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Comparative Analysis of Special Categories of Personal Data: How closely does the Data Protection Law in Turkey follow the GDPR?

A. Sercan Sağmanlıgil

***ÖZET**

Günümüzde veriye atfedilen değer her geçen gün arttıkça, kişilere ait verilerin korunması da temel hak ve özgürlüklerin korunması kapsamında daha büyük bir öneme sahip olmaya başladı. Bu çerçevede, kişisel verilerin korunması hukukun bugün önemli bir gereklilik olduğunu rahatlıkla söyleyebiliriz.

Nitekim Türkiye de bu alanda yakın bir zamanda Avrupa Birliği'nin 95/46/EC sayılı direktifini mehaz alarak yeni bir kanun yürürlüğe soktu. Bununla birlikte, getirilen yeni düzenleme ile uygulamada birtakım kaçınılmaz sorunlar da ortaya çıkmaya başladı. Bu sorunların pek çoğu da nitelikleri itibarıyla daha çok koruma ihtiyacı duyulan özel nitelikli verilerin işlenmesi çerçevesinde toplandı.

BASEAK Papers'ın bu sayısında yazar Sercan Sağmanlıgil, özel nitelikli kişisel veriler kavramını mercek altına alıyor. Bu kapsamda bu kavramı Türkiye'de yürürlükte olan Kişisel Verilerin Korunması Kanunu ve Avrupa Birliği Genel Veri Koruma Tüzüğü ("GDPR") ile karşılaştırmalı bir şekilde incelemek suretiyle uygulamada yaşanan sıkıntılara ne gibi çözümler getirilebileceğini tartışıyor.

Anahtar Kelimeler: kişisel verilerin korunması, KVKK, özel nitelikli veriler, sağlık verisi, kişisel veri

JEL Kodları: K00, K20, K29

ABSTRACT

As the importance of data increases day by day, protecting fundamental rights and freedom in this area is becoming much more significant. In this respect, data protection is one of the biggest essentials today.

Turkey recently enacted a new law that primarily follows EU Directive 95/46/EC. A number of practical issues have inevitably stemmed from the application of the current rules. These issues mainly surround the processing of the special categories of personal data that are more capable of harming the fundamental rights and freedoms of individuals.

In this edition of the BASEAK Papers, Sercan Sağmanlıgil, the author, examines the concept of the special categories of personal data. Within this concept, he conducts a comparative analysis of Data Protection Law in Turkey and the GDPR. As a conclusion, he provides significant insights into how the current practical issues can be resolved by the lawmaker.

Keywords: data protection, GDPR, special categories of personal data, health data, personal data

JEL Codes: K00, K20, K29

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I. Introduction

It is the age of data and it is increasing its value with every passing day. At the same time, the types of personal data are evolving extremely fast as well. It is an inevitable fact that reckless and arbitrary processing of personal data may cause great harm to companies and individuals[1].

[Therefore, the new age requires data protection rules. Rules are not just for securing a person's data, but also for protecting the fundamental rights and freedoms attached to it.]

Data protection regulations in the European Union date as far back as 1995. By contrast, Turkey has only just begun its legislative efforts in this area and recently enacted Law no: 6698 ("Data Protection Act"), which essentially follows the EU Directive 95/46/EC ("Directive"). Not surprisingly, it aroused controversy in Turkey that the Data Protection Act is based on the Directive rather than the EU Regulation 2016/679 ("GDPR"), which repealed the Directive and introduced new regulations in data protection.

These criticisms are made especially in the area of special categories of personal data that are more capable of harming the fundamental rights and freedoms of individuals[2]. As they are more sensitive by their nature, the general rule for data processing should be stricter than for the usual processing activities[3]. Moreover, as it will be subject to stricter conditions, exceptions to the general rule for processing such special categories of personal data should be clearly provided by the lawmaker.

As will be addressed in chapter 2, the GDPR provides sufficient legal grounds for the data controller who has to process special categories of personal data in line with their core business activities[4]. By contrast, the Data Protection Act is substantially inadequate for providing legal grounds that allow exceptions to the general strict rule for processing activities. This causes a bottleneck in the implementation of the Data Protection Act.

Within this context, this paper will initially analyse the general conditions for processing special categories of personal data within the scope of the Data Protection Act and the GDPR. Subsequently, chapter 3 will address the main issues arising from the inadequacy of the Data Protection Act in a comparative way.

II. Legislative Framework

In this chapter, this paper analyzes the special categories of personal data under the Data Protection Act and the GDPR; the comparative assessment of both regulations will be addressed in the following chapter.

II.1. Legislative Framework

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II.2. Data Protection Law in Turkey

Article 6 of the Data Protection Act is the main provision that sets out the framework of the processing conditions for the special categories of personal data.

The Data Protection Act does not provide a definition of the special categories of personal data; however it gives a list of special categories of personal data in numerous clauses[5]. According to paragraph 1 of Article 6:

> *"Data relating to race, ethnic origin, political opinions, philosophical beliefs, religion, sect or other beliefs, appearance and dressing, membership of association, foundation or trade union, health, sexual life, criminal conviction and security measures, and biometrics and genetics"*

are defined as special categories of personal data.

In addition, the Data Protection Act specifies the main condition for processing of special category data to be obtaining the consent of the data subject.

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[1] P. T. J. Wolters, The security of personal data under the GDPR: a harmonized duty or a shared responsibility?, International Data Privacy Law, Volume 7, Issue 3, August 2017, Pages 165–178, https://doi-org.ezproxy.library.qmul.ac.uk/10.1093/idpl/ipx008

[2] Recital of the EU General Data Protection Regulation, Paragraph 51 http://www.privacy-regulation.eu/en access date 20.5.2019

[3] Elif Küzeci, Kişisel Verilerin Korunması, Ankara Turhan Kitapevi, 2010 s.233

[4] Viviane Reding, The European data protection framework for the twenty-first century, International Data Privacy Law, Volume 2, Issue 3, August 2012, Pages 119–129, https://doi-org.ezproxy.library.qmul.ac.uk/10.1093/idpl/ips015

[5] Doc. Dr. Hüseyin Murat Develioğlu, Avrupa Birliği Genel Veri Koruma Tüzüğü ile karşılaştırmalı olarak Kişisel Verilerin Korunması Hukuku, On iki levha yayıncılık, Aralık 2017, sayfa 72

Article 6 also includes the exceptional legal grounds under which the data controller may be able to process the special categories of personal data without obtaining the consent of the data subject. According to paragraph 3 of Article 6, special categories of personal data other than personal data relating to health and sexual life can be processed without the consent of the data subject if the processing activity is required by any Data Protection Act.

While it is unclear why the Data Protection Act distinguishes health and sexual data from other kinds, it also stipulates that this data can be processed for the purpose of protection of public health, operation of preventive medicine, medical diagnosis, treatment, and care services, planning and management of health services and financing by persons under the obligation of secrecy or authorized institutions and organizations.

Paragraph 4 of Article 6 refers to the necessity for additional security measures for special categories of personal data. Those measures to be taken by the data controller were announced by the Board in March 2018. According to the Board's decision[6], the data controllers who process special categories of personal data shall:

- *prepare a separate policy and procedures for special categories of personal data;*
- *take specific measures for the special category of personal data processing activities in which the employees are involved;*
- *take specific measures for the processing activities which take place in electronic environments;*
- *take certain measures for processing activities that take place in physical environments;*
- *take certain measures for transferring special categories of personal data.*

II.3. GDPR

In this section, the Paper analyses the main rules for the processing of special categories of personal data under GDPR.

Similar to the Data Protection Act, the GDPR also determines the special categories of personal data in numerous clauses. According to paragraph 1 of Article 9 of the GDPR, personal data revealing.

> *"racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation"*

will be deemed special categories of personal data.

On the other hand, the GDPR directly prohibits processing of special categories of personal data. In this respect, the consent of the data subject is deemed one of the exceptional legal groundsunder which the data controller may be able to process the special categories of personal data.

More specifically, paragraph 2 of Article 9 stipulates the legal grounds for processing special categories of personal data. In accordance with paragraph 2, the data controller may process the special categories of the personal data if one of the following applies:

- *the data controller obtains the explicit consent of the data subject*[7]
- *processing is necessary for the purposes of carrying out the obligations and exercising the specific rights of the controller or of the data subject in the field of employment and social security and social protection Law*[8]*;*
- *processing is necessary to protect the vital interests of the data subject oranother natural person, where the data subject is physically or legally incapable of giving consent;*

[6] The Board's Decision number 2018/10, dated 31 January 2018 https://www.kvkk.gov.tr/Icerik/4110/2018-10 access date 20.05.2019

[7] This will not apply if the Union or member state Data Protection Act provide that the prohibition referred to in paragraph 1 may not be lifted by the data subject;

[8] It applies if it is authorized by the Union or member state Data Protection Act or a collective agreement pursuant to a member state Data Protection Act providing for appropriate safeguards for the fundamental rights and the interests of the data subject.

- *processing is carried out in the course of its legitimate activities*9*;*
- *processing relates to personal data that is manifestly made public by the data subject;*
- *processing is necessary for the establishment, exercise or defense of legal claims or whenever courts are acting in their judicial capacity;*
- *processing is necessary for reasons of substantial public interest;* 10
- *processing is necessary for the purposes of preventive or occupational medicine, for the assessment of the working capacity of the employee, medical diagnosis, the provision of health or social care or treatment or the management of health or social care systems and services;* 11
- *processing is necessary for reasons of public interest in the area of public health, such as protecting against serious cross-border threats to health or ensuring high standards of quality and safety of health care and of medicinal products or medical devices;*12

*processing is necessary for archiving purposes in the public interest, scientifior historical research purposes or statistical purposes*13. As can be clearly seen, the exceptional legal grounds under GDPR are quite broad. Thus a data controller may easily find a legal ground for processing special categories of personal data[14].

Finally, similarly with the additional security measure provision in the Data Protection Act, the GDPR also gives space for member states to introduce further conditions, including limitations, with regard to the processing of genetic data, biometric data or data concerning health.

III. Evaluations

In this chapter, the paper will examine the differences between the rules set out in the Data Protection Act and the GDPR for the processing of special categories of personal data. Following this comparison, the paper will point out common issues stemming from this difference.

III.1. Comparative Analysis

III.1.1. The scope

As is mentioned in Chapter 2, both the Data Protection Act and GDPR define the special category of personal data in numerous clauses. In this respect, it seems the initial difference is revealed in the list of the special categories of personal data. As can be clearly seen from Article 6 of the Data Protection Act, unlike the GDPR, it regards "appearance and dress" and "criminal convictions and security measures" as special categories of personal data.

The author believes that the main reason for this distinction is the cultural and political differences between Europe and Turkey. In this respect, "criminal convictions and security measures" will most probably refer to any connection to a terrorist network or a ban on leaving the country etc. In a similar manner, the "appearance and dress" will be deemed as a style of dressing that is able to identify a person, such as use of a headscarf etc.

[9] It applies only for the legitimate activities with appropriate safeguards of a foundation, association or any other not-for-profit body with a political, philosophical, religious or trade union aim and on condition that the processing relates solely to the members or to former members of the body or to persons who have regular contact with it in connection with its purposes and that the personal data are not disclosed outside that body without the consent of the data subjects.

[10] It applies on the basis of the Union or member state Data Protection Act, which shall be proportionate to the aim pursued, respect the essence of the right to data protection and provide for suitable and specific measures to safeguard the fundamental rights and the interests of the data subject.

[11] It applies on the basis of the Union or member state Data Protection Act or pursuant to a contract with a health professional and subject to the conditions and safeguards referred to in paragraph 3 of the Article 9. This data can be processed by or under the responsibility of a professional subject to the obligation of professional secrecy under the Union or member state Data Protection Act or rules established by national competent bodies or by another person also subject to an obligation of secrecy under the Union or member state Data Protection Act or rules established by national competent bodies.

[12] It applies on the basis of Union or Member State Data Protection Act which provides for suitable and specific measures to safeguard the rights and freedoms of the data subject, in particular professional secrecy.

[13] It applies in accordance with Article 89/1 of the GDPR based on the Union or member state Data Protection Act, which shall be proportionate to the aim pursued, respect the essence of the right to data protection and provide for suitable and specific measures to safeguard the fundamental rights and the interests of the data subject.

[14] Victoria Hordem, How do you solve a problem like special categories of data? https://www.bateswells.co.uk/file/dpl-march-18-victoria-hordern-article-pdf access date 20.05.2019

III.1.2. Legal Grounds

In addition, the Data Protection Act and GDPR demonstrate a fundamental contrast in the legal grounds for processing special categories of personal data. According to the GDPR, processing the special categories of personal data is not allowed. However, there are a number of exceptional legal grounds that the data controller can rely on for processing that data. In this respect, the GDPR refers to the consent of the data subject as an exceptional legal ground, rather than a fundamental rule.

On the other hand, unlike the GDPR, the Data Protection Act stipulates the legal ground for processing special categories of personal data as the consent of the data subject. It should be noted that this difference makes no sense in practice. Since in both jurisdictions the data controller may process the special categories of personal data by obtaining the consent of the data subject.

From a general perspective, the GDPR allows member states to draw up the framework for the use of special categories of personal data in any national law. As is specified in the previous chapter, the exceptional legal grounds in the GDPR allow member states to determine the scope of each legal ground. In this respect, it seems that the GDPR allows that processing conditions for the special categories of personal data should be partially under the control of member states. By determining the scope of the exceptional legal grounds that allow the data controller to process special categories of personal data without obtaining the consent of the data subject, member states may decide to what extent the explicit consent of the data subject should be regarded as an additional safeguard/ legal ground for the data controller.

By contrast, the Data Protection Act clearly made a different choice and it provides that the data controller may rely on the consent of the data subject for the processing of special categories of personal data. However, as will be explained in the following section, this difference in approach of the Data Protection Act causes significant issues in practice as for some processing activities it is not suitable to obtain the consent of the data subject, such as for employees.

The most significant discrepancy between the Data Protection Act and the GDPR is obviously the scope of the exceptional legal grounds for processing special categories of personal data. The GDPR clearly makes the exceptional legal grounds as broad as possible. On the other hand, the Data Protection Act allows the processing of special categories of personal data without explicit consent only if it is permitted by a Data Protection Act. In this respect, the legal grounds − which are quite significant for companies, such as the legitimate interest of the company, data subject or the public − are not included within the scope of Article 6 of the Data Protection Act.

Moreover, the Data Protection Act even restricts the processing activities that rely on any Data Protection Act and leaves the data relating to health and sexual life out of its scope. As will be explained in the following section, it creates a difficult situation for almost all companies regardless of whether their main activities are related to the health sector or not. The main reason is that the data controllers from almost all sectors are obliged to process health data in order to comply with the law and other secondary legislation, and obtaining the consent of the data subject is not appropriate in some instances.

Finally, it should be noted that the GDPR restricts the authority of member states to introduce further conditions, limitations with the processing of generic data, biometric data or data concerning health.

III.1.3. Issues in Practice

In the previous section, this paper highlighted the main differences between the Data Protection Act and the GDPR within special categories of personal data. Within this context, this section focuses on the main issues stemming from the aforementioned inadequacies of Article 6 of the Data Protection Act. The issues caused by the narrow coverage of Article 6 of the Data Protection Act can be set forth under two headings: issues arising from the inadequacy of exceptional legal grounds; and issues arising from the lack of coverage of health and sexual data.

Issues arising from the inadequacy of exceptional legal grounds

As discussed in the previous chapter, the Data Protection Act stipulates that the data controller can process special categories of personal data only if he/she obtains the explicit consent of the data subject or it is permitted by law. Thus, as obtaining the consent of the data subject is not feasible in some instances, it can be claimed that the controller will not have much space if their processing activity

is not clearly permitted by law. To make this clearer, processing of fingerprints can be given as an example.

Let's assume a company whose main activity is the production of confidential technological units in Turkey desires to establish a fingerprint system to monitor the accession of its employees. As the company clearly operates a confidential business, it is highly feasible to establish a fingerprint system and it has a legitimate interest in protecting the significant know-how of the company. Fingerprints of the employees are biometric personal data, and therefore a special category of personal data[15]. In this respect, the processing activity will be subject to Article 6 of the Data Protection Act. Hence, the processing should either rely on the explicit consent of the employee or it should be permitted by law.

As the processing of fingerprints of employees in the workplace is not permitted by any relevant law, the company has only one option, which is obtaining the explicit consent of the employee. However there is an obvious imbalance between the employee and the employer in relying on the employee's consent. This scenario may cause significant issues as the employee is required to give his explicit consent with free will in every case. In this respect, the employees should have an **unconditional option** for not giving his consent. For instance, in the current situation, if the employee chooses to refrain from giving his consent for the fingerprint system, the company should provide an alternative option such as an electronic card system etc. that does not require the processing of special categories of personal data.

As a result, the lack of legal grounds for a legitimate interest for processing special categories of personal data makes the implementation of necessary processing activities almost impossible for data controllers.

Therefore, it is inevitable that the Data Protection Act will have to be updated in line with the similar approach embraced by the GDPR in order to expand the scope of the exceptional legal grounds.

Issues arising from the lack of coverage of health and sexual data

As mentioned, Article 6 excludes data related to health and sexual life from the scope of the exceptional legal grounds that allow the processing of special categories of personal data if it is permitted by law. This exclusion does not appear in EU legislation or practice, so it is hard to see what was the rationale for this.

On the other hand, it can be easily asserted that this exclusion causes significant issues in practice. To illustrate it by an example, let's assume a company is required to keep personal files on its employees pursuant to labor law in Turkey. The scope of the personal files clearly includes special categories of personal data of the employees such as blood type and, to comply with the labor law, the company should keep the personal file precisely.

On the other hand, as Article 6 of the Data Protection Act excludes health data from the exception of being permitted by law, the only option for the company is seeking the explicit consent of its employees, which is quite problematic as explained above. Although Article 6 provides an exception that allows processing of health data by persons who are under secrecy obligations, this is far from squaring the circle in practice as it is only applicable for health professionals [16].

Therefore, the exclusion may cause significant issues for data controllers, who are unable to rely on the explicit consent of the data subject. In this respect, this paper emphasizes the necessity for the abolition of this exclusion from Article 6 of the Data Protection Act.

IV. Conclusion

As explained in detail, the Data Protection Act embraces quite a conservative approach for processing special categories of personal data. By contrast, the GDPR allows data controllers to rely on several different legal grounds. In this respect, the paper concludes that the GDPR puts emphasis on the legitimate interest of the parties, while the Data Protection Act clearly ignores it.

Although it can be claimed that the exceptional legal grounds in the GDPR create a contradiction with the general

[15] Danny Ross, Processing biometric data? Be careful, under the GDPR, https://iapp.org/news/a/processing-biometric-data-be-careful-under-the-gdpr/ access time 20.05.2019

[16] Article 29, Data Protection Working Party, Advice paper on special categories of data ("sensitive data") https://www.pdpjournals.com/docs/88417.pdf access time 20.05.2019

processing rule that prohibits the processing of special categories of personal data, it should be recognized that it resolves many issues in practice, while the Data Protection Act clearly does not.

In this respect, this paper concludes that Article 6 of the Data Protection Act should be updated in line with Article 9 of the GDPR. To resolve the current issues in practice, the data protection law should be examined with reference to real situations. Hence, this update should include the addition of legitimate interests that allow the data controller to process special categories of personal data without obtaining the explicit consent of the data subject.

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