RECENT AMENDMENTS AND JUDICIAL REVIEW OF DECISIONS BY THE TURKISH DATA PROTECTION AUTHORITY*

Son Değişiklikler Işığında Kişisel Verileri Koruma Kurumu Kararlarının Yargısal Denetimi

Fatma Sümeyra DOĞAN**

L&JR
Year: 15, Issue: 28
July 2024
pp.57-76

Article Information

Submitted : *13.02.2024*
Last Version Received : *21.06.2024*
Accepted : *02.07.2024*

Article Type

Research Article

Abstract

The enactment of the Turkish Personal Data Protection Law ("PDPL") on 7 April 2016 marked a milestone, in line with the country's candidacy for EU membership. It established the Turkish Data Protection Authority (the "DPA"), an independent body that oversees compliance, research, and trends in personal data protection law. In cases of non-compliance, the DPA conducts thorough investigations resulting in a variety of decisions. The appeals process used to vary; fines were subject to the Misdemeanour Law and criminal courts, while other decisions were referred to administrative courts. Recent developments, in particular, a decision by the Constitutional Court, have further highlighted the inadequacy of the current system of judicial review. Following this decision, Turkish lawmakers introduced a Reform Law that brought several amendments to the PDPL. Administrative courts have been designated as the competent judicial organ with these changes. This study examines both the situation before and after the reform. While there is still room for improvement, the Reform Law has met an important need for legal certainty, security and having an effective judicial review system.

Keywords: personal data, Turkish DPA, Turkish DPA decisions, judicial review

* There is no requirement of Ethics Committee Approval for this study.

** PhD Researcher, Jagiellonian University (Krakow), Poland, e-mail: fatma.sumeyra.dogan@uj.edu.pl, ORCID ID: 0000−0002−6774−0228.

Özet

Kişisel Verilerin Korunması Kanunu'nun ('KVKK') 7 Nisan 2016 tarihinde yürürlüğe girmesi, Türkiye'nin AB üyeliği adaylığı doğrultusunda bir dönüm noktası olmuştur. Kanun, kişisel verilerin korunması hukukuna uyum, araştırma ve eğilimleri denetleyen bağımsız bir kurum olan Kişisel Verileri Koruma Kurumu'nu kurmuştur. Kanun hükümlerinin ihlal edilmesi durumlarında, Kişisel Verileri Koruma Kurumu kapsamlı soruşturmalar yürütmekte ve bu soruşturmalar çeşitli kararlarla sonuçlanmaktadır. Kurum tarafından verilen bu kararların temyiz süreci kısa bir süre öncesine kadar çeşitlilik göstermekteydi. Kurum tarafından verilen idari para cezaları Kabahatler Kanunu'na tabi ve sulh ceza hakimliklerinde görülmekte iken, diğer kararların itiraz süreci idare mahkemelerinde görülmekteydi. Bu hususta yakın zamanda Anayasa Mahkemesi tarafından verilen bir karar, mevcut yargısal denetim sisteminin yetersizliğini daha da vurgulamıştır. Bu kararın ardından, KVKK'da çeşitli değişiklikler öngören Reform Kanunu 12 Mart 2024'te yürürlüğe girmiştir. Bu değişikliklerle idare mahkemeleri Kurum tarafından verilen kararlara karşı itiraz hususunda yetkili yargı organı olarak belirlenmiştir. Bu çalışmada hem Reform öncesi hem de Reform sonrası durum incelenmiştir. Reform kanununda halen iyileştirmeye açık alanlar bulunmakla birlikte, bu değişiklik hukuki güvenlik ve belirlilik yanı sıra etkili bir yargı denetimine haiz olmak açısından önemli bir ihtiyacı karşılamıştır.

Anahtar Sözcükler: kişisel veri, Kişisel Verileri Koruma Kurumu, Kişisel Verileri Koruma Kurumu kararları, yargı denetimi

INTRODUCTION

The primary motivations behind formulating a legal framework for the protection of personal data in Türkiye can be attributed to three key factors: the effective safeguarding of human rights, the ongoing membership negotiations with the European Union and the need to enhance international cooperation and trade.[1] To achieve these aims, the Law on Personal Data Protection (the "PDPL"), numbered 6698 was adopted and published in the Official Gazette of Türkiye.[2] Article 1 of the PDPL states that the purpose of the law is to protect the fundamental rights and freedoms of individuals with regard to the processing of personal data and to regulate the obligations of natural and legal persons who process personal data, as well as the procedures and principles to be followed.

1 *Kişisel Verilerin Korunması Kanununa İlişkin Uygulama Rehberi* (KVKK Yayınları 2018) 9 <https://kvkk.gov.tr/SharedFolderServer/CMSFiles/0517c528-a43d-49f5-b1eb-33dc-666cb938.pdf> accessed 18 April 2024; 'Kişisel Verilerin Korunması Kanunu ve Uygulaması' 9 <https://kvkk.gov.tr/yayinlar/K%C4%B0%C5%9E%C4%B0SEL%20VER%C4%B0LER%C4%B0N%20KORUNMASI%20KANUNU%20VE%20UYGULAMASI.pdf> accessed 18 April 2024.

2 Kişisel Verilerin Korunması Kanunu 2016 [6698].

Articles 19-27 in Chapter 6 of the PDPL introduce and stipulate the provisions related to the establishment of the Turkish Personal Data Protection Authority (the "DPA"). The DPA is responsible for supervising the implementation of the PDPL by data controllers and other subjects of the law (Article 20). The Personal Data Protection Board (the "Board") was established as the decision-making body and is vested with certain tasks and powers.[3] The Board's responsibilities encompass ensuring compliance with personal data processing in line with fundamental rights, addressing complaints, maintaining the Data Controllers' Registry, enacting regulatory acts on various aspects including data security, and deciding on administrative sanctions as specified by the PDPL, as listed in Article 22.[4] As an example of one of the Board's rulings, on 1 March 2023, TikTok Pte. Ltd. was fined 1,750,000 Turkish Lira (approximately EUR 87,500 EUR) for not taking sufficient measures to protect users from the unlawful processing of their data.[5]

The DPA is structured and vested with powers similar to those of other regulatory administrative bodies in the Turkish legal system, such as the Competition Authority or the Banking Regulation and Supervision Authority. This role leads the DPA to act as a guardian of individuals' right to the protection of their personal data, in addition to ensuring compliance with data protection legislation. The function of regulatory supervisory bodies is crucial in safeguarding the rights and freedoms of individuals and ensuring that administrative authorities and companies comply with the law.[6]

The PDPL introduces comprehensive and systematic safeguards to the right to protection of personal data, along with various administrative sanctions to be applied in the event of a violation. The DPA is established to provide these safeguards and enforce sanctions. However, vesting these powers without an effective judicial review will undermine the rule of law and its natural consequences: legal security, legal certainty and legal predictability. The competent judicial authority will review the legality of the acts of the DPA, especially the sanctions imposed, which should also be examined in terms of

---

3 Nurullah Tekin, 'Kişisel Verilerin Korunması ile İlgili Türkiye'deki Kanun Tasarısının Avrupa Birliği Veri Koruma Direktifi Işığında Değerlendirilmesi' (2014) 4 Uyuşmazlık Mahkemesi Dergisi <http://dergipark.gov.tr/doi/10.18771/umd.51258> accessed 12 February 2023.

4 'Law on Personal Data Protection Numbered 6698' <https://www.kvkk.gov.tr/Icerik/6649/Personal-Data-Protection-Law> accessed 17 February 2023.

5 'TikTok Pte. Ltd. Hakkında Kişisel Verileri Koruma Kurulunun 2023/134 Sayılı Karar Özeti' <https://www.kvkk.gov.tr/Icerik/7538/2023-134> accessed 11 March 2023.

6 Cemal Başar, 'Türk İdare Hukuku ve Avrupa Birliği Hukuku Işığında Kişisel Verilerin Korunması' (Doctoral thesis, Dokuz Eylül University 2019) 204 <https://tez.yok.gov.tr/UlusalTezMerkezi/tezDetay.jsp?id=KFdPFVOUwKkR30JKHaFnfQ&no=Br0hJrRvY-gINNzdBdaOs4g> accessed 12 June 2023.

the right to fair trial. Until recently, the PDPL did not include a provision on the appeal process of the sanctions to be imposed by the DPA.[7] With revisions introduced on 12 March 2024 (the "Reform Law" or the "Reform"), the PDPL was amended. This Reform changed several articles of the PDPL, such as cross border data sharing and the processing of sensitive data, though this paper will focus more on changes related to administrative fines and the appeal process.[8]

This work aims to provide clarity on the data protection regime in Türkiye, while focusing on the appeal process of Personal Data Protection Board decisions. In this regard, the paper addresses the following question: *Does the Turkish data protection law provides an effective legal remedy against the decisions of the Turkish Data Protection Authority?* To achieve this aim, firstly, the types of decisions that the Board is authorised to issue will be examined, and secondly, the appeal process in the Turkish judicial system before the latest reform will be analysed. The recent amendments of the PDPL will be presented as the next item. Furthermore, the examined appeals process will be compared with the judicial review system of other Turkish regulatory administrative bodies. Thereafter, decision 2020/7518 of the Turkish Constitutional Court will enrich the discussion. Lastly, an evaluation regarding the reformed appeal process will be presented.

A. TYPES OF DECISIONS OF THE BOARD

The Board either bases its decisions on a data subject's claim of a personal data infringement or conducts an *ex officio* examination. After the examination, the Board will determine whether there has been a personal data infringement. The Board then makes one of four decisions, which will be explained in the following sections. However, before starting the appeals process, it is important to resolve one issue: identifying the type of decision made by the Board. Saygı notes that the Board's practice is to decide all matters as a whole, resulting in a single decision text that may contain multiple decisions differentiated by the case.[9] Each of these decisions may have different legal outcomes and must be carefully examined before initiating the appeals process.

---

7 İbrahim Korkmaz, 'Kişisel Verilerin Korunması Kanunu Hakkında Bir Değerlendirme' [2016] Türkiye Barolar Birliği Dergisi 81 <https://kutuphane.dogus.edu.tr/mvt/pdf.php?pdf=0019944&lng=0> accessed 29 March 2023.

8 'Ceza Muhakemesi Kanunu Ile Bazı Kanunlarda Değişiklik Yapılmasına Dair Kanun' <https://www.resmigazete.gov.tr/eskiler/2024/03/20240312-1.htm> accessed 19 April 2024.

9 Samet Saygı, '6698 Sayılı Kanun'un Sistematiğinde Yargısal Başvuru Yolları' (2020) 2 Kişisel Verileri Koruma Dergisi 30 <https://dergipark.org.tr/en/pub/kvkd/issue/58932/738180> accessed 14 February 2023.

1. Decision Ordering the Removal of the Personal Data Violation (Article 15(5))

As the first type of decision, the Board can reach a verdict described as a mandatory instruction. This would require the data controller to cease its operations regarding the processing of personal data. According to Article 15(5) of the PDPL: "As a result of the examination made further to a complaint or *ex officio*, in cases where it is understood that an infringement exists, the Board will decide that identified infringements must be remedied by the relevant data controller and notify this decision to the relevant parties. This decision must be implemented without delay and within thirty days at the latest after the notification."[10] The wording "shall be remedied" indicates the binding nature of the Board's decisions regarding administrative law.

Saygı argues that, based on the Board's decision-making patterns, the Board does not issue this type of decision for every personal data violation incident. If a violation has already occurred, the Board will tend to impose a fine.[11] As an example of a decision of this nature, there was a case involving a bank, an asset management company and their lawyers who were accused of initiating an unlawful execution proceedings for a debt. The defendant, who submitted a complaint to the DPA, claimed that they had never been a customer of the bank, and thus the bank must have processed their data unlawfully.[12] The applicant's complaint was based on the fact that they had never been a customer of the bank, and thus the bank must have processed their data unlawfully. The DPA ordered the data controller to provide evidence confirming that the data subject's information had been updated and the debt-related information had been deleted.[13]

According to Article 18(c) of the PDPL, a failure to comply with the orders of the Board is grounds for issuing a fine. Thus, another consequence of this type of decision is the direct effect of the requirements of the Board. In this sense, if a controller does not follow the instructions issued by the Board based on the proceedings, there arises a risk of a monetary fine.

2. Decision Stopping the Processing or Transfer of Personal Data (Article 15(7))

Under Article 15(7): "The Board may decide to stop the processing of personal data or transfer of personal data abroad in the case damages which are difficult

---

10 'Law on Personal Data Protection Numbered 6698' (n 5).

11 Saygı (n 10).

12 '"Bir Bankanın, Varlık Yönetim Şirketinin ve Üç Farklı Avukatın Borçlu Olmayan Ilgili Kişinin Kişisel Verisini Işleyerek Icra Takibi Başlattıkları Iddiası" Hakkında Kişisel Verileri Koruma Kurulunun 27/04/2021 Tarihli ve 2021/424 Sayılı Karar Özeti' <https://www.kvkk.gov.tr/Icerik/7114/2021-424> accessed 6 June 2023.

13 ibid.

or impossible to compensate for, and in the event of explicit infringement of the law."[14]

This provision should be interpreted in the context of Article 22(1)(c) of the PDPL, is dedicated to the list of duties and powers appointed to the Board. It is stated that the Board can take temporary measures when conducting research on an alleged violation. According to Saygı, decisions that fall under this category would be a temporary protection measure under Article 22(1)(c). Additionally, he comments that, with this provision, the aim of the lawmaker is to prevent any further costs that could arise as a consequence of the violation.[15]

3. Resolution Decisions (Article 15(6))

Article 15(6) reads as follows; "As a result of examination made upon complaint or ex officio, in cases where it is determined that the infringement is widespread, the Board shall take a resolution on this matter and publishes this resolution in the Official Gazette. Prior to taking the resolution, the Board may also receive the opinions of the relevant institutions and organisations, if needed."[16]

This provision indicates that decisions categorised as resolutions specify how the law should be interpreted and applied in specific cases. In this sense, if the Board determines that the acts constituting a violation have been committed not only by the data controller complained against, but also by other individuals and institutions, then the Board takes a decision on how to decide on that particular matter and declares it publicly.

Therefore, resolution decisions must be considered as decisions showing how the PDPL will be understood and applied. In a way, they create new norms and have legal consequences for their addressees. Furthermore, Article 18(1)(c) regulates not complying with the decisions rendered pursuant to Article 15 as a misdemeanour under the PDPL. In other words, anyone who fails to implement the Board's resolution decisions may be subject to administrative fines. In this respect, resolution decisions can be considered as decisions that have a coercive nature for the relevant parties and therefore have legal consequences.[17]

Examining the resolution decisions taken by the Board reveals that the Board employs this type of decision when it identifies a widespread violation. For instance, one of the most recent resolution decisions rendered by the Board concerned municipalities using payment systems that have a major security flaw. The decision begins with an explanation of the current system and the reasons

14 'Law on Personal Data Protection Numbered 6698' (n 5).

15 Saygı (n 10).

16 'Law on Personal Data Protection Numbered 6698' (n 5).

17 Saygı (n 10) 54.

why it is vulnerable to personal data violations. It concludes with the actions that must be taken by municipalities. Moreover, the Board states the necessary actions in a clear manner, as can be seen in the following: "municipalities must use the 'membership and password' method or 'two-factor verification' system in their real estate tax payment/fast payment and debt inquiry services as per Article 12 of the Law."[18] The resolution decisions of the Board are also made public pursuant to Article 15(6) of the PDPL.[19]

4. Decisions Imposing a Monetary Fine (Article 18)

Decisions imposing a monetary fine are outlined in a separate article dedicated to misdemeanours as defined by the PDPL. Article 18 first lists the actions identified as misdemeanours according to the PDPL, and then provides specific circumstances related to implementing sanctions. The list of actions stated in Article 18(1) includes: a) non-compliance with the obligation to inform (Article 10), b) non-compliance with obligations of data security (Article 12), c) non-compliance with the obligation to register with the Data Controllers' Registry (Article 16).[20] It should be noted that the amount of fine for each misdemeanour will be updated each calendar year. According to the last update, the minimum amount is TRY 47,303 and the maximum amount is TRY 9,463,213.[21] The remaining sub-paragraphs of Article 18 state that these fines can only be issued to individuals and private law legal entities. If a public institution or organisation commits any of the listed actions, disciplinary provisions will be applied and the Board will be informed about the investigation and outcomes.[22]

The significant gap between the maximum and minimum amount of the fine was discussed during the law-making process.[23] When the preamble of the PDPL examined, particularly Article 18, the reason behind the gap between the minimum and maximum amount of monetary fines is explained as granting the Board the

---

18 'Resolution of the Personal Data Protection Board Dated 21/04/2022 and Numbered 2022/388 on Payment and Debt Inquiry Services of Municipalities' <https://www.kvkk.gov.tr/Icerik/7415/2022-388> accessed 3 March 2023.

19 'Law on Personal Data Protection Numbered 6698' (n 5). Full text of Article 15(6): "As a result of the examination made upon complaint or ex officio, in cases where it is determined that the infringement is widespread, the Board shall take a resolution on this matter and publishes this resolution. Prior to taking the resolution, the Board may also receive the opinions of the relevant institutions and organisations, if needed."

20 ibid.

21 KİŞİSEL VERİLERİ KORUMA KURUMU, '6698 Sayılı Kişisel Verilerin Korunması Kanunu Kapsamında İdari Para Cezası Tutarları' <https://www.kvkk.gov.tr/SharedFolderServer/CMSFiles/8833aad2-62c2-4a01-b147-fe97062678f3.pdf> accessed 15 February 2024.

22 'Law on Personal Data Protection Numbered 6698' (n 5).

23 Mehmet Bedii Kaya, 'Kişisel Veri Koruma Hukuku - Mevzuat, İçtihat, Bibliyografya' 43.

power of discretion.[24] This reasoning is derived from the Misdemeanour Law number 5326, Article 17(2) of which implies that authorities should consider the severity of the misdemeanour, the fault of the perpetrator and their economic status when making a decision in this manner. For example, if a family business operating in a small city and a nationwide holding company violate the same provisions of the Misdemeanour Law, the amount of administrative fines to be determined will be different, based on the economic status of the infringers.[25]

B. APPEAL PROCESS AGAINST THE BOARD DECISIONS BEFORE THE REFORM

Before the March 2024 reform, there were no provisions concerning appeals or the appellate court in the PDPL. Therefore, every decision of the Board had to be examined individually and its legal classification had to be determined through independent analysis. Only this way could any judicial remedy against the Board's decisions be identified under the Turkish legal system.[26]

The first two types of decisions, namely "termination of the processing or transfer of personal data" and "instruction decision to eliminate the personal data violation," were subject to administrative law, as they are also administrative acts unilaterally taken by the administrative body. Therefore, the appeals process would also be governed by the Administrative Jurisdiction Procedure Law number 2577. In this regard, an application to annul an action may be submitted within 60 days after receiving the Board's decision. The competent court would be determined based on the general competency rules of the Administrative Jurisdiction Procedure Law. However, the appeal process for decisions imposing a monetary fine was not as clear.

Decisions imposing a monetary fine are considered punitive actions for misdemeanour acts listed in Article 18 of the PDPL. As a result, they fall under the Law on Misdemeanours number 5326. According to Article 27 of the Law on Misdemeanours, administrative fines imposed by the Board may be appealed against to the first instance of the criminal magistrate court within 15 days from the date of notification. The competent court would be the court of the data controller's residential city, based on the interpretation of Articles 12 and 13 of the Law on Misdemeanours.[27]

Lastly, the Board's decision-making practice shows that there can be hybrid decisions where the Board issues multiple types of decisions in one ruling. Even if one of the decisions is an administrative fine, the competent court for

24 ibid 42.

25 ibid 43.

26 Saygı (n 10) 44.

27 ibid 49.

judicial review would still be the administrative courts, according to both İnan and Saygı. Both argue that there is no provision in the Law on Misdemeanours that would act as a restraint in this regard. However, both decisions that will be subject to administrative judicial review must be imposed due to the same act or within the scope of the same violation of the law. In other words, there must be a material or legal connection between the two actions.[28]

Briefly it can be expressed that, prior to the Reform, there was a dual review practice against decisions of the Board. Administrative monetary fines imposed by the Board could be appealed to the criminal judgeship of peace, while the remaining part of the decisions could be appealed to the administrative judiciary for review. Consequently, this practice reduced the effectiveness of the review process for the decisions of the Board.

C. CHANGES INTRODUCED WITH THE PDPL REFORM

The PDPL is based on Directive 95/46/EC, the predecessor of the General Data Protection Regulation (the "GDPR"). Two years after the PDPL came into force, the GDPR was adopted and introduced a more advanced set of rules in the field of data protection. Therefore, the idea of updating the PDPL had been floated and a discussion topic in recent years. This could be observed in the preamble of the Reform Law, which states: "After the entry into force of the General Data Protection Regulation, various action plans included the goal of updating Law No 6698 by taking into account the GDPR. Announced in 2021, the Human Rights Action Plan, the Economic Reforms Action Plan and the 2024-2026 Medium Term Programme included the objectives of harmonisation with the GDPR. In this context, with the Proposal, amendments are made to the provisions regarding the processing conditions of special categories of personal data and data transfer abroad."[29] Although the preamble mentions topics regarding special categories of data and cross-border data sharing, there are provisions related to the appeal process and monetary fines stated in the PDPL.

The third subparagraph of Article 35 of the Reform Law indicates the competent court to hear appeals against Board decisions as administrative courts.[30] With

---

28 ibid 51; Salih İnan, 'Kişisel Verilerin Korunması Kapsamında İhdas Edilen Yaptırım Kararlarına Karşı Yargısal Başvuru Yolları: Karşılaştırmalı Bir İnceleme' (2021) 3 Kişisel Verileri Koruma Dergisi 34, 56 <https://dergipark.org.tr/en/pub/kvkd/issue/67484/1036379> accessed 14 February 2023.

29 'Ceza Muhakemesi Kanunu ile Bazı Kanunlarda ve 659 Sayılı Kanun Hükmünde Kararnamede Değişiklik Yapılmasına Dair Kanun Teklifi ve Gerekçesi' 15 <https://cdn.tbmm.gov.tr/KKBSPublicFile/D28/Y2/T2/WebOnergeMetni/6e8b6477-2942-49d1-acf1-cfa13b-cac252.pdf>. (author's translation)

30 'Ceza Muhakemesi Kanunu Ile Bazı Kanunlarda Değişiklik Yapılmasına Dair Kanun' (n 9). Author's translation of the Art. 35(3): Administrative fines imposed by the Board could be appealed to the administrative courts.

this provision, it is now clear that administrative fines imposed by the Board will be subject to administrative judicial review.

With Article 35 of the Reform Law, another misdemeanour action is stipulated as added into Article 18 of the PDPL. The fifth paragraph of Article 9 is another amendment introduced by the Reform Law, establishing the concept called 'standard contractual clause' to be used in cross-border data transfers. Pursuant to the new paragraph 5 of Article 9 of the PDPL, a standard contract clause must be notified by the data controller or the data processor to the DPA within five business days of being signed. The notification obligation for standard contracts is also sanctioned. With subparagraph (d) added to the first paragraph of Article 18, it is regulated that those who fail to comply with this five business day notification requirement regarding standard contractual clauses are subject to an administrative fine of between TRY 50,000 and TRY 1,000,000.[31]

Article 35(2) of the Reform Law presents another novelty in terms of implementing administrative fines. It states that "The administrative fines stipulated in subparagraphs (a), (b), (c) and (ç) of the first paragraph shall be imposed on the data controller, and the administrative fine stipulated in subparagraph (d) shall be imposed on the data controller or data processing natural persons and private legal entities."[32]

D. APPEAL PROCESS OF OTHER REGULATORY ADMINISTRATIVE AUTHORITIES

As stated above, the DPA is also a regulatory administrative authority ("RAA") in the Turkish legal system, as specified in the PDPL. According to Article 19 of the PDPL, "Personal Data Protection Authority, which is a public legal entity and has administrative and financial autonomy, has been established to carry out duties conferred on it under this Law."[33] Furthermore, Article 21(1) states that "The Board shall perform and exercise the duties and powers conferred on it under this law and other legislation, independently and under its own responsibility."[34] Pursuant these provisions, there is no doubt that the DPA is an RAA, but the legal classification of RAAs in general is a highly debated topic in Turkish legal doctrine.[35]

---

31 ibid. (author's translation)

32 ibid. (author's translation)

33 'Law on Personal Data Protection Numbered 6698' (n 5).

34 ibid.

35 Yahya Usman, 'Kişisel Verileri Koruma Kurumunca Uygulanan Yaptırımların Yargısal Denetiminde Görevli Mahkeme' (2021) 16 Terazi Hukuk Dergisi <https://www.jurix.com.tr/article/22668> accessed 1 March 2023.

RAAs became a part of Turkish administrative law with the adoption of liberal policies in the early 1980s. As a result, the first RAA – the Capital Markets Board of Türkiye – was established in 1981.[36] Afterwards, with the requirement of Customs Union Decision 1/95[37] the Turkish Competition Authority was founded in 1994[38] which then stood as a model for other institutions. The Banking Regulation and Supervision Agency, the Energy Market Regulatory Authority and the Public Procurement Authority are examples of public bodies established under this structural reform.[39]

The judicial review process for decisions and actions of RAAs is usually outlined in their founding laws, and, according to administrative law, the competent authority is usually the administrative courts, and rarely the Council of State, unless explicitly provided in the law.[40] For instance, Article 55 of the founding law of the Turkish Competition Authority points out that decisions on administrative sanctions can be appealed to the competent administrative court.[41] A similar provision can be found in the founding law of the Energy Market Regulatory Authority. Article 12 determines that the competent administrative court will be the judicial office to conduct the judicial review.[42] Başar also remarks that, as a rule, RAAs are subject to administrative law in their activities, and disputes arising from their activities are resolved in the administrative jurisdiction.[43]

E. DISCUSSION

The absence of a provision indicating the competent judicial authority for appealing the Board's decisions was criticised as being in conflict with Article

36 Nagehan Talat Aslan, 'Yönetimin Yeni Yapı Taşları Bağımsız İdari Otoriteler' (2010).

37 Decision No 1/95 of the EC-Turkey Association Council of 22 December 1995 on implementing the final phase of the Customs Union 1995 (OJ L).

38 Emre Baş, 'Türkiye'deki Bağımsız İdari Otoriteler ve Uygulaması' (Master's Thesis, Karadeniz Teknik Üniversitesi 2010) <https://acikbilim.yok.gov.tr/bitstream/handle/20.500.12812/490483/yokAcikBilim_389238.pdf?sequence=-1&isAllowed=y> accessed 3 March 2023.

39 Yavuz Göktaylar, 'The Rise of Independent Administrative Authorities in Turkey: A Close Look on Sources, Successes and Challenges of This New Institutional Transformation' (2011).

40 Oğuzkan Güzel, 'Bağımsız İdari Otoritelerde İdari Usul ve Yargısal Denetimi' (Doctoral thesis, Ankara University 2007) <https://tez.yok.gov.tr/UlusalTezMerkezi/tezDetay.jsp?id=D-K1aB-SQzTTZDCoaZb7Xxg&no=R1bRQhCmditkKAVPJv2DIA> accessed 21 February 2023.

41 'Rekabetin Korunması Hakkında Kanun' <https://www.mevzuat.gov.tr/mevzuatmetin/1.5.4054.pdf> accessed 23 April 2024.

42 'Enerji Piyasası Düzenleme Kurumunun Teşkilat ve Görevleri Hakkında Kanun' <https://www.mevzuat.gov.tr/MevzuatMetin/1.5.4628.pdf> accessed 24 April 2024.

43 Başar (n 7) 207.

40(2) of the Turkish Constitution.[44] According to Article 40, "The State is obliged to indicate in its proceedings the legal remedies and authorities the persons concerned should apply to, and the time limits of the applications."[45] This provision is important for the protection of the individuals' right to legal remedy. By applying this provision and indicating the competent authority, the individual's right to data protection would be subjected to effective scrutiny.

In the first draft of the PDPL, there was a provision in Article 18 (4th subparagraph) stating that "Those concerned may file a lawsuit against the administrative sanction decisions of the Board before the administrative courts." However, this clause was removed during the discussions of the law in the process of committees. The subcommittee report stated that the provision was deliberately removed from the draft law to ensure the application of the Law on Misdemeanours for decisions about monetary fines.[46] As a result, there was no provision for regulating the competent authority for the judicial review of the Board's decisions.

The fact that the relevant criminal judgeship of peace was assigned as the competent judicial authority by the interpretation of the PDPL added another aspect to this debate. The jurisdiction of these courts, as stated in the document prepared by the Ministry of Justice, is limited to handling minor crimes involving a penalty of less than two years of imprisonment or only a fine or security measure.[47] Their main assignment is to resolve petty crimes and misdemeanours, such as detention decisions and objections to traffic tickets. Furthermore, the trial process therein is subject to simplified trial procedures, with decisions reached based on the information in the case file. This means that they reach verdicts quickly, without going through a full procedure and have a single judge in the court.[48]

Assigning additional responsibilities to the criminal judgeship of peace in an area that requires specialised knowledge, such as personal data protection, will directly affect the quality of the system. Another problem is the extent to which these courts function properly in Turkish legal practice. Assigning a function regarding personal data protection to this mechanism will pose a problem for

---

44 Saygı (n 10) 44.

45 'Turkish Constitution' <https://www.anayasa.gov.tr/en/legislation/turkish-constitution/> accessed 9 February 2023.

46 Saygı (n 10) 44.

47 Ministry of Justice, 'The Judicial System of Turkey and Organisation of the Ministry of Justice' 11 <https://diabgm.adalet.gov.tr/Resimler/SayfaDokuman/2492019170148THE_JUDICIAL_SYSTEM_OF_TURKEY_AND_ORGANISATION_OF_THE_MINISTRY_OF_JUSTICE.pdf> accessed 4 January 2023.

48 Zahit Yilmaz and Özge Apiş, 'Seri Muhakeme ve Basit Yargılama Düzenlemelerinin Değerlendirilmesi' (2020) 26 Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi 62, 65 <http://dergipark.org.tr/tr/doi/10.33433/maruhad.733175> accessed 15 June 2023.

the quality of the system.[49]

In addition, as explained above, the main focus of these courts is on the field of criminal justice. The decision-making processes of criminal courts and administrative courts differ in many components. Compared to the criminal judgeship of peace, administrative courts are more competent and experienced in reviewing the legality of administrative decisions and resolving conflicts in this sense. Therefore, it is clear that the administrative court review process is more suitable for the judicial review of Board decisions, as it provides a more thorough review process.

One of the latest decisions of the Turkish Constitutional Court is significant in this context. In its decision dated 12 October 2023 and numbered 2020/7518, the Constitutional Court ruled that the deficiencies in proceedings to complain against an administrative fine imposed by the Turkish DPA against a global hotel chain, which the DPA found to have breached its obligations to ensure data security, violated the complainant's right to property. The Constitutional Court decided that a retrial must be held to rectify the consequences of the violation of rights.

The complainant appealed against the administrative fine before the Istanbul Anatolian 1st Criminal Judgeship of Peace. In the appeal, it claimed that all necessary technical and administrative measures had been taken, and that the infringement was detected and notified in a short period of time, along with other claims. The complainant also argued that the imposition of administrative fines at the highest level was disproportionate and infringed their right to property.

However, the Istanbul Anatolian 1st Criminal Judgeship of Peace rejected the complaint, stating that the act subject to the administrative fine had been determined with the decision issued by the DPA and that the administrative fine was therefore in accordance with the law and procedure. The complainant's appeal against this decision to the Istanbul Anatolian 2nd Criminal Judgeship of Peace under the Misdemeanours Law was also rejected on the grounds that "there is no procedural and legal violation and there is nothing to change in the decision."[50] With this decision appeal process to the administrative fine concluded, the complainant could only take this decision to Turkish Constitutional Court.

After reviewing the case, the members of the Constitutional Court determined that the Applicant's claims against the decision were important and should have been evaluated within the entire judicial process. The criminal judgeship of peace did not make an assessment within this framework. Furthermore, the procedural safeguards for the protection of the right to property within the scope of a fair trial were not fulfilled in the case, resulting in a violation of the complainant's right to property. Therefore, according to the decision of the Constitutional

49 İnan (n 29) 57.

50 *Case numbered: 2020/7518* (Turkish Constitutional Court).

Court, a retrial was required in order to eliminate the violation of rights, and the complainant's claims must be comprehensively re-evaluated.[51]

Interpretation of the Turkish Legislator's Choice in light of the EU Data Protection Legislation

Article 28 of Directive 95/46/EC sets out that the EU legislator chose to leave the regulation of legal remedies to the discretion of Member States. According to Article 28 of the directive, each Member State is required to establish independent supervisory bodies "responsible for monitoring the implementation of the provisions adopted pursuant to the Directive."[52] In addition, paragraph 6 of Article 28 stipulates: "Each supervisory authority is competent, whatever the national law applicable to the processing in question, to exercise on the territory of its own Member State, the powers conferred on it in accordance with paragraph 3."[53]

Galetta and De Hert, argue that the provisions on remedies under Directive 95/46/EC are vague and lack detail on how data protection breaches should be remedied or what sanctions should be imposed.[54] However, they note that the GDPR introduces a more articulated legal remedy system, reducing this ambiguity.[55] Indeed, with the GDPR's Article 78, a mandatory and more detailed legal remedy system was set out.[56] At this point, it is sensible to question the reason behind Turkish legislator's choice to adopt Directive 95/46/EC, even though the proposal for GDPR was published in 2012.[57]

To set an example to Member States' implementation of the GDPR, a closer look at Austria's Data Protection Law (the "DSG") reveals insights into legal

51 ibid 63.

52 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

53 ibid.

54 Antonella Galetta and Paul De Hert, 'The Proceduralisation of Data Protection Remedies under EU Data Protection Law: Towards a More Effective and Data Subject-Oriented Remedial System?' (2015) 8 Review of European Administrative Law 125, 128.

55 ibid 148.

56 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 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 (General Data Protection Regulation) 2016.

57 'Proposal for a Regulation of the European Parliament and of the Council on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data (General Data Protection Regulation)' <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52012PC0011> accessed 10 June 2023.

remedies against the decisions of a data protection authority.[58] Article 24 of the DSG outlines the Austrian authority's commitment to resolving complaints within a three-month timeframe and subsequently informing the applicant. Following this, Article 27 of the DSG grants the applicant the right to appeal the decision to the Federal Administrative Court. The second paragraph of that article details the formation of the panel of judges, emphasising the inclusion of lay judges. Additionally, the third paragraph specifies that expert lay judges must possess a minimum of five years of relevant professional experience and specialised knowledge in data protection law.[59]

The regulatory framework in Austria underlines the acknowledgment by Austrian lawmakers of the importance of expertise and rigorous legal examination in the realm of data protection law. This recognition serves as a key distinguishing factor. While the designation of administrative courts by the Reform Law could be considered as progress, the failure to require any proficiency for the judges indicates that there is still room for improvement. Data protection law is an ever-evolving field and with technological developments, the technical implementation of legal rules calls for expertise. For instance, Article 12 of the PDPL lists the obligations that a data controller must abide by, and subparagraph (c) indicates that one of these is "ensuring the protection of personal data"; thus, non-compliance with this provision could result in a fine issued by the DPA. Consequently, if an appeal against this decision is heard in front of a judge, the judge must be able to assess whether the data controller deployed appropriate safeguards or not. Hence, the lack of a provision on expertise in the Reform Law indicates that this crucial aspect has been overlooked.

CONCLUSION

This study undertakes an analysis of the types of decisions issued by the Turkish DPA and the legal remedy procedures available under Turkish law. Looking at the situation from before the Reform, a significant gap becomes apparent, especially concerning the judicial review process for decisions imposing a monetary fine, which is not directly addressed in the PDPL. This omission has resulted in a considerable amount of uncertainty within the legal landscape. Before the Reform, the Board's decisions were subjected to a dual judicial review process that meant no precedent was formed. During this period, the competency of the

58 'Federal Act Concerning the Protection of Personal Data (DSG)' <https://www.ris.bka.gv.at/Dokument.wxe?ResultFunctionToken=25a20e90-04d7-4b06-aadc-83c8c93c6144&Position=1&SkipToDocumentPage=True&Abfrage=Erv&Titel=&Quelle=&ImRisSeitVonDatum=&ImRisSeitBisDatum=&ImRisSeit=Undefined&ImRisSeitForRemotion=Undefined&ResultPageSize=100&Suchworte=data+protection&Dokumentnummer=ERV_1999_1_165> accessed 14 June 2023.

59 ibid.

single courts was subject to debate, given their nature as criminal courts with a single judge and adherence to a straightforward trial process. Moreover, their lack of specialisation in the area of data protection law raised serious concerns. Consequently, this system failed to provide an effective legal review. A recent decision by the Constitutional Court further emphasised the inadequacy of the previous legal review system. This decision served as compelling evidence that a re-evaluation and enhancement of the judicial review process was imperative, emphasising the pressing need for comprehensive reforms in this crucial aspect of data protection law in Türkiye.

It is not very common for a legal scholar to experience a reform on the exact thing that they were criticising. As a matter of fact, while writing this study, the PDPL has been subject to a reform. The ramifications of the Reform were discussed in this sense. Although the Reform has some shortcomings, the amendments regarding the appointment of administrative courts could be considered as progress. Judicial review, being the cornerstone of scrutiny in a rule-of-law framework, necessitates proper regulation and integration into the judicial system in order to be effective. Without this, the achievements made thus far may risk proving futile. In terms of legal security and certainty, the Reform Law has therefore met an important need.

Acknowledgments

This work has been funded by the European Union's Horizon 2020 Innovative Training Networks, Legality Attentive Data Scientists (LeADS) under Grant Agreement ID 956562. I would like to thank Professor Fryderyk Zoll for his support in writing this article. I would also like to thank the editors and referees of the Law and Justice Review for their valuable assistance.

Bibliography

Baş E, 'Türkiye'deki Bağımsız İdari Otoriteler ve Uygulaması' (Master's Thesis, Karadeniz Teknik Üniversitesi 2010) <https://acikbilim.yok.gov.tr/bitstream/handle/20.500.12812/490483/yokAcikBilim_389238.pdf?sequence=-1&isAllowed=y> accessed 3 March 2023

Başar C, 'Türk İdare Hukuku ve Avrupa Birliği Hukuku Işığında Kişisel Verilerin Korunması' (Doctoral thesis, Dokuz Eylül University 2019) <https://tez.yok.gov.tr/UlusalTezMerkezi/tezDetay.jsp?id=KFdPFVOUwKkR30JKHaFnfQ&no=Br0hJrRvYgINNzdBdaOs4g> accessed 12 June 2023

"Bir Bankanın, Varlık Yönetim Şirketinin ve Üç Farklı Avukatın Borçlu Olmayan Ilgili Kişinin Kişisel Verisini İşleyerek Icra Takibi Başlattıkları Iddiası" Hakkında Kişisel Verileri Koruma Kurulunun 27/04/2021 Tarihli ve 2021/424 Sayılı Karar Özeti' <https://www.kvkk.gov.tr/Icerik/7114/2021-424> accessed 6 June 2023

'Ceza Muhakemesi Kanunu Ile Bazı Kanunlarda Değişiklik Yapılmasına Dair Kanun' <https://www.resmigazete.gov.tr/eskiler/2024/03/20240312-1.htm> accessed 19 April 2024

'Ceza Muhakemesi Kanunu ile Bazı Kanunlarda ve 659 Sayılı Kanun Hükmünde Kararnamede Değişiklik Yapılmasına Dair Kanun Teklifi ve Gerekçesi' <https://cdn.tbmm.gov.tr/KKBSPublicFile/D28/Y2/T2/WebOnergeMetni/6e8b6477-2942-49d1-acf1-cfa13bcac252.pdf>

'Enerji Piyasası Düzenleme Kurumunun Teşkilat ve Görevleri Hakkında Kanun' <https://www.mevzuat.gov.tr/MevzuatMetin/1.5.4628.pdf> accessed 24 April 2024

'Federal Act Concerning the Protection of Personal Data (DSG)' <https://www.ris.bka.gv.at/Dokument.wxe?ResultFunctionToken=25a20e90-04d7-4b06-aadc-83c8c93c6144&Position=1&SkipToDocumentPage=True&Abfrage=Erv&Titel=&Quelle=&ImRisSeitVonDatum=&ImRisSeitBisDatum=&ImRisSeit=Undefined&ImRisSeitForRemotion=Undefined&ResultPageSize=100&Suchworte=data+protection&Dokumentnummer=ERV_1999_1_165> accessed 14 June 2023

Galetta A and De Hert P, 'The Proceduralisation of Data Protection Remedies under EU Data Protection Law: Towards a More Effective and Data Subject-Oriented Remedial System?' (2015) 8 Review of European Administrative Law 125

Göktaylar Y, 'The Rise of Independent Administrative Authorities in Turkey: A Close Look on Sources, Successes and Challenges of This New Institutional Transformation' (2011)

Güzel O, 'Bağımsız İdari Otoritelerde İdari Usul ve Yargısal Denetimi' (Doctoral thesis, Ankara University 2007) <https://tez.yok.gov.tr/UlusalTezMerkezi/tezDetay.jsp?id=DK1aB-SQzTTZDCoaZb7Xxg&no=R1bRQhCmditkKAVPJv2DIA> accessed 21 February 2023

İnan S, 'Kişisel Verilerin Korunması Kapsamında İhdas Edilen Yaptırım Kararlarına Karşı Yargısal Başvuru Yolları: Karşılaştırmalı Bir İnceleme' (2021) 3 Kişisel Verileri Koruma Dergisi 34 <https://dergipark.org.tr/en/pub/kvkd/issue/67484/1036379> accessed 14 February 2023

Kaya MB, 'Kişisel Veri Koruma Hukuku - Mevzuat, İçtihat, Bibliyografya'

KİŞİSEL VERİLERİ KORUMA KURUMU, '6698 Sayılı Kişisel Verilerin Korunması Kanunu Kapsamında İdari Para Cezası Tutarları' <https://www.kvkk.gov.tr/SharedFolderServer/CMSFiles/8833aad2-62c2-4a01-b147-fe97062678f3.pdf> accessed 15 February 2024

'Kişisel Verilerin Korunması Kanunu ve Uygulaması' <https://kvkk.gov.tr/yayinlar/K%C4%B0%C5%9E%C4%B0SEL%20VER%C4%B0LER%C4%B0N%20KORUNMASI%20KANUNU%20VE%20UYGULAMASI.pdf> accessed 18 April 2024

Kişisel Verilerin Korunması Kanununa İlişkin Uygulama Rehberi (KVKK Yayınları 2018) <https://kvkk.gov.tr/SharedFolderServer/CMSFiles/0517c528-a43d-49f5-b1eb-33dc666cb938.pdf> accessed 18 April 2024

Korkmaz İ, 'Kişisel Verilerin Korunması Kanunu Hakkında Bir Değerlendirme' [2016] Türkiye Barolar Birliği Dergisi 81 <https://kutuphane.dogus.edu.tr/mvt/pdf.php?pdf=0019944&lng=0> accessed 29 March 2023

'Law on Personal Data Protection Numbered 6698' <https://www.kvkk.gov.tr/Icerik/6649/Personal-Data-Protection-Law> accessed 17 February 2023

Ministry of Justice, 'The Judicial System of Turkey and Organisation of the Ministry of Justice' <https://diabgm.adalet.gov.tr/Resimler/SayfaDokuman/2492019170148THE_JUDICIAL_SYSTEM_OF_TURKEY_AND_ORGANISATION_OF_THE_MINISTRY_OF_JUSTICE.pdf> accessed 4 January 2023

'Proposal for a Regulation of the European Parliament and of the Council on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data (General Data Protection Regulation)' <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52012PC0011> accessed 10 June 2023

'Rekabetin Korunması Hakkında Kanun' <https://www.mevzuat.gov.tr/mevzuatmetin/1.5.4054.pdf> accessed 23 April 2024

'Resolution of the Personal Data Protection Board Dated 21/04/2022 and Numbered 2022/388 on Payment and Debt Inquiry Services of Municipalities' <https://www.kvkk.gov.tr/Icerik/7415/2022-388> accessed 3 March 2023

Saygı S, '6698 Sayılı Kanun'un Sistematiğinde Yargısal Başvuru Yolları' (2020) 2 Kişisel Verileri Koruma Dergisi 30 <https://dergipark.org.tr/en/pub/kvkd/issue/58932/738180> accessed 14 February 2023

Talat Aslan N, 'Yönetimin Yeni Yapı Taşları Bağımsız İdari Otoriteler' (2010)

Tekin N, 'Kişisel Verilerin Korunması ile İlgili Türkiye'deki Kanun Tasarısının Avrupa Birliği Veri Koruma Direktifi Işığında Değerlendirilmesi' (2014) 4 Uyuşmazlık Mahkemesi Dergisi <http://dergipark.gov.tr/doi/10.18771/umd.51258> accessed 12 February 2023

'TikTok Pte. Ltd. Hakkında Kişisel Verileri Koruma Kurulunun 2023/134 Sayılı Karar Özeti' <https://www.kvkk.gov.tr/Icerik/7538/2023-134> accessed 11 March 2023

'Turkish Constitution' <https://www.anayasa.gov.tr/en/legislation/turkish-constitution/> accessed 9 February 2023

Usman Y, 'Kişisel Verileri Koruma Kurumunca Uygulanan Yaptırımların Yargısal Denetiminde Görevli Mahkeme' (2021) 16 Terazi Hukuk Dergisi <https://www.jurix.com.tr/article/22668> accessed 1 March 2023

Yilmaz Z and Apiş Ö, 'Seri Muhakeme ve Basit Yargılama Düzenlemelerinin Değerlendirilmesi' (2020) 26 Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi 62 <http://dergipark.org.tr/tr/doi/10.33433/maruhad.733175> accessed 15 June 2023

Case numbered: 2020/7518 (Turkish Constitutional Court)

Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data

Kişisel Verilerin Korunması Kanunu 2016 [6698]

Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 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 (General Data Protection Regulation) 2016

Decision No 1/95 of the EC-Turkey Association Council of 22 December 1995 on implementing the final phase of the Customs Union 1995 (OJ L)