

Decree on Personal Data Protection Issued

Introduction

On 17 April 2023, the Government issued the long-awaited Decree 13/2023/ND-CP on personal data protection ("**PDP Decree**").

The PDP Decree represents the first consolidated data protection regulation in Vietnam, and introduces significant changes to the existing (fragmented) regulatory environment for data protection in the country. Many of the provisions and concepts introduced by the PDP Decree were influenced by the European General Data Protection Regulation (GDPR).

This Update summarises the key features of the PDP Decree.

Scope of Application

The PDP Decree will have extraterritorial application. It regulates both Vietnamese and foreign agencies, organisations and individuals. For the latter, foreign agencies, organisations or individuals that directly participate in or otherwise involved in processing personal data in Vietnam will be regulated by the PDP Decree.

"Processing" covers a wide range of operations that involve personal data. It includes the collection, recording, analysis, confirmation, storage, correction, disclosure, association, access, retrieval, revocation, encryption, decryption, copying, sharing, transmission, provision, deletion and destruction of personal data or other related actions.

Regulatory Oversight

The Department of Cybersecurity and High-Tech Crime Prevention (A05) ("**A05 Department**") under the Ministry of Public Security ("**MPS**") will be the state agency with primary oversight in the activities of personal data protection. This is not a specialised "Personal Data Protection Committee" – instead, it is a department of MPS that is involved in protection of cybersecurity.

Personal Data

The PDP Decree regulates personal data as information in the form of symbols, letters, numbers, images, sounds or the like on an electronic medium that is associated with a particular person, or helps to identify a particular person. Similar to data protection laws of other jurisdictions, the PDP Decree now categorises personal data into **basic personal data** and **sensitive personal data**.

Processing of sensitive personal data attracts additional regulatory obligations. For example, prior to processing, it would require data subjects to be informed that the data being processed comprises sensitive personal data.

Data Controller – Data Controller and Processor – Data Processor

The PDP Decree introduces the concept of a data controller and data processor (and the hybrid data controller and data processor) – similar to that applied in data protection laws of other jurisdictions. The PDP Decree regulates specific obligations applicable to each of these subjects.

New Rights for Data Subjects

The PDP Decree introduces a significant expansion to the rights that data subjects can have in respect of the processing of their personal data. In particular, it prescribes the following 11 rights:

- (a) the **right to know** of the personal data processing activities, unless the law provides otherwise;
- (b) the **right to consent** in respect of the processing of their personal data, save for certain exceptions in the PDP Decree (*see Section 0*);
- (c) the **right to access** to view, correct or request correction of their personal data, unless the law provides otherwise;
- (d) the **right to withdraw consent**, unless the law provides otherwise;
- (e) the **right to deletion** (including to request for his/her personal data to be deleted), unless the law provides otherwise;
- (f) the **right to restriction of data processing**, unless the law provides otherwise;
- (g) the **right to be provided with their data**, unless the law provides otherwise;
- (h) the **right to object to processing** in order to prevent or limit the disclosure of personal data or the use of for advertising and marketing purposes, unless otherwise provided by law;
- (i) the **right to complain, denounce and initiate lawsuits** in accordance with the law;
- (j) the **right to claim compensation** in accordance with the law if there is a violation of personal data protection regulations, unless the law provides or the parties otherwise agree; and
- (k) the **right to self-defence** in protecting themselves according to the Civil Code, other relevant laws and the PDP Decree, or to request the relevant agencies and organizations to protect their civil rights.

General Bases for Processing Personal Data

The PDP Decree regulates consent from the data subject as the default legal basis on which personal data can be processed – i.e., that the data subjects' consent applies to all activities in the processing of personal data unless otherwise provided for by law. This theme is largely consistent with the requirements for consent set out in other laws, such as the Law on Information Technology and the Law on Network Information Security.

The PDP Decree prescribes five circumstances in which processing of personal data does not require the data subjects' consent:

- (a) in cases of emergency where it is necessary to immediately process relevant personal data to protect the life and health of the data subject or others (and in this case, the data controller, data controller and processor, data processor, and third party bears the burden of proving such case);
- (b) disclosure of personal data in accordance with the law;
- (c) where it is done by the competent state agencies in the event of a state of emergency on national defence, national security, social order and safety, major disasters or dangerous epidemics, or where there is a risk of a threat to security and national defence (but not to the extent that it is declared a state of emergency); or to prevent and combat riots and terrorism, to prevent and combat crimes and violations of the law in accordance with the law;
- (d) to fulfil the contractual obligations of the data subject with relevant agencies, organisations and individuals as prescribed by law; and
- (e) to serve the activities of state agencies as prescribed by specialised laws.

It remains unclear as to how the consent requirements in the PDP Decree would be interpreted against existing laws (e.g., Law on Information Technology) which also expressly cater for other cases where consent of the data subject is not required for certain personal data processing activities. These carve-outs arguably still apply.

Consent Requirements

Where consent is needed to process personal data, the PDP Decree introduces more detailed requirements as to how consent is to be obtained (and the conditions that need to be met to ensure valid consent is given). Consent will only be valid if the data subject voluntarily and has clear knowledge of the following:

- (a) the type of personal data to be processed;
- (b) purpose of processing personal data;
- (c) organisations and individuals are allowed to process personal data; and

- (d) their rights and obligations of data subjects.

The PDP Decree requires express consent, where the data subjects express clearly, in writing, by voice, by ticking the consent box, by texting consent syntax, by selecting consent technical settings or by other actions expressing such consent. Consent is not deemed to be given by silence or non-response. Data subjects can withdraw their consent.

Notification Prior to Processing Personal Data

Data subjects must be notified before their personal data is processed, including as to:

- (a) the purpose of processing;
- (b) the type of personal data used in connection with the processing;
- (c) the method of handling;
- (d) information about other organisations and individuals related to the processing;
- (e) the consequences and unexpected damage that is likely to occur; and
- (f) the time for starting and ending the data processing.

Breach Notification Requirements

The PDP requires the data controller, data controller and processor and data processor to, upon detecting a violation of personal data protection regulations, notify the A05 Department of MPS within 72 hours from occurrence of the violation. If notification cannot be done within 72 hours, reasons for the belated notice must be given.

A statutory form has been prescribed for such notification. It requires inclusion of details such as the nature of the breach (time, place, affected data, etc.), contact details of the employee in charge of data protection (or organisation and individual responsible for data protection), description of the consequences and measures to handle and minimise harm.

The PDP Decree does not clearly displace other breach notification requirements that could potentially apply under existing legislation – for example, those in the Law on Network Information Security, Law on Cybersecurity and Decree 52/2013/ND-CP on e-commerce. Therefore, as it stands, the PDP Decree appears to add a new notification requirement in addition to the existing ones.

Impact Assessment for Processing Personal Data

The PDP Decree requires the data controller, data controller and processor and data processor to prepare and retain a "Personal Data Processing Impact Assessment Record" ("**PDP Impact Assessment**") from the time on which it starts processing personal data.

The PDP Decree regulates mandatory content of this PDP Impact Assessment, which include – *for example*, contact details, contact details of the employee in charge of data protection (or the organisation and individual responsible for data protection), purpose of processing, organisations and individuals that may receive the personal data (including outside of Vietnam), whether data will be transferred overseas, period for processing (estimated time to delete or destroy the data), description of protection measures applied, and general impact assessment (e.g., benefits, potential consequences, measures to reduce risk or harm, etc.).

The above requirements draw some similarity to the "Data Protection Impact Assessment" that is required under the GDPR.

This PDP Impact Assessment must be available for inspection and assessment by MPS. An original must also be filed to the A05 Department of MPS within 60 days from the date of processing of personal data.

Cross-border Transfer of Personal Data

The PDP Decree introduces stricter requirements on transfers of personal data (of Vietnamese citizens) outside of Vietnam. Previously, such transfers were largely treated in a similar manner to other processing activities.

Cross-border transfers of personal data require a specific PDP Impact Assessment with the following to be included:

- (a) information and contact details of the parties that transfer and receive personal data of Vietnamese citizens;
- (b) name and contact details of the party in charge of the data transfer party related to the transfer and receipt of personal data of Vietnamese citizens;
- (c) description and explanation of the objectives of the data processing activities of Vietnamese citizens after the cross-border transfer;
- (d) description and clarification as to the type of personal data transferred overseas;
- (e) description and clear specification of the compliance with regulations on personal data protection in the PDP Decree, detailing the personal data protection measures applied;

- (f) assessment of impact of the processing personal data, potential consequences, unwanted damage, and measures to reduce or eliminate such risk or harm;
- (g) the consent of the data subject as prescribed in the PDP Decree (see *Section 0*) on the basis of clear knowledge of the feedback complaint mechanism when problems or requests arises and
- (h) a document showing the binding and responsibilities between organisations.

This PDP Impact Assessment will need to be sent to the A05 Department of MPS within 60 days from the date of processing of personal data. MPS will review the PDP Impact Assessment and may request the data controller, data controller and processor, and data processor to update the assessment if it is incomplete or non-compliant with regulations.

Upon successfully conducting the cross-border data transfer, MPS must be notified of the same.

Measures for Protecting Personal Data

The PDP Decree prescribes general measures that should be deployed to protect personal data. These include a need for management and technical measures to be taken by organisations and individuals related to personal data processing. It caters for different measures to be applied according to protection of basic personal data and sensitive personal data.

For both categories of personal data, it requires regulations (policies) on personal data protection to be established, clearly specifying what has to be done according to the provisions of the PDP Decree.

Data Protection Officer and Data Protection Department

As a measure for protecting sensitive personal data, the PDP Decree requires those involved in processing personal data to designate a department that has the function of personal data protection ("**PDP Department**") and appoint personnel in charge of personal data protection and to exchange information on the matter with the relevant agencies (e.g., a data protection officer) ("**DPO**").

The PDP Decree does not clearly regulate this requirement where no sensitive personal data is processed. However, subject to further guidance, it would be prudent for companies to still designate the PDP Department and appoint the DPO because such information forms part of the PDP Impact Assessment (see *Section 0*) and expected to be included for data breach notification requirements (see *Section 0*).

For micro-enterprises, SMEs and start-ups, they are exempt from the above requirements for the first two years from the date of registering to set up their business. However, this does not apply where they are directly engaged in processing personal data.

Effectiveness

The PDP Decree will come into effect from 1 July 2023.

Concluding Words

The enactment of the PDP Decree see Vietnam join its regional peers, such as Singapore, Thailand and Malaysia, in putting in place an consolidated data protection regulation. It expected to change the landscape of personal data protection in Vietnam.

Once the PDP Decree comes into effect, companies – whether Vietnamese or foreign – would need to have in place processes and practices to ensure compliance with the new legal requirements. Given the very short period of time until its effectiveness, companies are advised to start looking into reviewing the compliance of its existing processes and practices.

The Government is in the process of developing a decree that will prescribe penalties for breaching cybersecurity regulations, which include those on personal data protection. Harsh penalties can be anticipated for non-compliance, including turnover-based fines.

A Vietnamese version of the PDP Decree can be found [here](#).

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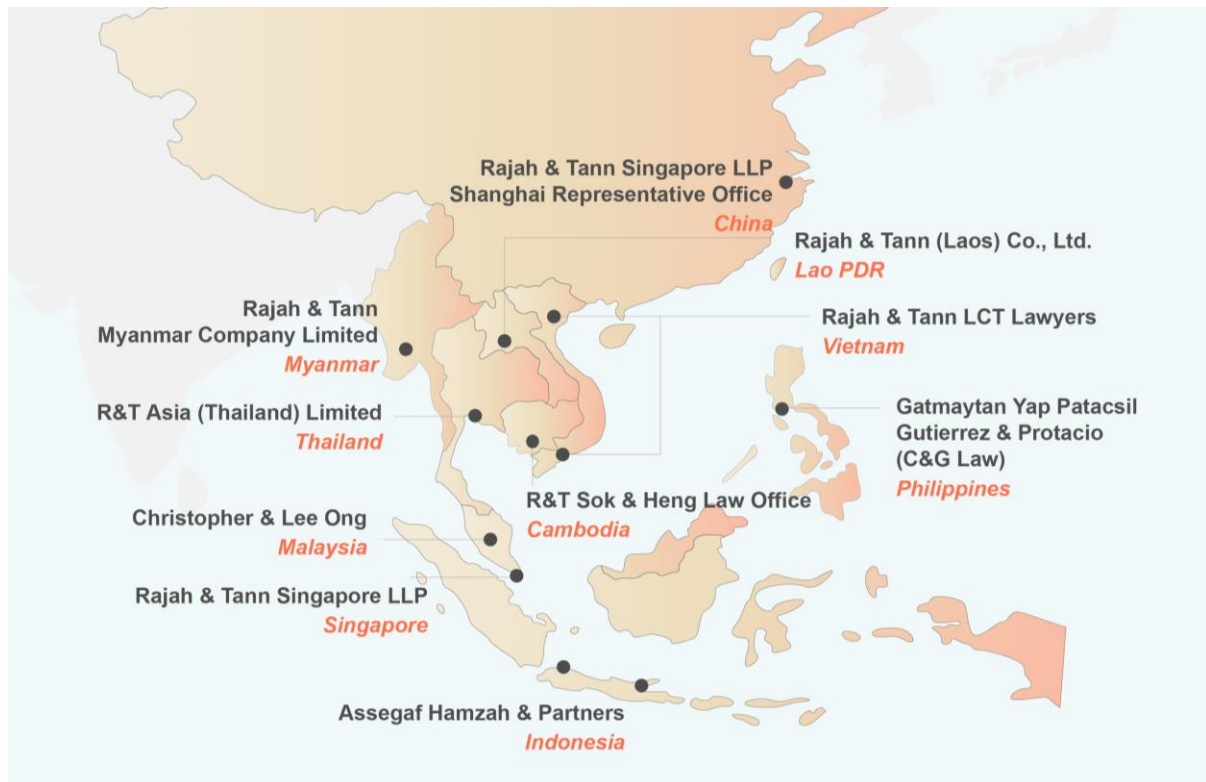
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