



Legal Alert- Draft decree on data protection in Vietnam and what entrepreneurs need to know

Overview

Recently, the Government published the second draft of decree stipulating personal data protection in Vietnam ("**PDP Decree**"). The PDP Decree, intended to become effective from December 2021, introduces the following concepts and compliance requirements which will have significant impact on various organizations and companies having activities relating to personal data.

Broad governing scope

The governing scope of the draft PDP Decree covers all Vietnamese citizen's personal data regardless of whether it is processed onshore or offshore. In addition, "personal data processing" is broadly defined to cover *"one or more actions affecting personal data, including collection, recording, analysis, storage, alteration, disclosure, grant of access, retrieval, recovery, encryption, decryption, copy, transfer, deletion, or destruction of personal data or other related actions"*. This means that foreign entities, agencies and individuals engaged in any activities relating to personal data of Vietnamese individuals, including international social networks and websites, will need to comply with the requirements provided in this regulation.

Establishment of the Personal Data Protection Committee ("**PDP Committee**")

The draft PDP Decree provides for the establishment of a PDP Committee based in the Department of Cybersecurity and Hi-tech Crime Prevention under the Ministry of Public Security. The main functions of PDP Committee are, amongst others, to oversee and ensure the compliance of the personal data protection requirements stipulated in the PDP Decree. The PDP Committee shall be entitled to inspect and examine such compliance at a specific organisation/company no more than twice a year, but in case of doubt about any violation, additional inspection may be conducted.

A National portal on personal data protection will be set up that will publish the committee's evaluation of the rate of reliability of personal data protection by agencies and organizations.

Basic and sensitive personal data

One significant element of the draft PDP Decree is its attempt to provide a unified definition of personal data previously found in separate laws and regulations. In particular, personal data is categorized into two types:

- Basic personal data: covering not only usual identification information e.g. Name, date of birth, date of death, contact details, education background, marital status, ethnicity, gender, but also including blood type and data reflecting individuals' activity history on cyberspace;
- Sensitive personal data: covering information regarding political and religious views, health conditions, biometric data, genetic data, sexual orientation, crime records, financial data and geographic location and social relationships.

Entities desiring to process sensitive personal data are required to comply with stricter requirements such as restriction on disclosure, registration with the PDP Committee (see more analysis below).

Compliance requirements for personal data processors

Personal data processors must comply with the following requirements:

- (i) Obtaining consent from data subjects on a voluntary basis and in a format that can be printed or copied in writing.

Notably, silence or non-response of data subjects will not be considered consent.

Consent is generally valid for the lifetime of the data subject, unless otherwise decided by the data subject. However, the data subject's consent given to state agencies will be valid for 20 years after the data subject dies.

- (ii) Notifying data subjects of all processing of personal data, unless:
 - Data subjects have fully agreed with the contents and processing of personal data;
 - The processing of personal data is required by law;
 - Processing of personal data does not affect the rights and interests of the data subject and the notification to the data subject is not possible;
 - Processing personal data for scientific research or statistics.
- (iii) Registering with the PDP Committee before (a) processing sensitive personal data, and (b) cross-border transfer of personal data.

The registration dossier must include:

- An application letter with extensive details of, amongst others, information of data processors, purpose of data processing/transferring, type and source of data, description of data protection measures;
- An impact assessment report, including the details of data processing activities, assessing adverse impacts on data subject and proposed measures to mitigate the potential risks;
- Other supporting documents.

Besides the approval from PDP Committee, the following conditions must be met before personal data of Vietnamese individuals can be transferred offshore:

- Consent of the data subject is obtained;
- The original data stored in Vietnam; and
- The data processor demonstrating that the recipient country or region has an equal or higher personal data protection level than required under the PDP Decree.

In addition, the data processors would be required to develop a system to store data transfer history for three years.

It is hoped that the Government will provide a grace period for compliance and will allocate sufficient resources to expeditiously process the influx on applications from entities intending to store data offshore.

- (iv) Applying physical, technical, and managerial measures to protect personal data;
- (v) Developing and issuing internal policy on personal data protection in accordance with this Decree.

The internal policy must have content items as required by the PDP Decree and appraised by the PDP Committee before being published.





Circumstances in which personal data is allowed to be processed without consent

The PDP Decree allows personal data processors to process and share personal data without consent in specific circumstances concerning national and public security; emergencies when the freedom and health of the data subject or the general public is threatened; for investigation of any legal violations; research and statistics collection or other circumstances as required by Vietnamese law and international treaties. However, it is not clear if this extends to internal investigations against employees.

Enforcement

The draft PDP Decree also sets out an enforcement regime, which imposes disciplinary or administrative fines for data breaches ranging from VND50 million to VND100 million (equivalent to USD2,000 to USD4,350) based on nature and degree of the breach. It is possible to be banned from processing or transferring data – temporarily and permanently. The Decree also introduced a turnover based penalty for continued breaches that can extend up to 5% of the offender's revenue in Vietnam in addition to revocation of right to process data.

The PDP Decree affords the relevant authority with broad discretion to implement the PDP Decree which will hopefully be clarified by further legal instruments to guide the Decree's implementation.

How to stay ahead of the regulations

The principle of the Decree is "privacy by design" which essentially requires companies and individuals to integrate the security of personal data into their core. This can be achieved through a comprehensive review of existing business processes, applications and forms so as to be compliant with the Decree once implemented. The success to this will be through implementing a data protection plan. Here are a few ways to help companies and individuals to get started:

1. To map the data source and location e.g. if it is spread across multiple (on-premise or cloud based) storage systems and who can access to identify any risks to the data. Noting that whilst dispersed customer data is not cause of alarm in its own right but needs to be supported by a clear management system and periodic audits;
2. To check if the data collected thus far is important and relevant to the business and to check the clean-up process to consider if archived data is necessary and if so, the benefit of encrypting the data;
3. To keep certifications and technology up to date;
4. To develop and implement safeguards throughout the system to contain any possible data breaches;
5. To check with third party contractors to make sure that they have the right security measures in place;
6. To review current consent forms with pre-checked boxes to ensure no implied consent;
7. To review/develop the privacy policies and procedures to ensure compliance with the new requirements.

As the regulations in the draft PDP Decree are broadly based on the EU GDPR principles, companies that have adopted data protection standards established by the GDPR, will not face much difficulties in updating their practices to ensure compliance with the Vietnamese personal data regulations when it comes into effect.

The current draft form of the PDP Decree may be modified further following suggestions and consultation from the public; however, we opine that it does not detract from the fact that the Government is seeking to impose stricter data protection regulation.

Contact us

Hanoi

46th Floor, Keangnam Landmark 72,
E6 Pham Hung Road, Me Tri Ward,
South Tu Liem District, Hanoi, Vietnam

T: +84 (24) 3946 1600

F: +84 (24) 3946 1601

E: kpmghanoi@kpmg.com.vn

Ho Chi Minh City

10th Floor, Sun Wah Tower,
115 Nguyen Hue Street, Ben Nghe Ward,
District 1, Ho Chi Minh City, Vietnam

T: +84 (28) 3821 9266

F: +84 (28) 3821 9267

E: kpmghcmc@kpmg.com.vn

Da Nang

Unit D3, 5th Floor, Indochina Riverside Towers,
74 Bach Dang Street, Hai Chau I Ward,
Hai Chau District, Da Nang City, Vietnam

T: +84 (236) 351 9051

F: +84 (236) 351 9051

E: kpmgdanang@kpmg.com.vn

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