

A COMPARATIVE ANALYSIS OF LEGITIMATE INTEREST IN TURKISH DATA PROTECTION LAW AND GDPR

1. Introduction

Legitimate interest of the data controller and third party is one of the valid reason for legitimate data processing. The concept of legitimate interest is one of the highly debated and confusing subject in the scope of the data protection practices in both Europe and Turkey. The Turkish Data Protection Act (hereinafter referred to as “**KVKK**”) has been articulated by taking into account the provisions of the former EU Directive 95/46/EC (“**Directive**”) which is also the basis of General Data Protection Regulation (“**GDPR**”). Legitimate interest was first found in the Directive. However, since the wording of the corresponding articles in KVKK and GDPR are dissimilar, shedding some light on the the notion has become indispensable.

This paper will present a comparative analysis regarding one of the legal grounds based on “legitimate interest” stated under KVKK and GDPR and is structured as follows. First part of the paper will examine two different provisions separately by reflecting the differences and similarities of conditions for processing personal data without receiving explicit consent of the data subject provided that the legitimate interests are necessary.

2. Understanding the legal framework of legitimate interest under KVKK and GDPR

Lawfulness of processing has been regulated under Article 5 of the KVKK and Article 6 of the GDPR. Processing of personal data of individuals is prohibited, unless the law provides an exception. Major allowance of processing is the consent given by the data subject. From the perspective of the KVKK, consent of the data subject is also not superior than the listed legal grounds for processing. However, it has been stated that an evaluation should be held regarding whether there is any other seven legal basis for processing, before receiving consent of the data subject.¹ While data processing could be legitimised with any of the legal grounds, conducting activities on explicit consent would be deceptive and abuse of rights.²

With regards to GDPR, even though consent is the most well-known valid legal basis, it is not the initial criteria that must be satisfied. Therefore, it is just one of the legal grounds and has no precedence over legitimate interest of data controller or third party.³ In some cases, considering the fact that both KVKK and GDPR set the standards of data subject’s consent very high, receiving it may create an additional burden on the organisations.⁴ For instance, getting consent is unpractical in the case of data analytics in which data sets are acquired

¹ Turkish Data Protection Authority Guideline “Conditions for processing personal data”, <https://www.kvkk.gov.tr/SharedFolderServer/CMSFiles/8c90423f-97ea-4d81-a7c1-ace74295c2b8.pdf>, accessed 25 April 2020.

² Ibid.

³ “Consent” (General Data Protection Regulation (GDPR)December 3, 2018) <<https://gdpr-info.eu/issues/consent/>> accessed 20 April 2020.

⁴ Ferretti, Federico. 'Data Protection and the Legitimate Interest of Data Controllers: Much Ado about Nothing Or the Winter of Rights?', *Common Market Law Review*, vol. 51/no. 3, (2014), pp. 843-868, 854.

from different sources.⁵ Therefore, building processing on the legitimate interest ground is more feasible in certain occasions under the GDPR compared to KVKK.

Article 5(2)(f) of the KVKK and Article 6(1)(f) of the GDPR corresponds with each other in terms of the legitimate interests. GDPR states that “processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child”.⁶ Article 6(1)(f) of GDPR also adds that this provision is not enforceable for “processing carried out by public authorities in the performance of their tasks”.⁷ On the other hand KVKK indicates that “processing of data is necessary for the legitimate interests pursued by the data controller, provided that this processing shall not violate the fundamental rights and freedoms of the data subject”.⁸

3. Legitimate Interest of third parties

Article 6(1)(f) of the GDPR states that legitimate interest shall be pursued by the data controller or by a third party. On the other hand, only data controller’s interest falls under the scope of the KVKK Article 5(2)(f). The difference between the wordings of the legislations would raise the issue about what would be done if there is an overriding interest of public or another third party in terms of obtaining certain information.⁹

For instance, in the case of corruption or irregularities faced within the activities of a public authority or a company located in the border of Turkey, there is no doubt that public or the employees would hold a higher interest.¹⁰ Another example is that there could be a felony which would be in the concern of the public, or for the purpose of ensuring accountability and transparency within the operations of the public institute certain information must be shared with the society.¹¹ Since legitimate interest is not included in the scope of KVKK, there is a necessity to receive the consent of the data subject on order to process personal data. However, supporting the idea that public interest in certain cases must be disregarded is not feasible and fair.

Given the fact that wordings of two data protection legislation is completely different, this would result in facing with a significant deviation from the EU practice. This is an issue that must be evaluated and subject to an issuance of a secondary legislation. Also, Turkish DPA

⁵ Ibid.

⁶ GDPR, art 6(1)(f).

⁷ GDPR, art 6(1).

⁸ KVKK, art 5(1)(f).

⁹ “Processing Personal Data Based on Legitimate Interest: A Comparison of Turkish Data Protection Law, the Directive 95/46/EC and the GDPR - Privacy - Turkey” (Articles on All Regions including Law, Accountancy, Management Consultancy Issues) <<https://www.mondaq.com/turkey/Privacy/571252/Processing-Personal-Data-Based-on-Legitimate-Interest-A-Comparison-of-Turkish-Data-Protection-Law-the-Directive-9546EC-and-the-GDPR>> accessed 26 April 2020.

¹⁰ Ibid.

¹¹ Ibid.

will discuss this provision and would make a decision accordingly in order to fulfill the gap in the KVKK.

4. Reversal of burden of proof in right to object

One of the rights that has been recognised for data subjects is the “right to object” which is under the Article 21 GDPR. This provision grants data subject to assert an objection for the processing of his personal data which is based on Article 6(1)(f) legitimate interest. GDPR provides that if data controller bases his processing the personal data on legitimate interest, data subject has an opportunity to object the activity.¹² Once data subject assert his right, data controller is obliged to stop the processing, unless he demonstrates a compelling legitimate grounds which override the interest, rights and freedoms of the data subject.¹³

The right to object was first granted under the Article 14 of the Directive. However, the wording of the provision is completely different than the GDPR. This article explicitly mentions that objection of an individual must be justified. Furthermore, the processing must be stopped by the controller only if the data subject bases his objection on a compelling legitimate ground.

When we look at the position of KVKK, the rights of the data subject has been articulated under Article 11 KVKK. Under this provision, no explicit provision included regarding the object to processing as in the meaning of both the Directive and GDPR. KVKK is also silent about the burden of proof, since it does not incorporate any regulation regarding the right to object for processing based on legitimate interest.

Even though related provision of the GDPR is based on the Directive, there is an essential shift regarding the burden of proof.¹⁴ This amounts to the possibility that a controller is permitted to process a personal data in accordance with Article 6(1)(f), however, a data subject is still allowed to allege an objection which is justified.¹⁵ Unlike the Directive, It is the data controller who has the burden of proof with regards to demonstrating compelling legitimate grounds. Particular difference between the legislations could be seen as a tightening of the principle.¹⁶ The GDPR strengthens the right to object with regards to processing.¹⁷ By the virtue of the right, GDPR undoubtedly raises the power of the data subject upon their personal data. As a result, it is clear that interest of data subjects are privileged in the eye of law.

Even though KVKK has adopted majority of the principles and provisions stated under the Directive, it is clear that lawmaker intentionally choose not to regulate this topic. However, such a deficiency in the KVKK would lead into inequalities between the data controller and

¹² GDPR, art. 21(1).

¹³ Ibid.

¹⁴ Wolters, P. T. J. 'the Control by and Rights of the Data Subject Under the Gdpr', *Journal of Internet Law*, vol. 22/no. 1, (2018), pp. 1-18.

¹⁵ Ibid.

¹⁶ Rights to object, <https://www.twobirds.com/~media/pdfs/gdpr-pdfs/33--guide-to-the-gdpr--rights-to-object.pdf?la=en>, accessed 26 April 2020.

¹⁷ Sobolewski, Maciej, Joanna Mazur, and Michał Paliński. 'GDPR: A Step Towards a User-Centric Internet?', *Intereconomics*, vol. 52/no. 4, (2017), pp. 207-213.

data subject. Compared to the other legal grounds for processing personal data, legitimate interest appears to be more subjective which means that it must be evaluated case-by-case basis. This is why acknowledging the right to object for data subject's would make the assessment lawful. In addition, considering that the purpose of the KVKK is to protect the personal data of individuals which makes data protection law a data subject center public law, not recognising such a right would damage the objectives of the KVKK.

5. Three-step assessment based on legitimate interests

One of the significant component of the application of legitimate interest requires the use of a three-step test in order to process a personal data lawfully. This assessment involves, first, an evaluation whether data controller or a third party have a “real, present, and clearly articulated” interest.¹⁸ Secondly, necessity of the processing must be analysed which refers to an obligation to weigh if there is any other way which is less violating the rights of data subject.¹⁹ Finally, a balancing test must be carried out by making a comparison between the interest of the data controller or third party and rights of data subjects.²⁰ Neither of the legislations applied in the EU provide any instruction regarding the assessment.

The situation of enforcing the provision in bad faith or misinterpretation may result in the be used as a “tool for circumvention”.²¹ Some of the authors have granted the provision under the Directive as a legal loophole in the protection of personal data, since there is no authority to evaluate whether the balancing test applied accurately, unless a claim has been asserted in front of the court.²²

According to the KVKK, there is no explicit provision or issued guideline regarding whether there is an obligation to hold a balance test. However, in a recent decision given by Turkish DPA it was stated that interest of the data controller must not significantly damage the fundamental right and freedom of the data subject and the assessment of this comparison shall be held by performing a balance test.²³ With the help of this decision balance test has become a precedent in the evaluation of the right.

Finally, on the contrary of the GDPR and Directive, interest of the individuals has not been stated under the Article 5(1)(f), in addition to the fundamental rights and freedom. According to the decision of Turkish DPA, it has not been considered while assessing the balance test as well. However, when we look at the reasoning of the law, lawmaker broadens the scope of the law by mentioning about the interest of the data subject's. However, non-binding nature

¹⁸ Article 29 Working Party: Opinion on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46 (WP 217) (2014). http://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2014/wp217_en.pdf, accessed 29 April 2020.

¹⁹ Kosta, E. Consent in European Data Protection Law. Martinus Nijhoff Publishers, Leiden (2013).

²⁰ Gil González, Elena, Elena Gil González, Paul de Hert, et al. 'Understanding the Legal Provisions that Allow Processing and Profiling of Personal data—an Analysis of GDPR Provisions and Principles', ERA Forum, vol. 19/no. 4, (2019), pp. 597-621, 605.

²¹ Ibid (n 4) 852.

²² Bits of Freedom “A loophole in data processing. Why the ‘legitimate interests’ test fails to protect the interests of users and the Regulation needs to be amended”, https://www.bof.nl/live/wp-content/uploads/20121211_onderzoek_legitimate-interests-def.pdf, accessed 27 April 2020.

²³ Turkish Data Protection Board Decision 2019/78 numbered, 25/03/2019 dated decision, <https://www.kvkk.gov.tr/Icerik/5434/2019-78>, accessed 20 April 2020.

of the reasoning should not be disregarded. Therefore, considering that interest of the data subjects has not been evaluated under the decision as well, there is still a risk of not including the interest of individuals which would eventually harm the purpose of the law

6. Conclusion

The concept of legitimate interest refers to an establishment of balance between the business and individual. However, some of the words in both of the legislations are creating ambiguity which results in uncertainty in the practice and requires a comprehensive interpretation. Particularly there should be clearance about the legitimate interest of the third parties for the purpose of public interest. In addition to that right to object should be provided for the data subjects who are under the scope of the KVKK. Finally, a clarification is also needed for the interest of individuals. It is clear that further clarification should be implemented either by a secondary legislation or court decisions of the supervisory authorities in the forthcoming days.