



TURKISH DPA ISSUES 1.950.000 TL ADMINISTRATIVE FINE TO WHATSAPP LLC.

10.09.2021

Authors: Atty. Berfu Yalçın (LL.M.), Legal Intern Serdarhan Güler

In early 2021, WhatsApp LLC.'s (WhatsApp/Data Controller) imposition of the transfer of its users' personal data to third parties residing abroad as a mandatory element for the use of the application had severe reactions and occupied Turkey's agenda for a while. In this context, The Personal Data Protection Authority (the Board) has put the situation under the microscope and decided to initiate an ex officio investigation on WhatsApp LLC in accordance with the Turkish Personal Data Protection Law.

The inquiry was predominantly on the issues of whether WhatsApp was in violation of Article 9 of the Turkish Personal Data Protection Law (*transfer of personal data*), whether this situation constituted a breach in terms of being "*freely given*" explicit consent as specified in the Law, and whether WhatsApp complied with general principles of the Data Protection Law. The Board finally announced on 03.09.2021 that the inquiry was completed and decided to impose an administrative fine of 1,950,000 Turkish Liras on WhatsApp LLC.

The main ground for the decision was obtaining the data subject's explicit consent through approval of the Terms of Service. In this context, a single explicit consent was obtained from the users to process their data and transfer it to third parties residing outside of Turkey, *without presenting a right to choose on providing consent*. Furthermore, considering that WhatsApp obtained explicit consent through a contract that covered data processing and transfer to the third parties in a single text, the explicit consent's essential elements were absent. Indeed, pursuant to Turkish Law, explicit consent should be *freely given, specific, and informed*. In this scope, explicit consent cannot be obtained from data subjects as a prerequisite for the performance of a service. Therefore, in the concrete case, elements of explicit consent were damaged.

WhatsApp's practice was questionable considering the criteria for valid consent. Indeed, under the Turkish Data Protection Law, where explicit consent is required for the process of personal data, such consent will not be valid unless it is given freely. The Board stated that WhatsApp's demand for explicit consent was designed as a condition for the continuation of the provided service. Thus, the element of "*expressing explicit consent with free will*" was damaged, and WhatsApp's method of obtaining consent was not in line with Turkish Data Protection Law. Another important revelation in the decision is that the clauses on data transfer in the contract were imposed on the users as non-negotiable provisions, and this way, the principle of "*compliance with the lawfulness and fairness*" as per article 4 of the Law was violated.

Albeit WhatsApp has requested explicit consent from its users about the data to be processed, this consent has been requested for all kind of personal data. Consequently, the requested consent was not limited to the purpose of processing. Moreover, it was not clearly stated which data would be transferred to third parties and for which purpose exactly. For these reasons, the Board decided that the controller (WhatsApp LLC.) was and still is in violation of the principles of “being processed for specified, explicit and legitimate purposes” and “being relevant, limited and proportionate to the purposes for which they are processed” in Article 4 of the Law.

Another aspect of the inquisition was made in the context of Article 9 of the Law, which regulates the transfer of personal data to foreign countries. Considering that the data controller (WhatsApp) did not obtain the explicit consent of its users in line with the Law for data transfer, and further the data controller also did not apply to the Board for determining whether the relevant foreign country had adequate protection, it has been determined that the data controller did not comply with the Article 9.

Another significant point of the decision is that the data controller did not obtain explicit consent from the data subjects regarding the personal data processing activity to be carried out through cookies for profiling purposes. Thus, the personal data processing activity carried out within this scope is also contrary to Law. In this context, one of the important issues pointed out by the decision is the necessity of obtaining explicit consent from the data subjects regarding the use of cookies. In cases where the explicit consent of the data subject is required, it must not be forgotten that the obligation to inform and obtaining explicit consent must be fulfilled separately, pursuant to article 5/f of the *Communique on Principles and Procedures to be Followed in Fulfillment of the Obligation to Inform*.¹

In line with these explanations, the Board decided to impose an administrative fine of 1,950,000 Turkish Liras on WhatsApp LLC. In addition, although the Terms of Service and Privacy Policy texts dated 04.01.2021 are currently presented to users as valid versions, WhatsApp stated those texts have not been implemented yet. Consequently, since it is necessary for texts to be compliant with the Law, in order to inform data subjects accurately, the Board instructed WhatsApp to adapt its policies accordingly within three months. Since the Privacy Policy was used as a text for informing the data subject on processing, and it did not carry the elements in regard to the obligation of the data controller to inform, the Board decided to instruct WhatsApp to inform data subjects accordingly with the provisions of Article 10 of the Law and *Communique on Principles and Procedures to be Followed in Fulfillment of the Obligation to Inform* and to inform the Board about the result of the said actions.

Therefore, with this decision, in addition to the administrative fine, the Board decided WhatsApp to remedy identified infringements pursuant to Article 15/5 of the Law. According to the relevant article, this decision shall be implemented without delay and within thirty days at the latest after the notification of the decision. If the Board's instruction to remedy the infringements is not complied by WhatsApp LLC. within the time limit, Article 15/7 of the Law will be applied. Respectively, Board can decide to halt the process and transfer of data to foreign countries by WhatsApp. In this regard, the effect of the decision on the policies of WhatsApp LLC. and in case of non-compliance with the Board's instructions, the legal consequences of the non-compliance will emerge in the upcoming days.



İsmail Paşa Sok. No: 77
34718 Koşuyolu, Kadıköy/İstanbul
Tel : +90 0216 327 27 00 pbx
Faks : +90 0216 327 27 44
<https://www.urey.av.tr>

Bu bilgi notu ve varsa ekleri, sadece bilgilendirme amacıyla tarafınızla paylaşılmıştır. Bu bilgi notu, uygun yasal tavsiye olmaksızın herhangi bir özel durumda veya somut olayda uygulanmamalıdır. Bu bilgi notu, diğer internet adreslerinin linklerini içerebilir, ÜreyhukuK kendisine ait olmayan web sitelerinden hiçbir şekilde sorumlu değildir ve herhangi bir web sitesi ile ilgili bilgileri, içeriği, sunumu veya doğruluğu onaylamaz, açık veya zımni herhangi bir garanti vermez. Bu bilgi notunun telif hakları ÜreyhukuK'a ait olup işbu bilgi notu ÜreyhukuK'un önceden yazılı izni olmaksızın çoğaltılamaz, çevrilemez ve değiştirilemez.

¹ Article 5/ f; In the event that processing personal data is on the basis of explicit consent, procedures of the obligation to inform and obtaining explicit consent shall be performed separately.