

**Personal Data Protection Board’s Decision No. 2023/1041 dated June 15, 2023 “Regarding the data controller’s failure to fulfill its information obligation on its website in accordance with the procedure and its conditioning of the service provided on the requirement of explicit consent”**

**Date of Decision** : June 15, 2023

**Decision No.** : 2023/1041

**Summary of the Matter:** The data controller’s failure to properly fulfill its duty to provide information on its website and its conditioning of the service provided on the requirement of explicit consent

In summary, the complaint received by the Authority states that the data subject wished to purchase glucose monitoring devices worn on the body for diagnostic and monitoring purposes; however, the product offered for sale by the Data Controller, which met these specifications, could not be purchased or the website registration process could not be completed unless the fields marked as “ ” in the privacy and disclosure texts were filled out, It was stated that filling out the fields in the aforementioned texts is mandatory for the product to be purchased, and that the use of personal health information for commercial and marketing purposes, as well as the refusal to sell the product without sharing such information, restricts the patient’s right to diagnosis and treatment, and that the patient does not consent to the transfer of any personal data abroad, and action was requested accordingly.

As part of the investigation initiated regarding this matter, the data controller was requested to submit a defense, and in the data controller’s response, it was summarized that:

- Prior to making a purchase on the website, customers are expected to create an account and check the last two boxes with identifying information; the first box preceding these is intended for commercial communication and is optional; The checkboxes are designed as a system requiring consent via the “opt-in” method; even if customers have granted permission for optional commercial communications, they may withdraw their explicit consent at any time and without providing any reason; whether or not consent is given via the checkbox does not prevent making a purchase on the website and is not a prerequisite for the sale;
- Article 230 of the Tax Procedure Code specifies the minimum content required on an invoice; the information requested in this section includes the customer’s first name, last name, and address, These details are mandatory under the law to process the sale and issue an invoice; the email address and account creation are necessary for the customer to track their shipment; the customer’s phone number is collected to be provided to the shipping company for delivery purposes; The Turkish ID number is not mandatory; it is collected only if the individual chooses to provide their correct Turkish ID number and is optional; no health data is requested on the website in any way;

- The Data Controller is a subsidiary of a global group of companies; due to the mandatory requirement to participate in international systems, it can only transfer the name, surname, address, and email address collected during registration to foreign countries, that this data is collected in accordance with Article 9 of Law No. 6698 based on explicit consent and is processed to fulfill the legal obligations set forth in medical device regulations in the capacity of a manufacturer, for this reason, it is stated that data will be transferred abroad only if the customer provides explicit consent after being clearly informed via an information notice and being offered the right to choose freely,
- Customers who do not wish to give explicit consent may contact customer service to purchase products through a sales channel other than the website; there is no situation where explicit consent is compelled, and the consent for commercial communication and the consent for data transfer abroad are presented to the customer for review via two separate tabs and distinct information texts,
- The alternative sales channel for the product is “sales via an authorized seller at ,” which holds a Medical Device Sales Center Authorization Certificate in compliance with the Medical Device Sales, Promotion, and Advertising Regulation; the authorized seller has properly registered the product in the Product Tracking System,
- In order to complete the sales transaction, the authorized seller collects the customer’s first name, last name, and address—information required for shipping the products and for fulfilling legal obligations under financial regulations—but these data are not processed or stored in any manner, Furthermore, since the authorized seller is a local company and all transactions are conducted in Turkey, the data is not transferred abroad in any form,
- It has been stated that no additional or different cost items arise in the alternative sales channel offered by the authorized seller, and that shipping and/or delivery are provided free of charge.

As a result of the investigation conducted on this matter, pursuant to the Decision No. 2023/1041 of the Personal Data Protection Board dated June 15, 2023;

- Article 3 of the Personal Data Protection Law No. 6698 (the Law), under the heading “Definitions” in Article 3; “data subject” refers to the natural person whose personal data is processed; “personal data” refers to any information relating to an identified or identifiable natural person; “data controller” refers to the natural or legal person who determines the purposes and means of processing personal data and is responsible for the establishment and management of the data recording system; and “processing of personal data” is defined as any operation performed on personal data, whether fully or partially automated or non-automated provided it forms part of a data recording system, such as collection, recording, storage, retention, alteration, reorganization, disclosure,

transfer, acquisition, making available, classifying, or restricting the use of personal data,

- Regarding the claim that the sale transaction was not carried out without approval of the text regarding explicit consent for the transfer of personal data abroad; it is necessary to examine whether the service provided by the Data Controller in the specific case was conditional upon the Data Subject's "explicit consent." The "explicit consent" defined in Article 3(1)(a) of the Law refers to consent that is specific to a particular matter, based on information provided, and freely given; in this sense, explicit consent must first and foremost be obtained in relation to a specific matter and be limited to that matter. In this regard, the Data Controller must clearly specify the subject matter for which the declaration of explicit consent is sought; in other words, the declaration of explicit consent must not be of a general nature but must be specific to a particular subject and limited to that subject,
- Furthermore, since explicit consent is an expression of will, the individual must know what they are consenting to in order to give consent freely. Furthermore, since the individual is expected to have full knowledge not only of the subject matter but also of the consequences of their consent, the information provided must be clear and understandable regarding all aspects of data processing and must be provided prior to the processing of the data. On the other hand, for explicit consent to be valid, the individual must be fully aware of the action they are taking at ; within this framework, explicit consent must be given freely, the provision of any product and/or service (or the granting of access to any product and/or service) must not be contingent upon the individual's provision of explicit consent; in situations where the parties are not on equal footing or where one party exerts influence over the other, it is necessary to carefully assess whether consent was given freely, since making the provision of the service contingent on the condition of explicit consent would negate free will, the individual's expression of consent cannot be legally considered a valid "explicit consent,"
- If the statement does not reflect the Data Subject's true intent and is not based on their own decision, or if refusing to give consent causes the Data Subject harm compared to the situation they would have faced had they consented, and if it is impossible to withdraw consent at a later date, then consent cannot be deemed to be based on a free expression of will;
- Based on the comprehensive evaluation of all information and documents in the review file, the practice of obtaining explicit consent for data transfers abroad was applicable to sales made through the website as of the date of the complaint, however, for customers who did not provide explicit consent for the transfer of their personal data abroad, an alternative sales channel was available through customer service, and this channel offered customers the opportunity to make purchases without imposing any additional costs or obligations; accordingly, the Data Subject could obtain the product without suffering any harm and without being compelled to consent to the transfer of

their personal data abroad, therefore, the service cannot be deemed to be subject to the condition of explicit consent,

- Upon reviewing the Data Controller’s website and membership/sales screens, it was observed that the text on the website and membership screen at the time of the complaint differs from the text on the pages accessed as of the date of this decision; specifically, the statement “For detailed information regarding product purchases... you can contact our Customer Service at our phone number.” does not clearly establish that customers who have not given explicit consent to the transfer of their personal data abroad have the option to place an order through customer service; it fails to provide customers with transparent guidance; and the change made on the current website renders it unreasonable to expect customers to understand that an alternative sales channel exists under normal circumstances,
- Regarding the claim that a sale cannot be completed and a membership cannot be established without checking the privacy and disclosure texts; As a general rule, pursuant to Article 3(1)(i) of the Law, the obligation to provide information to natural persons whose personal data is processed, as required by Article 10 of the Law, applies to those who qualify as data controllers, Article 5(1)(e) of the “Communication on the Procedures and Principles to Be Followed in Fulfilling the Duty to Inform” states that the burden of proof regarding the fulfillment of the duty to inform lies with the data controller; upon evaluating these two provisions together, the practice on , which prevents membership and sales transactions from being completed without checking the privacy and disclosure texts, constitutes a measure adopted by the Data Controller to fulfill its disclosure obligation under the Law, and is intended to ensure that customers are informed by reading the disclosure text and thereby encouraged to consider their options; therefore, it does not constitute a violation of the Law,
- Regarding the allegation that health data is used for commercial and marketing activities: Since it cannot be concluded that individuals purchasing the product offered for sale by the Data Controller are diabetic, it cannot be concluded that the requested information constitutes personal data within the meaning of Article 3 of the Law or that the health data of customers purchasing the product is being processed,
- Purchases and membership processes can be continued even without consent for the processing of personal data for commercial or marketing purposes, Since it was determined that the Data Controller sought the explicit consent of the Data Subject for the processing of personal data for marketing purposes and that there were no circumstances preventing such consent from being freely given, it was assessed that the Data Controller’s practice does not constitute a violation of the Law in this regard;
- The practice of not allowing membership and sales transactions to be completed without checking the privacy and disclosure texts was adopted by the Data Controller to fulfill its disclosure obligation under the Law, and it aims to inform customers by having them

read the disclosure text and thereby encourage them to consider the matter; It cannot be concluded that the processing of health data of customers who purchase a product intended for use by diabetic patients occurs through the sale of such a product, and therefore, the claim that special category personal data is being processed is not acceptable; Considering that explicit consent is required for the processing of the Data Subject's personal data for marketing purposes, and that there were no circumstances in the specific case that would prevent such consent from being freely given, the sale could not be completed and the membership process could not be carried out without the Data Subject checking the privacy and disclosure statements; regarding the claims that health data was used in commercial and marketing activities, there is no violation of the Law;

- Regarding the claim that the sale could not be completed without consent to the explicit consent text for the transfer of personal data abroad, it was noted that at the time of the complaint, explicit consent for the transfer of customers' personal data abroad was obtained during purchases made via the website; however, for customers who did not consent to the transfer of their personal data abroad, a sales channel was available through customer service, Therefore, it was assessed that the service was not contingent on the condition of explicit consent; however, considering that as of the date of this Decision, changes made by the Data Controller on its website have rendered the alternative sales channel nearly impossible to understand, it was decided to instruct the Data Controller to ensure transparent information by clearly and understandably displaying the path to the alternative sales channel on the membership and sales screens.