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The tale of two data protection regimes: The analysis of the recent law reform in Turkey in the light of EU novelties

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A B S T R A C T

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Personal data protection regimes across jurisdictions have been faced with new challenges due to certain legislative gaps created by technological advancements and social media eco-systems that place data at the center of connected societies. Realizing this, in April 2016, EU officials adopted Regulation 2016/679 On Protection of Natural Persons with Regard to Processing and Free Movement of Personal Data. At the very same time, the Turkish counterpart finally enforced its Law on protection of such data. This article provides a threefold analysis of the newly introduced reform in relation to the EU rules on data protection and the recently adopted Turkish law, focusing on the citizen, business and governance aspects of the two regimes. Main issues related to cross border transfer of such data are also analysed, considering that in today's digital world it is almost impossible to do business without cross border movement/exchange of data. Since the transfer of personal data to recipients outside the EU/Turkey is normally prohibited unless certain imperative conditions are met, understanding of the lawful data transfer mechanisms in both jurisdictions is essential. Objectives of the article are to examine the two data protection regimes with regard to the new adjustments and assess the extent of consistency between the Turkish law and the reformed EU data protection rules. As being one of the first studies in this context, the article refers to the relevant case law in both regimes. The results of this analysis should be of a particular interest as it comprises a comparative analysis of the legal environment of data protection in the EU and Turkey.

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1. Introduction

The enactment of the Law of Turkey on Protection of Personal Data¹ (the “Turkish Law”) and recent amendments to the EU data

protection rules via adoption of a new Regulation 2016/679 on Protection of Natural Persons with Regard to Processing of Personal Data and on Free Movement of Such Data (the “Data Protection Regulation”)² bring about certain discussions as to the effectiveness of the two new data protection regimes, and

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¹ Law of Turkey No 6698 On Personal Data Protection, Official Gazette, 07.04.2016, No 29677.

² Regulation 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, European Parliament and Council 2016, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2016.119.01.0001.01.ENG&toc=OJ:L:2016:119:TOC (accessed 15 September 2016).
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concerns to various organizations (as well as individuals) that are either based in or do business in the EU and/or Turkey, even if based abroad. What new rights are available for individuals, what steps should be taken and what policies should be implemented by such organizations to make sure that they are fully compliant with the data protection rules, how to lawfully transfer data across borders (which is particularly relevant for organizations that are using online IT services, cloud based services or global HR databases) – are among the key questions nowadays. That is why comparing the two regimes and identifying the main commonalities and discrepancies is important in the process of establishing and contributing to the consistent data protection compliance culture, particularly considering the fact that the Turkish Law is based on the Directive 95/46/EC³ (the “Directive”) which will no longer be in force (as the Data Protection Regulation repeals it). The comparison of the two regimes will also contribute to a better understanding of the essence of the updated rules and hence to minimizing the risks of being faced with severe penalties for any non-compliance (which under the new EU regime may turn to be quite a lump sum).

It should be mentioned that the enactment of the data protection law in Turkey and reform of the respective rules in the EU are motivated by significant changes in the ways people use information due to the societal and technological developments. More specifically this is due to the fact that information sharing across borders has increased dramatically particularly because of the emergence of new devices and applications that are widely used today for business and personal purposes. This has resulted in more personal data⁴ being publicly available globally. The value of European citizens’ personal data has the potential to grow to nearly EUR 1 trillion annually by 2020.⁵ In this huge big data environment, the multiplicity of information sources highlights the need to ensure personal data protection. Considering this, individuals require a better protection regime for their personal data which may be exposed to certain abuses by both business practices and technological advancements.

³ Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data, European Parliament and Council OJ L 281, 23.11.1995, p. 31.

⁴ Personal data is defined according to the Data Protection Regulation as “any information relating to an identified or identifiable natural person”, including “a name, an identification number, location data, an online identifier, factors specific to physical, physiological, genetic, mental, economic, cultural or social identity that such natural person.” A similar definition can be found in the law of Turkey defining personal data as “any information relating to a natural person whose identity has been or may be identified” (Article 3/c). Even though definition of personal data has common features in both European and Turkish law, contemporary discussions on the protection of personal data are shaped in the search of a legislative environment that is efficient and effective in the context of the potential use and process of the data. Today, personal data has become a rivalrous system resource comprising an entire business ecosystem (Purtova, N. ‘The Illusion of Personal Data as no one’s property’, *Law Innovation and Technology*, vol. 7, no.1, 2015, p. 83–111).

⁵ The EU Data Protection Reform and Big Data Factsheet, European Commission, 2016. http://ec.europa.eu/justice/data-protection/files/data-protection-big-data_factsheet_web_en.pdf (accessed 15 September 2016).

Protection of individuals with regard to the processing of their personal data, irrespective of nationality and/or residence, is one of the fundamental rights envisaged by Article 8(1) of the Charter of Fundamental Rights of the European Union, as well as by Article 16(1) of the Treaty on the Functioning of the European Union (the “TFEU”). The Convention of the Council of Europe on the Protection of Individuals with regard to Automatic Processing of Personal Data emphasises on the importance of data protection and proposes an international regime for the protection of this fundamental right.⁶ The respective provisions on the protection of personal data are reflected in the law of Turkey, particularly in Article 20 of the Constitution of Turkey. It states that every single person has the right to request respect for privacy of his/her life. However, though the privacy is considered as the background of the protection of personal data, the right to privacy and protection of personal data are recognized as separate rights.⁷ The constitutional amendments⁸ that were enacted in 2010 contribute to the scope of the article by including the right to request protection of personal data. Accordingly, currently the right to protection of personal data under the Constitution of Turkey includes being informed of, having access to and requesting the correction and deletion of his/her personal data, and being notified whether these are used in consistency with the envisaged objectives.

Data protection in both jurisdictions is based on individual’s right to information privacy. In this regard, privacy is protected by the provisions that safeguard the processing of personal data only for specified and legitimate purposes. Yet, the right to personal data protection cannot be absolute, meaning that it “must be considered in relation to its function in society and be balanced against other fundamental rights”⁹ in line with the proportionality principle and public interest. This is particularly important nowadays when personal data has become an integrated part of business. There should be a well-balanced relationship between the interests of the owners of the data and the potential users or processors in order not to use data protection argument as an unreasonable obstacle to doing business. The data protection regimes of both jurisdictions provide for certain exemptions to the data protection, the adequacy of which (along with other essential components of data protection regimes) is yet to be assessed.

Both Turkish and EU data protection regimes bear three objectives which are competitive and complementary with each other. Those three objectives can be outlined as (i) protection

⁶ Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data deals with automatic processing of personal data. It proposes an international regime for this fundamental right in the digital environment. Turkey is a signatory of this Convention and ratified it on 2 May 2016. – Convention, Council of Europe, CETS No. 108, 1981, https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/108/signatures?p_auth=wnOB96Ro (accessed 15 September 2016).

⁷ Bogdanovskaya, I. *Privacy Protection*, 2016, pp. 211–238 in Dumortier, J. Blanpain, R. Hendrickx, F. IEL *Cyber Law*, Kluwer Law International BV, Netherlands, 2016.

⁸ A paragraph introduced by Law of Turkey, No 5982, Amending Certain Provisions of the Constitution, September 12, 2010, http://www.ab.gov.tr/files/Bas%C4%B1nMusavirlik/haberler/constituional_amendments.pdf (accessed 20 November 2016).

⁹ Data Protection Regulation, para 4.

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