data Abroad from the KVK Institution

- Draft Bill on Crypto Assets is at the Turkish Grand National Assembly!
- What Changes are Set Forth in the Turkish Commercial Code?
- ".a.tr" Domain Name Applications' Deadline Extended
- Annual Legal Interest Rate Increased from 9% to 24% effective from 1 June 2024

THE Fine PRINT — Gökçe

MAY 2024
126

Draft Regulation on Procedures and Principles Regarding the Transfer of Personal Data Abroad are Published

The Personal Data Protection Authority (**Authority**) published the Draft Regulation on the Procedures and Principles Regarding the Transfer of Personal Data Abroad (**Draft**) on its website on 9 May 2024 and opened it for public comment.

As is known, some of the long-awaited amendments to the Law on the Protection of Personal Data (**PDPL**), which came into force in 2016, were realized on 12 March 2024 with the 8th Judicial Package. Among these amendments was the new framework to be adopted for the transfer of personal data abroad. We have covered these amendments introduced by the judicial package in our TFP Special Issue 2024.

In this context, with the amendments, a new three-tiered and alternative transfer system was introduced for the transfer of personal data abroad as (i) an adequacy decision; if not available (ii) the existence of appropriate safeguards; if not available (iii) in occasional (not repetitive) circumstances, transfer based on the conditions determined.

In this regard, although the Draft repeats the changes made in the PDPL with the 8th Judicial Package at many points; it also aims to regulate some details about the transfer mechanisms. Below, we have compiled the main topics.

Implementation Details of the Standard Contract (SCC) Have Been Determined

The Draft regulates the details of "providing appropriate safeguards through a standard contract," which is perhaps the most frequently used mechanism for transferring data abroad. In this context, the following points are of particular interest:

- The standard contract will be announced by the Personal Data Protection Board (**Board**) and must be used without amendment. Additionally, even if standard contracts are signed in a foreign language, the Turkish text will be the authoritative version. It is a matter of curiosity how the language requirement and the restriction on amendments will be received in practice.

- The persons required to sign standard contracts will be only the parties to the transfer or persons authorized to represent and sign. Even if this regulation did not exist, the legal practice would be similar. However, it is important that the Authority wants to emphasize this point.

- Standard contracts must be notified to the Authority within five business days of their signing by physical delivery, KEP (registered e-mail/REM), or another method determined by the Board. As a rule, this notification obligation falls on the data transferor. However, if the parties wish, they may specify in the standard contract who holds this notification obligation.

- When making a notification, documents proving that those who signed the standard contract are authorized and a notarized translation of each document in a foreign language must be attached to the notification.

It remains to be seen how the regulations on the implementation of standard contracts and notification to the Authority will be managed by data controllers and/or data processors who will need to conclude hundreds of standard contracts in some cases. In particular, it is eagerly awaited how foreign-based global giant companies will act to comply with these procedures.

Details of the Binding Corporate Rules Have Been Determined

With the changes in the judicial package, the Authority has regulated that companies within a group of enterprises engaged in joint economic activity can provide appropriate safeguards through binding corporate rules (BCR). In this context, the issues that should be included in the BCR are detailed in the Draft. Parties who want to transfer data abroad via BCR must obtain approval from the Board. The Draft also details the issues that the Board will evaluate during the approval stage.

Additionally, the critical issues in the Draft are as follows:

- In parallel with the amendment to the PDPL, the Draft defines the Data Transferee as the data controller or data processor who transfers personal data abroad. This definition emphasizes that personal data can be transferred abroad by both data processors and data controllers.

- The requirement for personal data transfers to comply with the law and relevant legislation also applies to subsequent transfers of personal data abroad. Although this has been implicit in the basic logic of the PDPL, this regulation clearly establishes the necessity of conducting a "transfer impact analysis" along the data transfer chain.

- The details of the adequacy decision that the Board may issue for a country, a sector, or an international organization are regulated. The Board will review its adequacy decisions every four years. If, during the review, the Board determines that an adequate level of protection is not provided, it can change, suspend, or revoke its decision with future effect. Moreover, the Board can meet with the authorities of the country or international organization to remedy the situation before making a decision. These decisions of the Board will be published in the Official Gazette and on the website of the Authority.

- The 8th Judicial Package amendment stated that in the absence of an adequacy decision and if the parties fail to provide appropriate safeguards, "data transfer based on occasional circumstances" could be made exceptionally. The Draft defines occasional circumstances as transfers that are not regular, occur on a single or few occasions, are not continuous, and are not in the ordinary course of business. Thus, the Draft eliminates uncertainty.

The Authority collected opinions and assessments on the Draft until 20 May 2024. After reviewing these opinions, the Authority is expected to finalize the Draft and publish the regulation as soon as possible. The full text of the Draft is available here (only available in Turkish).

The Personal Data Protection Authority Released Draft Documents on Standard Contracts and Binding Corporate Rules

As part of the KVKK amendments, the presence of an appropriate standard contract and the existence of binding corporate rules were listed among the appropriate safeguard methods. In practice, these two regulations are expected to be the most frequently used methods for ensuring appropriate safeguards for the transfer of personal data abroad.

In this context, the Personal Data Protection Authority released draft documents on standard contracts and binding corporate rules for the transfer of personal data abroad, opening them to public consultation.

The draft documents for standard contracts, which are open to public consultation, vary according to different transfer scenarios between data controllers and data processors, in line with their legal obligations. Additionally, several important points to note are:

- The amendments to KVKK explicitly regulate "subsequent data transfers," with relevant provisions and commitments included in the contracts. This can be seen as a first step towards requiring companies to conduct transfer impact assessments.

- The scope of the authority granted to sub-processors by data processors is also detailed in the relevant contract. This is another aspect of the necessary evaluations for subsequent data transfers.

- The details of the data transfer are included in the annexes of the contract as expected. In this context, details regarding the data to be transferred, the activity of the data transfer, the activity of the data recipient, the categories of data transferred, the group of data subjects, the legal basis for the transfer, retention periods, recipient group, and transfer frequency will be detailed in the contract. This will require data controllers and data processors to conduct comprehensive internal evaluations to prepare these contracts.

For binding corporate rules, the Personal Data Protection Authority has published two separate application forms for data controllers and data processors. In this context, the Authority will gather information and obtain commitments from group companies on various matters, such as legal obligations and the links between group companies. Guides to assist in filling out these forms are also among the documents published.

The Personal Data Protection Authority collected feedback and evaluations on the draft documents until May 27, 2024. After assessing these, the announcement of the final texts of standard contracts and binding corporate rules is expected shortly. You can access the Authority's related announcement and draft documents here (*only available in Turkish*).

Draft Bill on Crypto Assets is at the Turkish Grand National Assembly!

The long-awaited regulation on crypto assets will enter into force soon. The Law Proposal on Amendments to the Capital Markets Law No. 6362 (commonly known as the Draft Bill on Crypto Assets) was submitted to the Grand National Assembly of Turkey on 16 May 2024. Accordingly, the Draft Bill on Crypto Asset Laws was approved by the Grand National Assembly of Turkey Plan and Budget Commission on 30 May 2024.

Due to the unique structure of crypto assets, characterized by the irreversibility of transactions and challenges in tracking assets, comprehensive regulations on crypto assets and crypto asset platforms have been anticipated for a long time. One of the most striking examples highlighting the need for regulation is the misuse of crypto assets belonging to customers on the platform FTX in the USA, where customer assets were used without permission. Similarly, in the Thodex case in Turkey, the platform failed to meet its obligations to its users, resulting in unjust treatment of customers. The increasing number of users trading on crypto asset platforms in Turkey has underscored the need to regulate these platforms, mirroring international examples. Therefore, it is fair to say that these regulations have been eagerly awaited for various reasons.

We have compiled the significant provisions in the Draft Bill on Crypto Assets.

Scope: The Draft Bill on Crypto Assets includes definitions of crypto-assets, crypto-asset service providers (**SPs**), and crypto-asset platforms. It primarily regulates the activities of crypto-asset platforms, along with the trading and transfer transactions and procedures that residents in Turkey may carry out on these platforms.

In addition, the Draft Bill on Crypto Assets stipulates that SPs must obtain permission from the Capital Markets Board (**CMB**) to be established and operate. The principles and procedures to be followed will be determined by secondary regulations to be issued by the CMB. It is evident that these secondary regulations will be quite decisive in situations where boundaries are deferred to them.

Basic obligations of SPs: With the Draft Bill on Crypto Assets, SPs are obliged to establish an internal control unit to provide a secure system, and their information systems and technological infrastructures must comply with the criteria determined by The Scientific and Technological Research Council of Turkey (TUBITAK) in order to be permitted by the CMB to start their operations.

The proposal requires SPs and crowdfunding platforms to become members of the Turkish Capital Markets Association, allowing them representation within a professional organization.

It is mandatory for SPs to sign contracts with their customers, and these contracts can be concluded via distance communication tools, similar to the options available to financial institutions. Additionally, any contractual terms that eliminate or limit the responsibility of the SPs towards their customers will be deemed invalid.

Furthermore, SPs must comply with the principles determined by the CMB regarding publications, announcements, advertisements, declarations, and all forms of commercial communication.
Under the scope of the Crypto Asset Law Proposal, SPs will be required to obtain permission from the CMB for share transfers.

Authorizations and obligations of the CMB: Within the scope of the Draft Bill on Crypto Assets, the CMB (Capital Markets Board) is authorized to determine the principles regarding the issuance of capital market instruments as crypto assets. The other powers granted to the CMB in the proposal are as follows:

- The CMB will be able to regulate the content, amendments, fees, termination conditions, etc., of the contracts between SPs and customers, and will be able to override conditions that limit the liability of SPs.

- SPs will be audited by independent audit firms authorized by the CMB.

- In case of unauthorized capital market activities, the CMB will be able to issue access blocking orders, which is likely to be one of the most controversial provisions.

According to the proposal, the CMB is authorized to regulate the procedures and principles regarding the purchase and sale of crypto assets through platforms, the initial sale or distribution, the settlement, transfer, and custody of crypto assets.

Additionally, the CMB will determine the procedures and principles regarding investment consultancy and portfolio management for crypto assets.

Moreover, the CMB may set rules for the issuance of capital market instruments as crypto assets and the dematerialized tracking of these assets on electronic platforms offered by the CMB, instead of being tracked by the Central Registry Agency. Accordingly, in the case of issuance of capital market instruments as crypto assets, the tracking, claiming, and transfer of their rights against third parties will be based on the records in the electronic environment where they are created and stored.

Key obligations and key regulations for crypto asset platforms: The Draft Bill on Crypto Assets introduces a wide range of obligations for platforms, requiring a comprehensive compliance process. The main provisions are listed below:

- Platforms must establish a written procedure for the determination of the crypto assets to be traded and for the termination of their trading. Secondary regulations regarding these procedures will be determined by the CMB. Additionally, other institutions and organizations, particularly TUBITAK, may also be consulted on the principles and guidelines.

- Internal Mechanisms for Customer Complaints: Platforms are required to establish internal mechanisms to resolve customer complaints.

- Customer Identity Verification: Platforms must verify the identities of customers in accordance with the Law No. 5549 on the Prevention of Laundering Proceeds of Crime and relevant legislation.

- The draft bill clearly stipulates that the assets of crypto asset platforms and the assets of users must be separate. This means that user accounts will not be subject to seizure in potential enforcement proceedings against the crypto asset platform.

- Platforms are obliged to notify the CMB of reports they generate by identifying market-distorting actions and transactions carried out by them. They must also take necessary measures against the accounts that carry out such transactions.

Sanctions regulated in the Draft Bill on Crypto Asset: The main sanctions in the Draft Bill on Crypto Asset are as follows:

- SPs are liable for damages arising from their unlawful activities or failure to fulfil their obligations. In case the damage cannot be compensated, SP members may also be liable.

- Administrative fines can be imposed on those who violate the law or CMB regulations.

- Those who provide unauthorized crypto asset services will be punished with imprisonment from 3 to 5 years and a judicial fine.

- In the case of an embezzlement offence committed by SPs, the chairman and members of the board of directors and other members may be punished with imprisonment from 8 to 14 years and a judicial fine.

- In case of losses arising from the behaviour of SPs, information systems and personnel, service providers will be liable under the "hazard liability" of the Turkish Code of Obligations. If such losses cannot be compensated, members of the service provider may be held liable according to their negligence.

- As a critical point, it is also regulated as unauthorized crypto asset service provision for platforms based abroad to carry out activities for residents in Turkey or to offer a prohibited activity. In parallel, if any unauthorized capital market activities are carried out through the internet, regardless of whether it is a domestic or foreign platform, a decision can be taken to remove the content and/or block access.

Transitional Provisions: Following the enactment of the Draft Bill on Crypto Assets, existing SPs are obliged to:

- Apply to the CMB within one month from the effective date to obtain an operating permit.
- Alternatively, make a liquidation decision within three months and cease accepting new customers.

New SPs wishing to start operations after the enactment and entry into force of the draft bill must apply to the CMB before commencing their activities. The CMB will announce applications on its website, and organizations that decide to liquidate must announce this on their websites and notify their customers.

Additionally, the proposal stipulates that SPs operating in Turkey but based abroad must terminate their activities in Turkey within three months from the effective date of the Draft Bill on Crypto Assets. The activities of ATMs and similar electronic transaction devices in Turkey, which enable customers to convert their crypto assets into cash or vice versa and transfer crypto assets, will also be suspended within the same period.

As seen, the Draft Bill on Crypto Assets represents a significant and critical step in regulating and supervising the crypto asset market in Turkey. By bringing crypto asset service providers under the supervision of the CMB, regulating platform obligations, and determining applicable sanctions, the draft bill is expected to enhance market transparency and security.

You can reach the full text of the Draft Bill of Crypto Asset here (*only available in Turkish*).

What Changes are Set Forth in the Turkish Commercial Code?

The Law on Amending the Turkish Commercial Code and Certain Laws, numbered 7511 (**Amending Law**), has been published in the Official Gazzette dated 29 May 2024 and a series of changes that will lead to significant transformations in the business world have entered into force. With the Amending Law, the innovations and conveniences we will encounter in the field of commercial law are summarized for you below:

- The phrase "every year" previously found in Article 366 of the TCC made it mandatory for joint stock companies to hold elections for the chairperson and vice-chairperson of the board of directors annually, resulting in the board being left without a chairperson and vice-chairperson if elections were not held the following year. The Amending Law sets forth aligning the election of the chairperson and vice-chairperson in joint stock companies with the term of the board of directors. With this change, the chairperson and vice-chairperson can be appointed for the term of the board, eliminating the need to repeat this process annually.

- In light of the above explanations, joint stock companies will no longer have to repeat the processes of deciding on the distribution of duties for the chairperson and vice-chairperson from among the board members and registering this decision with the trade registry every year; thus, it is expected that there will be no disruptions or vacancies in management.

- In the previous regulation, under Article 375 of the TCC, the appointment and dismissal of managers and signatories are among the non-delegable authorities of the board of directors. This situation could lead to issues such as restricting the ability to act according to business needs and making quick decisions, especially in the processes of appointing and dismissing branch managers. Under the changes in the Amending Law, the appointment and dismissal of branch managers and signatories will be removed from the non-delegable authorities of the board of directors and will be subject to delegation. Thus, businesses will be able to appoint and dismiss necessary individuals more quickly without a board decision. This change is considered an important step to enhance the operational efficiency and competitive strength of businesses.

- The Amending Law also brings significant changes regarding the calling of board meetings in the TCC. Under the previous regulation, Article 392 of the TCC, there were some ambiguities regarding the calling of board meetings, which could hinder decision-making processes. In the current situation, due to the lack of a specific period and method for calling meetings, it was difficult to hold meetings in a timely and effective manner. To address these issues, the Amending Law mandates that a meeting call must be made by the chairperson of the board within thirty days from the date the written request is received by the majority of the board members. If this call does not reach the chairperson or vice-chairperson, the call can be made by the board members who requested it.
V
- As will be recalled, the Presidential Decree published in the Official Gazette dated 25 November 2023 and numbered 32380 made changes to the minimum capital amounts for joint stock and limited companies in the TCC. The Decree stipulated that, effective from 01.01.2024, the minimum capital amounts for joint stock companies are 250,000 Turkish liras, for non-public joint stock companies that have adopted the registered capital system are 500,000 Turkish liras, and for limited companies are 50,000 Turkish liras. The Amending Law imposes the obligation for joint stock and limited companies established before 01.01.2024 with capital below the minimum thresholds set by the Decree to increase their capital to the specified minimums. However, companies in this situation will be given until 31.12.2026 to comply with the new regulations. Sanctions are also foreseen for ensuring compliance with this process; if existing companies do not adjust their capital to the new regulations by the specified date, their trade registry records will be deleted, and the companies will enter liquidation.

- Additionally, a different regulation is proposed for non-public joint stock companies that have adopted the registered capital system. These companies will only be considered to have exited the registered capital system as long as their issued capital is 250,000 Turkish liras or more. However, if their issued capital falls below 250,000 Turkish liras, these companies will also enter liquidation with the deletion of their trade registry records. With these changes, it is aimed to ensure certainty and reliability in the minimum capital amounts of companies.

- Another regulation introduced with the Amending Law is that in reinstatement lawsuits filed against trade registry offices by companies and cooperatives, the trade registry offices will not be held liable for litigation expenses if the lawsuits are accepted.

The regulations introduced to the TCC by the Amendment Law have come into effect as of 29 May 2024, the publication date of the Amendment Law.

In today's fast-changing commercial world, it is of great importance for companies to make quick and effective decisions. It can be said that the changes regarding the delegation of board authorities in the Amending Law aim to make internal company mechanisms work more efficiently. Additionally, extending the distribution of board duties from annually to up to three years is a well-placed step to prevent administrative and legal gaps. With the new regulations, the situation of companies with capital below the minimum amount will also be clarified. Overall, the Amending Law is expected to accelerate companies' decision-making processes, reduce administrative burdens, and facilitate long-term planning.

You can reach to the Amending Law from here (only available in Turkish).

".a.tr" Domain Name Applications' Deadline Extended

The Turkish Information Technologies and Communication Authority (ICTA) published the "Procedures and Principles for the Allocation of Domain Names in the a.tr Structure" and the "Fees for Domain Names in the a.tr Structure" (Deci-sion) on 25 August 2023 and the order of prioritization was determined as three categories.

With the completion of the 1st and 2nd categories, the final category, the 3rd category, was started on 14 February 2024. Pursuant to Article 9 of the Decision and the announcement published by TRABIS (TR Network Information System), within the scope of the 3rd category, as of 25 August 2023;

- “a.kep.tr”,
- “a.av.tr”,
- “a.dr.tr”,
- “a.com.tr”,
- “a.org.tr”,
- “a.net.tr”,
- “a.gen.tr”,
- “a.web.tr”,
- “a.name.tr”,
- “a.info.tr”,
- "a.biz.tr"
- “a.tv.tr”,
- “a.bbs.tr”,
- “a.tel.tr”

owners of domain names with extensions were prioritized. Accordingly, applications were to be accepted from 14 February 2024 until 14 May 2024; assessments were to be made and allocation procedures were to be carried out between 14 May 2024 and 14 June 2024.

Recently, TRABIS announced that the deadline for the applications of the priority right holders belonging to the 3rd category has been extended until 7 August 2024.

However, the announcement did not specify how long this assessment process and allocations will be completed. It is expected that the issue will be clarified in the coming days and an announcement will be made by TRABIS and/or ICTA.

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

Annual Legal Interest Rate Increased from 9% to 24% effective from 1 June 2024

On 21 May 2024, with the Presidential Decision published in the Official Gazette, the annual legal interest rate regulated in the "Law No. 3095 on Legal Interest and Default Interest" was increased and set as **24%.**

As it is known, the annual legal interest rate of 12% was reduced to 9% by the Council of Ministers Decision dated 19 December 2005 and numbered 2005/9831 (*only available in Turkish*). Thus, as of 1 January 2006, the annual legal interest rate was being applied as 9% for more than 18 years.

With this decision published in the Official Gazette, the annual legal interest rate was increased by 12 points after 18 years. As stated in the decision, the annual legal interest rate of 24% will be applied as of **1 June 2024**. The Presidential Decision is available here (*only available in Turkish*).

THE Fine PRINT
Gökçe
MAY 2024
126

Answers. Not theories.

Gokce Attorney Partnership

Editors:

Görkem Gökçe
gorkem.gokce@gokce.av.tr

Doç. Dr. Bedii Kaya
bedii.kaya@gokce.av.tr

Elif Aksöz
elif.aksoz@gokce.av.tr

Yağmur Yollu
yagmur.yollu@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
info@gokce.av.tr
0 212 352 88 33