

Amazon Turkey Decision

By Turkish Data Protection Authority (2020/173)

(Unofficial Translation by Serhat Turan, CIPP/E)

It is requested to examine the below-mentioned issues which was submitted to our Authority along with a complaint and its annexes by Personal Data Protection Authority, to take necessary actions. To summarize,

- According to Law No. 6563 on Regulation of Electronic Commerce (Law No. 6563), the activities carried out through www.amazon.com.tr, which is a service provider and intermediary service provider, should comply with the legislation on protection of personal data; however, the legislation was violated by the activities carried out on the relevant site,
- Regarding the services offered through Amazon.com.tr website and affiliated applications, no explicit consent is received neither while creating a user account nor shopping, sending electronic commercial messages for advertising, campaigns or promotional purposes, and no explanation was made about a reason for processing other than explicit consent,
- In the prologue section of "Conditions of Use and Sales", it is stated that *"... when you [a user] visit "Amazon Europe Core SARL, Amazon Turkey Retail Services Limited Company and / or its affiliates ("Amazon"), Amazon.com (website), or shop here, or you use its products or services, mobile Amazon applications, or services offered by Amazon in connection with the above (collectively, "Amazon Services"), it offers you website features and other products and services. Please review our Privacy Statement and Cookies Statement to understand how your personal information is collected and processed through Amazon Services"*
- In the first article titled Electronic Communications, it is said that *"you communicate with us electronically when you use any Amazon Service or send us emails, SMS or other communications from your desktop or mobile device. We will communicate with you electronically in various ways, for example by e-mail, SMS, in-app instant communications, or by sending or posting e-mail messages or communications on the website, or through other Amazon Services such as our Message Center. For contractual purposes, you consent to receive communications from us electronically, and as long as all applicable contracts, notices, disclosures and other communications we provide to you electronically do not provide for a different form of communication,"*,
- Further to the above statements, it is understood that a person will be deemed to approve or consent to receive electronic communication and accept the relevant provisions of use and sales by visiting amazon.com.tr alone.

Consenting to electronic communication and therefore receiving electronic commercial messages through using Amazon service would not be deemed to be within the scope of legal basis of “[processing is] necessary provided that is directly related to the conclusion or performance of the contract” as stated in the second paragraph of Article 5 of Law No. 6698 (“TDPL”).

- Granting permission to electronic communication by the confirmation of “Conditions of Use and Sales” to set up a user account that is compulsory for shopping cannot be considered as a explicit consent given with free will, as it is already noted on the website of Personal Data Protection Authority in the section of Summaries of Decisions that “signing up to the services as a prerequisite for providing consent” would not constitute a legally binding consent,
- It is further understood that the personal data is transferred abroad considering the explanations of “*In order to store and process your personal data for the purposes described in the Privacy Statement, we may transfer your personal data to the European Union and subsequently from the European Union, to the United States of America.*” stated in the section of "Transferring Personal Data out of Turkey" under "Does Amazon Share Your Personal Information?"; however, there is currently no requirement for explicit consent for the transfer of personal data abroad, regarding the services offered through amazon.com.tr website and its connected mobile applications, when creating a membership account or while shopping,
- If the Board's approval has not been obtained regarding the transfer of personal data abroad, since no explicit consent is obtained, article 9 of the Law No. 6698 will be violated, and this can be revealed by an investigation to be carried out by the Board.

Further to this application, it has been decided to initiate an investigation with the Decision of Personal Data Protection Board dated 16.05.2019 and numbered 2019/140, the data controller was asked to present its arguments along with the relevant information and documents on the allegations specified in the context of the complaint dated 27.06.2019 to ensure that the necessary investigations can be made.

In the summary of the letter received from the data controller on 17.07.2019.

- The allegations that commercial electronic messages have been sent unlawfully are groundless, not based on any evidentiary documents, and the applicant should submit such requests to the Ministry of Trade,
- Having said that we accept and respect to the Board's resolutions about commercial electronic messaging and its power in this field, the procedures and principles regarding on this issue were regulated within the scope of the legislation related to electronic commerce, and the complainant based its

complaint on hypothetical arguments instead of using the complaint procedures under the legislation [on commercial electronic messaging],

- Amazon Turkey offers the "Terms of Use" and "Privacy Statement" texts to ensure transparency in processing customers' personal data in accordance with the applicable legislation,
- After setting up an account, electronic communication was made to the registered customers regarding Amazon products and services; when an Amazon account is created, the related customer also accepts the "Privacy Statement" by clicking on the "Create Your Amazon Account" tab ("By *creating an account* , you accept the *practices specified in this Privacy Statement*"); likewise, when a registered customer places an order on the site, he / she is reminded that "Privacy Notice" is accepted ("When you place an order, you accept *Amazon.com's Privacy Notice, Terms of Use and Cookie Notice*"),
- Amazon Turkey also provides its registered customers with the opportunity to easily select, limit or refuse to receive commercial electronic messages whenever they want,
- Registered customers are not only aware but also agree that their personal data is/might be transferred out of Turkey by confirming the "Privacy Statement",
- The process regarding the undertaking on Amazon Turkey's international data transfer commitments are being carried out with Authority,
- In the light of the explanations above, the claims against Amazon Turkey that it transfers personal data abroad illegally, that it acts against e-commerce legislation is groundless and based on assumptions and so the complaint had to be rejected due to the lack of basis.

On the other hand, the complainant who also submitted a complaint to the Ministry of Commerce regarding that Amazon.com.tr applications constitute a violation of the provisions of the legislation on electronic commerce and personal data protection, with the letter of 43541135 of the Ministry dated 17.04.2019 was submitted to Authority in order for evaluation of the subject matter as per Turkish Data Protection legislation.

Assessment

1. **Law No. 6698, The Personal Data Protection Act (the Act) of Article 5 (1)** states, pursuant to the provision of paragraph "*the personal data cannot be processed without the explicit consent of the data subject*". **In the second paragraph of the article, it is stated that in which cases the personal data can be processed without the explicit consent of the data subject.**

According to the Article 5(1) of the Regulation on Commercial Communication and Commercial Electronic Messages (CCEEM), a prior

approval is required for *electronic messages sent by the service providers to the recipients' electronic communication addresses bearing celebration or wishes in order to promote, market, promote their business or to increase their recognition. The Approval is valid until the right to refuse is used.* The approval to be obtained under this article should be *in writing or received by any means of electronic communication in accordance with the provisions of the first paragraph of the Article 7 of the Regulation. The context of approval should include the demonstration of consent, name and surname, and the e-mail address that the recipient agrees to send commercial electronic messages.*

As per **the article 12 (2) of CCEEM a prior approval must be obtained from the data subject, in order for the personal to be shared with third parties, processed and used for other purposes.**

It is considered that the processing of the contact information of the persons before sending the messages for marketing purposes or at the latest when the approval of the sending of electronic messages is within the scope of explicit consent which is one of the conditions for processing personal data stated under the article 5; and the measures situated under the article 18 of the TDPL shall be applied against any data controller sending messages to data subject's e-mails or phones without the existence of explicit consent or any of the conditions for processing personal data under the paragraph 2 of the article 5 of the TDPL in accordance with the Board resolution dated 16.10.2018 and numbered 2018/119.

Data Controller has claimed, the dispute must be resolved under CCEEM and the DPA has no authority on the subject matter.

The purpose of the CCEEM is set out in Article 1 as *"to regulate the procedures and principles regarding the information obligations as to the commercial communication via electronic communication tools and the issues to be followed in commercial electronic messages"* and under the article 4 of the regulation, namely *"Definitions"*, commercial electronic messaging is defined as *"any data, voice and visual content messages sent for commercial purposes using electronic means such as telephone, call centers, fax, automatic call machines, smart voice recorder systems, electronic mail, short message service"*.

Although there is a separate legislation regarding commercial electronic messages, sending commercial messages to individuals by storing information such as phone numbers, e-mail addresses in data filing system indicates a personal data processing activity. Therefore, although a commercial electronic message should be sent in accordance with the legislation regarding the sending of commercial electronic messages, the processes of sending commercial electronic messages should also be in accordance with the legislation of personal data protection, since the use of communication channels to transmit these messages create personal data processing activity. In this context, the Board's Resolution regarding the above-mentioned subject is

not about the activity of sending commercial electronic messages, but the processing of personal data.

Besides, the request by Ministry of Trade as per the evaluation of the subject matter in accordance with the TDPL, creates a necessity for the case to be handled by Authority.

The investigation initiated by the Authority against the data controller ex officio within the framework of the power given in the first paragraph of the Article 15 of the TDPL following the evaluation of the complaint.

In the investigation, Authority has examined by creating a membership profile on the www.amazon.com.tr web site whether the explicit consent of the data subjects have been obtained regarding the processing of the contact information for the purpose of sending messages for marketing, and that no explicit consent was received during the entry of the necessary information for membership; after the completion of the membership process, in the "Communication Preferences" section of the "My Account" tab, "Emails are now being sent to e-mail address", and when clicking on the "Promotion E-mails", there is the expression "Select the communication categories you'd like to be informed", 10 pre-ticked boxes appear on the screen and at the bottom, there is a box with an expression of "please do not send marketing e-mails anymore".

In paragraph (a) of paragraph 1 of Article 3 of the TDPL titled Definitions, explicit consent is defined as freely given, specific and informed consent. In the light of the definition, explicit consent must be obtained by using the opt-in method (opt-out is not allowed) which would demonstrate the affirmative action of the data subject.

In the Privacy Statement, the data controller states that, "by visiting Amazon.com, you accept and approve the practices specified in this Privacy Statement", thus the data subjects by confirming the "Privacy Statement" the data subjects do not only become aware but also agree to processing of their personal data. However, it has been determined in the investigation that no consent was taken at any stage during the registration for membership. The expression in the privacy statement creates the impression that the data controller is trying to obtain explicit consent while establishing its burden on information. As it is known, other than explicit consent, if there are other conditions for processing, explicit consent is interpreted as being contrary to the rule of integrity, and on the other hand, in terms of data processing processes that require explicit consent, the realization of providing information and obtaining explicit consent does not meet the requirements in accordance with the current legislation. In the subparagraph (f) of first paragraph of Article 5 of the Communiqué On Principles And Procedures To Be Followed In Fulfillment Of The Obligation To Inform, it is regulated that procedures of the obligation to inform and obtaining explicit consent shall be performed separately if the personal data processing is carried out based on the explicit

consent. Therefore, the "Privacy Statement" published on the website by the data controller does not mean that the data subjects are informed and give explicit consent to the processing of personal data since it contains a lot of information and constitutes general information about data processing.

In this context, considering the fact that the data controller does not obtain the explicit consent of the data subjects to send commercial electronic messages by processing the contact information of the relevant persons and that they are not based on a reason other than explicit consent, the appropriate level of security in order to prevent the unlawful processing of personal data in article 12 of the Law, it is concluded that the data controller did not fulfill his obligation to take necessary technical and administrative measures to ensure the adequate level of security.

2. In accordance with the provisions of **second paragraph of Article 4 of the TDPL**, it is obligatory to comply with the principles of "Lawfulness and fairness", "*processing for certain, explicit and legitimate purposes*" and "*Being relevant, limited and proportionate to the purposes for which they are processed.*" in the processing of personal data.

The data controller, by stating in its "Privacy Statement" that "*You may choose not to provide certain information, but in this case you will not be able to use most of the Amazon Services. If you block or refuse our cookies, you cannot add products to your shopping cart, go to the purchase stage or use any Amazon service that requires you to sign in.*" ties the consent into the processing of personal data. As it is stated in a resolution published on the website of the Authority, in case of processing personal data belonging to the parties of the contract, obtaining explicit consent and imposing explicit consent as a condition of service and a contract; keeping in mind that obtaining explicit consent while another legal ground for processing is present is considered deceiving and misleading the data subject and abuse of data controller's rights and also that the fact that the service is bound by condition of the explicit consent will harm the validity of consent are considered as violation of being in conformity with the law and principle of good faith and being relevant, limited and proportionate to the purposes for which data are processed as stated in article 4 of the Law.

The dataset that is collected by Amazon.com.tr further to its declaration is as follows: "*name, address, phone number, payment information; age; Location information; persons to whom purchases have been sent; Contacts listed in 1-Click settings (including addresses and phone numbers); e-mail addresses of friends and others; the content of the evaluations and emails sent to the data controller; personal information and photos in the profile; pictures and video, identity and status information and documents stored in connection with Amazon services; corporate and financial information; credit history information; VAT numbers.*"

The information of the friends of the data subjects shall be deemed as personal data for the data subject himself, but also it is the personal data of these individuals. Thus, within the scope of the performance of a contract between

the member and Amazon.com.tr or within the context of the explicit consent of a member, the e-mail addresses of the contact persons of the member are processed without relying on their explicit consent. On the other hand, when "credit history information, situation information, corporate and financial information" are evaluated within the context of general principles of the TDPL, processing of this type of data is not proportionate and limited to the purpose and contradicts to the principle of "*Being relevant, limited and proportionate to the purposes for which they are processed.*" as the processed data should be at least predictable by the data subjects.

3. The article 8 of the TDPL is as follows:

"(1) Personal data shall not be transferred without explicit consent of the data subject.

(2) Personal data may be transferred without seeking explicit consent of data subject upon the existence of one of the conditions provided for in:

a) the second paragraph of Article 5,

b) the third paragraph of Article 6, provided that sufficient measures are taken.

(3) The Provisions of other laws relating to transfer of personal data are reserved."

Once the "Privacy Statement" is examined, under the section 'Does Amazon Share Your Personal Information?' it is stated that the sharing is made in the ways explained as "*Except for the above, when personal information about you is shared with third parties, you will receive a notification and you will have the option to choose not to share this information.*"

As expressed in the statement, the data subject can only choose not to share its personal data if the data is processed in accordance with his explicit consent. This is because the explicit consent of the data subject shall not be sought in the data transfer processes carried out within the scope of the paragraphs 2 and 3 of the Article 8 of the TDPL (paragraphs 2 of the Article 5 of the Law, paragraph 3 of the Article 6 and the transactions made in the cases stipulated in other laws), the person will not have the chance to choose not to share his data.

On the other hand, explicit consent must be obtained at the latest when the transfer activity takes place, and any explicit consent to be obtained after that will not be complied with the legislation. Therefore, the statement that the consent can be withdrawn after the transfer activity takes place is considered as the reverse interpretation of the law. The fate of the data transferred without explicit consent would also be unknown after the consent is withdrawn, leads us to another debate. Therefore, the ambiguous statements contained in the privacy statement regarding the transfer of personal data evoke the opinion that the act is in violation of the provisions of the Law.

4. The article 9 of the TDPL is as follows:

“(1) Personal data cannot be transferred abroad without the express consent of the data subject.

(2) Personal data may be transferred abroad without explicit consent of data subject upon the existence of one of the conditions referred to in Article 5(2) and Article 6(3) of the Law and if in the country where personal data are to be transferred;

(a) Adequate protection is provided.

(b) Adequate protection is not provided, upon the existence of commitment for adequate protection in writing by the data controllers in Turkey and in the relevant foreign country and authorization of the Board.

(3) The Board determines and announces the countries with adequate protection.”

During the investigation, it was seen that the data controller submitted the documents of undertaking to the Board to obtain the approval for transfer data abroad. However, when it is evaluated that the Board has not yet made a decision in this direction and that adequacy decisions in regard to the countries with sufficient protection have not been determined, the only method for transferring personal data abroad is considered to be the explicit consent of the data subject.

Although the data controller claims that the international data transfer activities have been carried out in accordance with the legislation and the consent of the data subjects is obtained through "Privacy Statement" is accepted as well by clicking the "Create Your Amazon Account" tab ("By creating an account, you accept the practices specified in this Privacy Statement."); Likewise, when a registered customer places an order on the site, s/he is reminded that "Privacy Statement" is accepted ("You accept Amazon.com.tr's Privacy Statement, Terms of Use and Sales and Cookie Notice when you place an order."), but it is considered that obtaining approval with an implied consent will not be deemed as lawful in accordance with the current legislation. Under the law, explicit consent means a data subject gives his consent for the processing of his data at his own request or upon the request from the controller/processor. Explicit consent will also enable the person to determine the limits, scope and duration of the data it allows to be processed. Explicit consents of general nature that are not limited to a specific subject and are not limited to the relevant transaction are considered as "blanket consent" and are considered legally invalid. In this context, any acts that fall under the scope of "data processing" (monitoring thru cookies, transfer, sharing, storage etc.) would be considered to be unlawful if a single declaration of consent is given by the approval of the "Privacy Statement". It is finally concluded that the assumption of valid consent through the using Amazon services by approving Privacy Statement constitutes a violation of the data security obligations under Article 12 of the TDPL and as stated in first paragraph of article 9 of the TDPL regarding the transfer of

personal data abroad, the data controller is required to obtain the explicit consent of the data subjects as per the existing legal regulations, but that the data controller does not obtain an explicit consent regarding the transfer abroad.

5. Pursuant to **the article 10 of the Law**, “(1) At the time when personal data are obtained, the data controller or the person authorized by it is obliged to inform the data subjects about the following:
 - a) the identity of the data controller and of its representative, if any,
 - b) the purpose of processing of personal data;
 - c) to whom and for which purposes the processed personal data may be transferred,
 - ç) the method and legal basis of collection of personal data,
 - d) other rights referred to in Article 11.”

According to the **clause subparagraph (f) of the first paragraph of Article 5 of the Communiqué On Principles And Procedures To Be Followed In Fulfillment Of The Obligation To Inform**, “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.”

It is obvious that the processing activity starts when a user visits the site. In the cookie notice, it is stated that “cookies, pixels and other technologies (collectively referred to as “cookies”) are used to provide essential features, services, and for additional purposes, including those listed below to know the browsers or device of the people visiting the site, to have more information about their interests”. In this case, it is not possible to conclude that the obligation to inform under the Law is fulfilled, based on the argument that the necessary texts are included on the site. Considering that whether a first-time visitor has yet to enter into a contractual relationship with the data controller, or whether s/he has an explicit consent to the processing of his personal data, it cannot be considered that he has declared his explicit consent to process his data. To start data processing via the visit of the site using different data processing tools, the information must first be given with the access to the website. However, when a user access to the site, no information (*i.e. pop-up messages*) is provided about the processing of personal data with different tools (*i.e. Cookies*) and there is no request for authorization to be processed (*i.e. you must consent to our cookie notification to continue browsing our site*). This situation contradicts both the requirement of explicit consent in the processing activity and the obligation to inform, and the lack of information despite the personal data is being processed upon the access to the website, the obligation to inform regarding the personal data processed through cookies, in the Article 10 of the Law and in the Communiqué On Principles And Procedures To Be Followed In Fulfillment Of The Obligation To Inform. Therefore, the Authority thinks that the obligation to inform was not fulfilled as it is set out in the Communiqué on the Procedures and Principles.

As a result of the ex officio investigation carried out against www.amazon.com.tr further to the evaluations given above, *the Board has decided to impose administrative penalty of 1.100.000 TL within the scope of subparagraph (b) of the article 18 of the Law, due to the failure of fulfillment of the obligations in the paragraph (1) of Article 12 of the Law by the data controller* as;

- The data controller does not duly obtain the explicit consent of the data subjects in order to send commercial electronic messages by processing the contact information of the data subjects, and; the data controller does not rely on any other legal grounds other than explicit consent, as well as the e-mail addresses of the contact persons of the members are also processed without the explicit consent of these persons, and the data controller violates the general principles stipulated in the article 4 of the TDPL,
- In the "Privacy Statement", under the section 'Does Amazon Share Your Personal Information?' it is stated that the sharing is made in the ways explained as *"Except for the above, when personal information about you is shared with third parties, you will receive a notification and you will have the option to choose not to share this information"* meaning that the data subject has no right to choose not to share his data unless he explicitly consents on the processing his data, where the obtain of explicit consent does not comply with the current legislation,
- Considering that the countries in which there is sufficient protection under article 9 of the Law on the transfer of personal data abroad have not yet been determined by the Authority and the written undertaking of the data controller has not been approved, the explicit consent of the data subject must be obtained as per the first paragraph of the Article 9 of the Law on the transfer of personal data abroad; however the data controller does not obtain a proper explicit consent for transferring abroad, and assumption of accepting the context of the Privacy Statement by using Amazon services cannot be qualified as legally binding explicit consent in accordance with the Law.
- And, the Board *has also decided to impose administrative penalty of 100.000 TL within the scope of subparagraph (a) of the article 18 of the Law for failure the fulfillment of the obligation to inform* in accordance with the procedures and principles set forth in the article 10 of the Law and the Communique On Principles And Procedures To Be Followed In Fulfillment Of The Obligation To Inform although the although the personal data is started to be processed through cookies upon accessing the website and considering the fact that "Privacy Statement" published on the website by the data controller does not mean that the data subjects are informed due to the fact that it contains a lot of information and is a general information about data processing,

- The data controller is instructed to update the personal data processing processes and the "Privacy Statement", "Terms of Use and Sales" and "Cookie Notice" texts in accordance with the violations identified above, and to inform the Board of the result by making the website and applications in compliant with the Law,
- The decision will be published on the website of the Authority within the framework of the paragraph (5) of Article 23 of the Law.

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