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Draft Decree on Personal Data Protection

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→ Draft decree on Personal Data Protection

Following the introduction and issuance of the Law on Cybersecurity in 2018 – which came into effect as of 1 January 2019 –, the Ministry of Public Security has completed a proposal to develop a Decree on Personal Data Protection, and published a preliminary draft for communal assessment (the “**DRAFT DECREE**”). Subsequently, on 29 September 2020, the Government issued Resolution 138/NQ-CP approving the development of the DRAFT DECREE. This month’s client alert will highlight some key issues currently stipulated in the DRAFT DECREE.

Key Issues

Definitions and scope of application

The Draft Decree contains six chapters and thirty articles, mostly in yet undeveloped outline forms, providing regulations on personal data, conditions and processes for handling and protecting personal data, handling violations of regulations on personal data, and responsibilities to protect personal data of agencies, organizations and individuals.

While Vietnam’s LAW ON CYBER INFORMATION SECURITY of 2015 (effective as of 1 July 2016) defines “personal data” as information associated with the identification of a specific person, the Draft Decree provides a broader definition of “personal data”, comprising symbols, letters, numbers, images, sounds or similar representations of an individual. The Draft Decree also introduced a new definition of “sensitive personal data”, which is defined to include, among others, political and religious beliefs, ethnicity or race, healthcare status, genetic information, biometric data, gender and/or sex life, and criminal records.

Principles of Personal Data Protection

The Draft Decree sets out principles for Personal Data Protection, which follow a similar approach like the data protection principles stipulated in the EU’s General Data Protection Regulation (the “**GDPR**”):

1. **LAWFULNESS:** Personal data shall only be collected legally;
2. **PURPOSE:** Personal data shall only be collected for the purposes that have been consented or registered to;
3. **MINIMIZATION:** Personal data shall only be collected to the extent necessary to achieve the specified purpose;

4. **LIMITED USE:** Personal data shall only be used with the consent of the data subject or with the permission of the competent authority;
5. **DATA QUALITY:** Personal data shall be up-to-date, sufficient and necessary to serve the purpose of data processing;
6. **SECURITY:** Security measures shall be taken to protect personal data;
7. **INDIVIDUALITY:** Data subjects shall be notified of all activities pertaining to their personal data;
8. **CONFIDENTIALITY:** Personal data must be kept confidential during data processing.

Personal Data Processors

Under the Draft Decree, a Processor of Personal Data is defined as a legal entity or a natural person or a branch of a foreign company or state authority or local authority that processes personal data (i.e. carrying all actions that affect personal data, including the collection, recording, analysis, storage, alteration, disclosure, granting of access to personal data, export, use, deletion, destruction of personal data or other related actions) (“**Personal Data Processor**”), and divided into MAIN PERSONAL DATA PROCESSOR and AUTHORIZED PERSONAL DATA PROCESSOR.

The Main Personal Data Processor may grant authorization in accordance with the laws (which is similar to a DATA CONTROLLER under the GDPR), while an Authorized Personal Data Processor is authorized by the Main Personal Data Processor to process personal data on their behalf (which is similar to a DATA PROCESSOR under the GDPR). The Main Personal Data Processor shall provide the Authorized Personal Data Processor with mandatory instructions for the processing of personal data, and shall be responsible for the

regulatory compliance of the Authorized Personal Data Processor when processing person data.

The Authorized Personal Data Processor may only authorize the processing of personal data to another person once they have obtained written consent from the Main Personal Data Processor.

Consent of Personal Data Subject

Any personal data processing by the Main Personal Data Processor or the Authorized Personal Data Processor must be clearly communicated to and consented by the personal data subject.

The consent on personal data processing is only valid if such consent is based on the following: (i) type of personal data to be processed; (ii) purpose of data processing; (iii) subjects to be processed and shared with personal data; (iv) conditions for transferring or sharing personal data to a third party; (v) personal data subject's rights related to the processing of his/her personal data in accordance with law.

It is clearly noted that such consent to personal data processing must be clearly stated either in forms which can be printed or copied in writing. Any silence or non-response of the personal data subject will not be considered as consent.

If there is no specific term consented, the consent is valid throughout the existence of the data subject and for 20 years after the data subject's death (for the activities of state agencies). During such term, the consent may be withdrawn by the personal data subject at any time. In the event of a dispute, the responsibility to prove the data subject's consent lies with the Personal Data Processor.

The Draft Decree also provides a definition for automatic personal data processing, which is described as the use of a computer system to process personal data according to algorithms.

Transfer of Personal Data outside of Vietnam

The Draft Decree requires that any transfer of personal data overseas must be registered with competent authorities. Particularly, the Personal Data of Vietnamese citizens may only be transferred out of Vietnam subject to strict compliance with the following conditions: (i) having consent of the personal data subject; (ii) original data must be stored in Vietnam; (iii) having documents proving that the country where the personal data are transferred to, has issued

regulations on the protection of personal data at a level equal to or higher than those specified in Vietnamese laws; (iv) having the approval of competent authorities (i.e., the Personal Data Protection Committee).

The draft Decree also requires the Personal Data Processor transferring personal data overseas to set up a system to store the data transfer history for 3 years. However, this particular provision is still an outline and subject to further clarification.

Disclosure of Personal Data (without consent)

The Draft Decree has also set in motion requirements and conditions for personal data disclosure. Specifically, personal data may only be disclosed without the consent of personal data subject in the following cases: (i) by requirements of laws; (ii) for the interest of national security or social order; (iii) in the media for purposes of national defense, social order or community health; (iv) in case of emergency or threat to the data subject's life or effects to the data subject's or public health; (v) in the media according to the provisions of the Press Law, not causing economic, honorable, spiritual or material damages to the data subjects.

Processing of Personal Data (without consent)

The Draft Decree further set in motion requirements and conditions for personal data processing. Specifically, personal data may only be processed without the consent of the data subject in the following cases: (i) in accordance with provisions of law; (ii) for the purpose of national security, social order and safety; (iii) in case of emergency or threat to the data subject's life or effects to the data subject's or public health; (iv) serving the investigation and handling of illegal acts; (v) serving scientific research or statistics.

Personal data may further only be shared for processing without the consent of the data subject in the following cases: (i) under the provisions of law or international agreements, international treaties to which Vietnam is a signatory; (ii) to protect the life, health or freedom of the data subject; (iii) not affecting the rights and interests of the data subject and it is impossible to obtain the data subject's consent; (iv) serving scientific research or statistics.

In this regard, data subjects have the right to require the person disclosing or processing or sharing their personal data to end such actions unless the disclosure or processing or sharing is conducted in accordance with applicable laws.

Administrative sanctions

The draft Decree also provides provisions on administrative sanctions on the violation of Personal Data Protection. Subject to acts and time of violation, the penalty rate may range from VND 50 million to VND 100 million or, in severe cases, even up to 5 per cent of the total turnover of the Personal Data Processor. In addition to such, the competent authorities may suspend the processing of personal data from 1 to 3 months and withdraw the approval for the transfer of personal data overseas.

Upcoming developments

As almost all provisions provided in the Draft Decree are still in skeletal form, it is expected that the next version of the Draft Decree will provide further explanation and clarification on:

- Procedures and methods for processing personal data;
- Measures to protect personal data;

- Registration for the transfer of personal data of Vietnamese nationals overseas;
- Provisions on the set-up of a system to store data transfer history for 3 years, and reporting mechanism;
- Stipulating rights and responsibilities of agencies, organizations and individuals processing personal data;
- Administrative sanctions and remedy for handling violations of the regulatory protection of personal data.

The Government believes that the Decree is consistent with international practice with Vietnam increasingly integrating itself into the world economy, and that the Decree is aimed to avoid the arbitrary disclosure of personal data by businesses and enterprises collecting and selling personal data to third parties.

Thereby, the personal data subjects are given tools and legal bases to protect their personal data and to claim for compensation in case of violations.

We will update this matter once the Decree is officially enacted.

Contact for further information



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