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RESEARCH ARTICLE / ARAŞTIRMA MAKALESİ

Overview of the Definitons of Data Controller and Data Processor within the Scope of The Turkish Code of Personal Data Protection (TCDP)

Kişisel Verilerin Korunması Kanunu Kapsamında Veri İşleyen ve Veri Sorumlusu Kavramı Üzerine Değerlendirme

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Abstract

The definition of data controller based on TCDP Art. 3: (ı). The definition of controller within the TCDP requires four main elements; 1) the data processing, 2) determining the purposes and means of the processing of personal data, 3) the natural or legal person, 4) alone or jointly with others. For secondary elements, the provision TCDP Art. 3(ı) seemingly entails two elements within the determination of data controller. The first element is to determine the purpose and means of processing personal data, the second is to establish and manage the data registry system. The first and second elements should not exist cumulatively. In fact, the first element contains all the constitutents of the second element that were implied in TCDP Art. 3 (ı), since the establishment of a personal data registry system requires a determination of the means of collecting and recording personal data. The management of the data registry system requires the performance of one of the operation listed within the scope of the processing of personal data and can therefore be evaluated within the scope of processing personal data. Considering the definitions of data controller and processor in the TCDP, even though the data controller and the data processor are likely to be identified separately in the TCDP, a natural or legal person may have both the title of data controller and data processor. When a processor deviates from the instructions of a controller, the processor becomes the "de facto" controller. This embraces those cases where the processor doesn't act on behalf of the controller, rather acts on his/her own behalf. In this context, there will be two separate data controllers. Although the TCDP does not explicitly refer to it, the "de facto" data controller should also be allocated the responsibilities and obligations of the "legal" data controller in the TCDP.

Keywords

Personal data, The data controller, The data processor, Data processing, The data registry system

Öz

Kişisel Verilerin Korunması Kanunu (KVKK) m.3 (ı) de tanımlanan veri sorumlusu kavramı 4 ana unsurun mevcudiyetinin incelenmesini gerektirmektedir. 1) veri işleme 2) veri işleme araç ve amacının belirlenmesi 3) gerçek veya tüzel kişi 4) birlikte veya yalnız veri sorumlusu. İkinci unsur bakımından KVKK m. 3 (ı) görünürde iki unsurun varlığını gerektirmektedir. İlk unsur kişisel verinin işlenmesinin amaç ve aracının belirlenmesi, ikinci unsur ise veri kayıt sisteminin kurulması ve yönetilmesidir. Bu ikinci unsur, ilk unsurdan farklı, onunla birlikte aranması gereken bir unsur olarak değerlendirilmemelidir. Bu ikinci unsur ilk unsurun içerisinde değerlendirilmelidir. Çünkü veri kayıt sisteminin kurulması kişisel verilerin toplanması ve kaydedilmesi aracının belirlenmesini gerektirir. Veri kayıt sisteminin yönetilmesi ise kişisel verilerin işlenmesi çatısı altında belirtilen işlemlerden en az birinin varlığını gerektirir. Dolayısıyla bu ikinci unsura veri sorumlusu tanımı bakımından gerek yoktur. KVKK' da yer alan veri sorumlusu ve veri işleyen tanımları göz önüne alındığında veri sorumlusu ve veri işleyen ayrı iki kişi olarak görülebilse dahi, bir gerçek veya tüzel kişi hem veri sorumlusu hem de veri işleyen sıfatına sahip olabilir. Veri

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işleyen veri sorumlusunun talimatlarından ayrıldığı ve kendi adına veri işleme araç ve amacını belirlediği andan itibaren artık fiili veri sorumlusu niteliğini haiz olacaktır. Bu kapsamda iki ayrı veri sorumlusu ortaya çıkacaktır. KVKK açıkça bu duruma işaret etmemiş olsa dahi, fiili veri sorumlusunun varlığını kabul etmek ve KVKK'da öngörülen veri sorumlusunun yükümlülüklerine tabi olduğunu belirtmek gerekir.

Anahtar Kelimeler
Veri, Veri sorumlusu, Veri işleyen, Veri işleme, Veri kayıt sistemi

Overview of the Definitons of Data Controller and Data Processor within the Scope of The Turkish Code of Personal Data Protection (TCDP)

I. Introduction

The need for data and its processing processes has increased significantly in today's technology and information focused society. This situation creates different challenges in terms of the protection of personal data. To provide this protection, law makers have a tendency within their legal systems to adopt specific provisions or codes. Thus, by adopting the Turkish Code of Personal Data Protection (TCDP) under No. 6698, Turkish lawmakers tend to meet this need. The TCDP regulates the data controller's and data processor's obligations and responsibilities seperately. Thus, the definition of "data controller" and "data processor" in the TCDP are especially crucial. The application of provisions related to obligations and responsibilities in the TCDP depend on the identification of the data controller and the data processor and seems to pose different challenges. In our study, in order to achieve a better understanding of the terms of the data controller and the data processor, the definition of data controller and data processor will be examined only within the scope of the TCDP. In this context, we will be able to put forward suggestions to minimize any problems that might arise. By doing this, it should be noted that we do not intend to compare European Law and Turkish Law as to the definition of data controller, but we will use the case law of main European countries in order to give a better understanding about the data controller and data processor.

II. Analysing the Definiton of the Data Controller within TCDP Art. 3 (1)

According to TCDP Art. 3 (1), data controller is the natural or legal person who determines the purposes and means of processing personal data, and is responsible for establishing and managing the data registry system. We will try to analyze the definition of controller under four primary elements which must be analyzed separately. They are as follows:

- the data processing,
- determining the purposes and means of the processing personal data,

- the natural or legal person,
- alone or jointly with others[1].

A. Data Proccessing

Firstly, it is necessary to analyze the element of data processing in order to achieve a better understanding of determining the purpose and means of processing and to identify the data controller. According to TCDP Art. 3 (e), the processing of personal data is any operation performed upon personal data such as the collection, recording, storage, retention, alteration, re-organization, disclosure, transferring, taking over, making retrievable, classification or preventing the use thereof, fully or partially through automatic means or provided that the process is a part of any data registry system through non-automatic means. Each of these processes is considered within the scope of processing personal data[2]. The determination of purposes and means of each of these operations is therefore crucial criteria for the nomination of data controller.

B. Determining the Purposes and Means of Processing Personal Data

TCDP Art. 3 (ı) appears to involve two elements within the scope of the determination of data controller. The first element is the determination of purpose and means of processing personal data, the second is the establishment and management of the data registry system[3].

The data controller determines the purposes and means of the operation listed in TCDP Art. 3 (e). The determination of purposes and means of processing personal

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1   These main elements are linked with each other separately and closely. See: Article 29 Data Protection Working Party, **"Opinion 1/2010 on the concepts of "controller" and "processor"**, 2010, p. 7. (http://ec.europa.eu/justice_home/fsj/ privacy/index_en.htm00264/10/EN WP 169 Opinion 1/2010 on the concepts of "controller" and "processor")

2   Hüseyin Murat Develioğlu, **6698 sayılı Kişisel Verilerin Korunması Kanunu ile Karşılaştırmalı Olarak Avrupa Birliği Genel Veri Koruma Tüzüğü uyarınca Kişisel Verilerin Korunması Hukuku**, On İki Levha, İstanbul, 2017, p. 40; Elif Küzeci**, Kişisel Verilerin Korunması**, 3. Baskı, Turhan, Ankara, 2019, p. 323; Christopher Modschein/ Cosimo Monda, **"EU's General Data Protection Regulation (GDPR) in a Research Context"**, Fundemantals of Clinical Data Science, Springer, 2019, p. 61. (pp. 55-74); IT Governance Privacy Team, **Eu General Data Protection Regulation –An Implementation and Compliance Guide**, 2. Ed., 2017. p. 19; İbrahim Korkmaz, " **Kişisel Verilerin Korunması Kanunu Hakkında Bir Değerlendirme**", TBB 2016/214, p. 95 (pp. 82-152); Stefan Brick/ Heinrich Amadeus Wolff, **BeckOK Datenschutzrecht**, 27. Ed. München, 2019, Art. 4, N. 35 vd; Jürgen Kühling/ Benedikt Bunchner, **Datenschutz-Grundverodnung/ BDSG**, 2. Aufl, München, 2018, Art.4, Nr. 2/ 20-37.
    The data processing is not, however, restricted to operation listed in the relevant provision. See. W. Gregory Vois, "**European Union Data Privacy Law Reform: General Data Protection Reguation, Privacy Shield, and the Right to Delisting**", The Business Lawyer, 2016-2017/ 72, p. 222 (pp. 221-233); **Küzeci**, p. 323; İlke Gürsel, "**Protection of Personal Data in International Law and The General Aspects of Turkish Data Protection Law**", DEUHD, 2016/1, p. 47 (pp. 33-61).

3   According to Art.4 VII of General Data Protection Regulation (GDPR), 'controller' means the natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data. In order to identify data controller, it is necessary to determine who decides on the purpose and means of processing personal data. See. Jürgen Hartung/ Lisa Büttgen, **"Die Auftragsverarbeitung nach der DS-GVO"**, DuD 2017/9, pp. 550-551; Stefan Seiter, "**Auftragsverarbeitung nach der Datenschutz-Grundverordnung**" DuD 2019/3, p. 128 (pp. 127-133). However, GDPR Art. 4 VII regulates only the first element of TCDP Art. 3 (ı) with regard to data controller.

data amounts to the determination of why and how personal data is processed. In this context, the main issue is who determines the purpose and means of processing personal data. This issue especially gains importance when multiple actors are involved in processing personal data. In these cases it is necessary to clarify which of those actors is considered as the data controller. First of all, determining the purposes and means of the operation depends on the specific circumstances of the concrete case where processing personal data takes place. In these cases, it is crucial to determine the role of any possible related actors in processing personal data. For instance, If one of them (A) gives clear instructions to others (B,C) in order to process personal data, the others (B,C) have to rely on the legal basis of instructor (A). But only one legal entity (A) is entitled to use and benefit from the processed personal data. In this context, the instructor (A) is the data controller when the third parties are involved in processing as data processors [4]. Under the legal basis of the data controller, the data processor is likely to determine the means of processing personal data. In this case, due to the reasons we have mentioned above, the data processor may not also be considered as data controller.

It is also debatable in terms of the definition of data controller in TCDP Art. 3 (1): Should one, who determines the purpose and means of processing personal data (the first element), also be responsible for managing and establishing the data registry system (the secondary element) ? Should the first and second factors be dealt with cumulatively? Doctrine has generally excluded the secondary element and has only dealt with the first element in TCDP Art. 3 (1) to identify the data controller[5].

In our opinion, the secondary element should not be considered cumulatively with the first element in TCDP Art. 3 (1). In this context, the first element contains the constituents of the second element. This is because, the establishment of a data registry system amounts to the determination of the means by which personal data are collected and recorded. TCDP Art. 3 (e) listed the operations of the collection and recording under the exemplary operations of processing personal data.

In this context, the means of collecting and recording personal data may include the means of establishing a data registry system. The means of collecting and recording personal data is a broader means than the previous one. Thus, one who establishes a data registry system is also the one who determines the means of collecting and recording personal data and the data controller who decides on the purposes and the means of the processing personal data as regards the first element.

In terms of the management of a data registry system, the manager of the system

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4   For the example of mail marketing. See. **Art. 29 Data Protection Working Party**, p. 13.

5   **Develioğlu**, pp. 41-42; Tekin Memiş, **"Veri Sorumlusu ve Veri İşleyen Arasındaki İlişkiler ve Sorumluluk Düzeni"**, BÜHFD, 2017/ 6, pp. 10-11; Damla Gürpınar, **"Kişisel Verilerin Korunamamasından Doğan Hukuki Sorumluluk"**, DEÜHFD, 2017/ Special Issue, p. 685 (pp. 679-694); **Korkmaz**, p. 98.

is the one who decides whether or not the personal data will be processed or how the personal data will be processed. The management of the data registry system requires one of the operations listed within the scope of the processing of personal data and can therefore be evaluated within the scope of processing of the personal data. For instance, X company, which is active on social media and known as web 2.0[6], establishes an online platform to collect and store personal data, and manage the platform and is also a legal entity that establishes and manages the data registry system. It decides which personal data will be processed and why or how this personal data will be processed. Therefore X company is the data controller as a legal entity determining the means of collecting and storing personal data, i.e. processing personal data[7].

As a preliminary result, the secondary element is not a mandatory factor in terms of determining who the data controller is. However it is a descriptive factor[8]. When a legal entity decides how and why the personal data are processed, the legal entity is data controller[9]. This determination(the first element) is necessary and sufficient to identify the data controller, but it is also unnecessary to determine whether or not the data controller establishes and/or manages the data registry system (the secondary element).

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6   It is difficult to determine who the data controller is, where data processing is performed by artificial intelligence (AI), known as web 3.0, which is capable of processing personal data more extensively and faster through automatic means. According to one view, it is important to find out who benefits from processing personal data Bkz. **Memiş**, p. 12; in terms of the definition, the answer to the following questions will help to identify the data controller on Web 3.0. Is there any possibility of accessing the data obtained and processed by artificial intelligence? If the answer is no, we can ask who benefits from processing the personal data taken place by Artificial İntelligent (AI). However, it should be answered that if these data are accessible, who determines the means and purpose of obtaining and processing the data?

7   However, it can hardly be said that X company is a data controller if it does not have access to the data obtained through the platform X built. The same applies to web page managers without data access , see. Paul Voight/ Stefan Alich, "**Facebook-Like-Button und Co. – Datenschutzrechtliche Verantwortlichkeit der Webseiten-betreiber"**, NJW 2011/ 49, p. 3543; **Memiş**, p. 11; where both X and third parties are able to obtain these data, they are both data controllers as they have jointly determined purpose and means of processing personal data. Same for this see: According to the decision of the European Court of Justice, Facebook and Wirtschaftsakademie Schleswig-Holstein company, managing a fun web page via Facebook, are both data controllers. For this decision see. **Court of Justice of the European Union, No 81/ 18, Case - 210/16, 5 June 2018;** for view that decision is right see. Thorsten Heermann, **EUGH: Gemeinsame Verantwortung für den Datenschutz bei Facebook-Fanpages"** ZD-Aktuell 2018/11, 06176.
According to another decision by the European Court of Justice on 29 July 2019, the Court ruled that Fashion ID, who embeds a social plugin on that website causing the browser of a visitor to that website to request content from the provider of that plugin and, to that end, to transmit to that provider personal data of the visitor, is data controller. According to the Court, because the operations involving the processing of personal data in respect of which Fashion ID is capable of determining, jointly with Facebook Ireland, the purposes and means are the collection and disclosure by transmission of the personal data of visitors to its website. However, Fashion ID do not determine the purposes and means of subsequent operations involving the processing of personal data carried out by Facebook Ireland after their transmission to the latter, so that Fashion ID cannot be considered to be a controller in respect of those operations. See **Court of Justice of the European Union, Case- 40/17, 29 July 2019;** for the same decision of Court of European Union. According to the Court, a religious community is a controller, jointly with its members who engage in preaching, for the processing of personal data carried out by the latter in the context of door-to-door preaching organised, coordinated and encouraged by that community, without it being necessary that the community has access to those data. **Court of Justice of the European Union, Case- 25/17, 10 July 2018.**

8   GDPR regulates on Art. 4 VII that the purposes and means of such processing may be determined by Union or Member State law, the controller or the specific criteria for its nomination may be provided for by Union or Member State law. In our opinion, this second factor may not be specific criteria for the controller's nomination in this context. See. **Modschein/ Monda**, p. 61.

9   There are three categories used to identify data controller; control stemming from explicit legal competence, from implict competence and from factual influence, the first two may cover more than 80% of relevant situations in practice. See **Art 29 Data Protection Working Party**, pp. 10-12; the TCDP includes the latter under these categories on itself.

C. Data Controller As A Natural or Legal Person

Under TCDP Art. 3 (1), the data controller may be a natural or a legal person. First, the data controller can be a natural person. For instance, a lawyer is a data controller, when the lawyer decides when and how the clients' personal data will be obtained or for which purpose the clients'data are processed or the length of storing their data. This is also valid even though the official assistants of the lawyer or the law office staff take part in data processing[10]. However, as we will discuss in detail below, the one, who processes the personal data on the legal basis of the lawyer or on behalf of the lawyer, becomes the data processor. Second, the data controller may be a legal person. For instance X company, as we have already discussed above, can be a data controller under certain circumstances. In terms of the legal persons, the bodies and employees, natural person who constitute the legal person will be able to carry out work and operations that will have legal consequences for the legal person. Therefore, even if these natural persons determine the purpose and means of data processing within the scope of the legal person's activity, as a rule, the legal person will be the data controller[11] and have the rights and obligations of the data controller. For example, in a car rental company, although the customers' personal data are obtained and stored by the companies' employees, the data controller will not be the companies' employees but will be the car rental company itself.

Finally in this section, the TCDP has made no distinction between private or public law in terms of legal persons who have the title of data controller,[12]. Thus, the cooperations, companies, associations, foundations, state institutions and organizations may be the data controller. In this sense, it can clearly be observed that the scope of application of the concept of"data controller" has been expanded in the TCDP.

D. Joint or Alone Controller ?

Although it states that the data controller is the natural or legal person deciding "why" and "how" processing the data takes place, the TCDP has not explicitly stated that the data controller can be more than one person. It can be concluded from TCDP Art. 3 (1) that the data controller must be *a natural or legal person*. However this does not lead to the conclusion that the data controller may not be more than one legal person who decides the purposes and means of processing personal data, especially considering the definition of data controller under GDPR Art. 4 (7).

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10   According to GDPR Art. 4 (10), third party means a natural or legal person, public authority, agency or body other than the data subject, controller, processor and persons authorized to process personal data under the direct authority of the controller or processor; consequently, the lawyer's aide and/or staff is third party pursuant to GDPR Art. 4 (10). Even though the TCDP includes no determinaton of third party, it doesn't effect the title of data controller and data processor.

11   **Memiş,** pp. 20-21; same for Directive 95/46 EC, see. **Art 29 Data Protection Working Party,** p. 15

12   **Memiş,** pp. 10-11; **Develioğlu,** p. 42; KVKK, **Data Protection in Turkey**, Ankara, p. 8.

According to GDPR Art. 4, the data controller is the natural or legal person alone or jointly with others, determines the purposes and means of the processing of personal data. Moreover, GDPR Art. 26 states that where two or more controllers jointly determine the purposes and means of processing, they shall be joint controllers[13]. The TCDP does not include such a provision,but in our view, this provision of the GDPR can also be applied under the TCDP. If two or more natural or legal persons have jointly decided to determine the purposes and means of processing personal data, then there is no hesitation that they are jointly data controllers. For instance, when two lawyers working together have determined the purposes and means of processing the personal data of their clients, both are the data controllers.

The main question arising is: Would it be possible to designate the data controllers as the joint data controllers in terms of people who seperately but not jointly, determine the means and purpose of processing personal data? In this case, these data controllers are not the joint controller on the basis of GDPR Art. 26. Because this provision explicitly states that the purpose and means of processing personal data shall be determined by joint decision. Therefore, if the joint decision has not been made, they are the separate data controllers. This conclusion also applies within the scope of the TCDP.

III. Definition of "Data Processor" within the TCDP

The TCDP defined the limit between the data processor and the data controller and regulated a stricter level of responsibility and liability attached to data controller than to processor. So the setup and due diligence in identifying the roles between these notions is crucial. The question of who is the processor should be answered.

According to TCDP Art. 3 (ğ), the processor is the natural or legal person who processes the personal data on behalf of the controller upon his authorization[14]. The data processor is the legal or natural person who has performed one of the operations listed in TCDP Art. 3 (e) on behalf of the controller.

Generally, the data processor is the person authorized to process data and the data proccessor contracts with the data controller. Within the application of the provisions of the contract, the data processor does not act on his/her own behalf, but he/she acts on behalf of the data controller. The data controller gives the data processor the instructions about the data processing, the data processor acts on behalf of the controller and processes the personal data in accordance with instructions after the

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13 The data subject may raise his or her rights against each of the joint controllers under GDPR. See. **Vois**, pp. 227-228; generally same for it, see. **Art 29 Data Protection Working Party,** p. 24.

14 GDPR Art 4 (8) regulates that 'processor' means a natural or legal person, public authority, agency or other body which processes personal data on behalf of the controller. In this context, the GDPR and theTCDP have a paralel provision. For processor, TCDP Art. 3 (ğ) has not distinguished between private and public agencies. See. **Küzeci**, p. 319.

data controller determines the purposes and means of processing data. Therefore, as a rule, the responsibilities, liabilities, rights and obligations stemming from the processing of the personal data belong to the data controller, and not to the data processor[15]. For instance, according to TCDP Art. 11, each person has the right to apply to the data controller for the purpose of fulfilling request and obtaining certain information listed under same provision.

The fact that the data processor is the natural or legal person in this context does not make any difference in terms of the title of data processor. The data processor may be the legal or natural person. If the data processor is the natural person, the data processor's aides and/or staff involved in processing may not have the title of data processor. The natural person, to whom the relavent instructions are directed and who is the party of the data processing contract, has the title of data processor.

As far as the legal person is concerned, the legal person has the title of data processor even though the employees of thed legal person are involved in data processing. For instance, bank (A) wants to create projects through taking advantage of its customers' personal data. In order to do this, (A) forms a contract with digital service provider (D) which is a legal person. Even though (D)'s employees process the personal data of (A)'s clients, the title of data processor belongs to (D).

IV. The Distinction Between Data Controller and Processor in Terms of Relevant Definitions

A. Acceptability of "De Facto" Data Controller

Considering the definitions of data controller and processor in the TCDP, even though the data controller and data processor are likely to be identified separately, a natural or legal person may have the titles of both data controller and data processor.

There may be several different combinations of data controller and processor relationships. The data controller and processor can be one legal entity or organization or be separate legal entities or organizations. In these cases, it is necessary to investigate and check the roles of the legal entities within the process. For instance, when a consumer product company hires a marketing agency to profile their consumer, the consumer product company will be the data controller, the marketing agency will also be the data processor. However, in the same case, if the marketing agency will decide how and why the data is used, it could be the data controller[16].

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15 Same For GDPR. See. **Seiter**, p. 128; W. Gregory Vois, "**European Union Data Privacy Law Reform: General Data Protection Reguation, Privacy Shield, and the Right to Delisting**", The Business Lawyer, 2016-2017/ 72, p. 226 (pp. 221-233).

16 See for instance: IT Governance Privacy Team, **Eu General Data Protection Regulation –An Implementation and Compliance Guide**, 2. Ed., 2017. p. 19; see. **Küzeci**, p. 320.

The distinctive criteria on this issue is whether or not the data processor acts on behalf of the controller. Where the data processor deviates from the instructions of the data controller, the data processor becomes the "de facto" data controller[17]. In this case he/ she doesn't act on behalf of controller, rather acts on his/her own behalf. This does not effect the title of instructor as data controller. In this context, there can be two seperate data controllers[18].On the one hand, the instructor is the "legal" data controller, and on the other hand the data processor is the "de facto" data controller. The TCDP-based definition of the data controller does not distinguish between the data controller by law or contract and one by de facto. TCDP Art. 3(ı) also supports this factual approach by regulating that the data controller is not the one who is "legally" supposed to determine the purpose and means, but the one who actually determines the purpose and means[19].

B. The Conclusions of Accepting the "De Facto" Data Controller

Considering the definition of the data controller in the TCDP, the acceptance of two separate data controllers will result in an outcome. The TCDP regulates the various obligations and responsibilities of the data controller. For instance, TCDP Art. 10 requires the data controller to inform the data subject about the issues listed in TCDP Art. 10[20]. In this perspective, the TCDP allocates the obligations and responsibilities only to the data controller and the person authorized by the data controller. As well as the data, the subject has the right to apply only to the data controller stated in TCDP Art. 11. The title of data controller and data processor seems to be dealt with separately in these provisions. However, the TCDP regulates responsibility for processing the personal data jointly under TCDP Art. 12. According to TCDP Art. 12 I;

"...the controllers are obliged to take all necessary technical and administrative measures to provide asufficient level of security in order to prevent unlawful processing of personal data and unlawful access to personal data, to ensure the retention of personal data..."

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17   **Modschein/ Monda,** p. 61; **Art 29 Data Protection Working Party,** p. 17

18   The designation of data controller by contract or law is not decisive in determining its actual status, which must be based on concrete, specific circumstances from which factual influence can be inferred. See **Art. 29 Data Protection Working Party**, p. 9**; Hartung/ Büttgen**, p. 551.

19   However this conclusion does not exclude the data controller from being identified explicitly by national law establishing a task or imposing a duty on a legal entity to process personal data. In some countries, we can see that the national law provides that public or private legal entities are responsible for the processing of personal data within their duties. See **Art. 29 Data Protection Working Party**, p. 10; we can see an example of this issue in the German Traffic Road Code §63a. See. Klink-Straub/ Straub," **Nachste Ausfahrt DS-GVO-Datenschutzrechtliche Heraus-forderungen beim automatisierten Fahren"**, NJW 2018, pp. 3202-3203.

20   For this provision and other responsibility of tha data controller. See. Nafiye Yücedağ, "**Medeni Hukuk Açısından Kişisel Verilerin Korunması Kanunu'nun Uygulama Alanı ve Genel Hukuka Uygunluk Sebepleri**", İÜHFM, 2017/2, p. 778; A. Çiğdem Ayözger, **Kişisel Verilerin Korunması**, Beta, İstanbul, 2016, p. 141; Nafiye Yücedağ, "**Kişisel Verilerin Korunması Kanunu Kapsamında Genel İlkeler**", Kişisel Verileri Koruma Dergisi 2019/1, pp. 48 vd.

According to Art. 12 II,

"In case of the processing of personal data by a natural or legal person on behalf of the controller, the controller shall jointly be responsible with these persons for taking the measures laid down in the first paragraph."

These two provisions relating to personal data security explictly regulate the joint responsibility of the data controller and the data processor, even though they are not explictly identified as "joint data controller" [21].

In our opinion, it is not in accordance with GDPR in terms of the definition of the data controller that the TCDP took into account a single data controller whilst establishing the provisions. Although the TCDP does not explicitly accept the term of "the joint data controller", it is not concluded that the TCDP explicitly rejected "the joint data controller". Within the scope of the TCDP, more than one legal entity may also have the title of data controller by jointly deciding on determining the purposes and the means of processing the personal data. In this perspective, the "joint data controller" is accepted within the scope of the TCDP in a similar way to the GDPR. Moreover, we have to mention the "de facto" data controller when there are more than one legal entities deciding on it not jointly, but having the title of data controller pursuant to TCDP Art. 3.

The legal entities other than those identified as the data controller pursuant to TCDP Art. 3 (1) may also be the "de facto" data controller when these decide on determining the purpose and the means of processing the personal data. The data processor among these legal entities is more likely to be a "de facto" data controller. Is the data processor, determining the purpose and the means of processing personal data actually, liable for responsibilities and obligations in the TCDP which the title of data controller is intended to allocate? Based on the definition of the data processor in TCDP Art. 3 (ğ), the data processor upon the data controller's authorization is not the data controller, thus he/she is not liable for responsibilities and obligations in the TCDP which the title of data controller is intended to allocate. When the data processor de facto deviates from the data controller's authorizations and has de facto the title of data controller based on TCDP Art. 3 (1), the "de facto" data controller is subject to responsibilities and obligations of the "legal" data controller based on TCDP[22].

In our opinion, although the TCDP does not explicitly refer to it, the de facto data controller should also be allocated the responsibilities and obligations of the data

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21 For this provision. See. **Memiş**, p. 17; **Küzeci**, pp. 357-358.

22 To some extent, one may give the data processor authority to decide on determination of special means of processing personal data, the determination of person deciding on determination of the purpose and the means of processing personal data depends on actual circumstances. See. **Hartung/Büttgen,** p. 551.

controller in the TCDP. With regard to TCDP Art. 11 regulating the rights of the data subject, the data subject should be able to apply to the legal entity which is the de facto data controller[23]. For instance, according to TCDP Art. 11 (d), the data subject has the right to request the rectification of the incomplete or inaccurate data if any, by applying to data controller. In our opinion, the data subject should also claim his rights against the data processor or legal entity having the title of the "de facto" data controller.

The TCDP enables the data processor to act as the data controller's representative upon the data controller's authorization in terms of task and operation related to processing data. However, the liability and obligations arising from processing personal data are not on the data processor, rather, they are on the data controller. The data processor also depends on the data controller's instruction to perform the obligations of the data controller. Where the data processor becomes the "de facto" data controller, he/she is also responsible for the data controller's obligations laid out in the TCDP.

V. Conclusion

The definition of data controller is based on TCDP Art. 3 (1). According to TCDP Art. 3 (1), a data controller is the natural or legal person who determines the purpose and means of processing personal data, is responsible for establishing and managing the data registry system. The definition of controller within the TCDP requires four main elements; 1) the data processing, 2) determining the purposes and means of the processing of personal data, 3) the natural or legal person, 4) alone or jointly with others. These four main elements are related with each other. Of these elements, the second and fourth elements are especially debatable. For second elements, the provision TCDP Art. 3(1) seemingly entails the two elements within determination of the data controller. The first element is to determine the purposes and means of processing the personal data, the second is to establish and manage the data registry system. This second factor should not be jointly considered as an element with the first element. Elements for the second factor stated in TCDP Art. 3 (1) fall even under the first factor and may be assessed in this context because the establishment of a personal data registry system requires determination of the means of collecting and recording personal data. Given the management of data registry systems, the one who manages the data registry is the one who decides on whether or not the data will be processed or how the data will be processed. The management of the data registry system requires that the one of the operation listed within the scope of the

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23   According to TCDP Art. 11 (ğ), the data subject has the right to request compensation for the damage arising from the unlawful processing of his personal data by applying to data controller. In our opinion, the data subject has this right also by applying to the data processor ("de facto" data controller). This provision is more likely to occur in circumstances in which the data processor is identified as "de facto" data controller.

processing of the personal data takes place and therefore may be evaluated within the scope of processing of the personal data. The TCDP has defined the limit between the data processor and the data controller and has regulated that a higher level of responsibilities and liability should be attached to the data controller than to the processor. The setup and due diligence in identifying the roles betweeen these notions is crucial. According to TCDP Art. 3 (ğ), the processor is the natural or legal person who processes the personal data on behalf of the controller upon his authorization. Considering the definitions of the data controller and the processor in the TCDP, even though the data controller and data processor are likely to be identified separately, a natural or legal person may have both the title of data controller and data processor. When the processor deviates from the instructions of the controller, or, to put it another way, when he/she doesn't act on behalf of the controller but rather acts on his/her own behalf, the processor becomes the de facto controller. In this context, the instructor as the "legal" data controller, and the data processor as the "de facto" data controller are two separate data controllers. Although the TCDP does not explicitly refer to it, the de facto data controller should also be allocated the responsibilities and obligations of the legal data controller in the TCDP.

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