

Vietnam: New developments as regards the draft decree on personal data protection

In brief

Following the issuance of the first version of the Draft Decree on Personal Data Protection ("**Draft Decree**") in 2019, on 9 February 2021, the Ministry of Public Security (MPS) released the second version to collect public opinions until 9 April 2021.

This updated draft has a more robust set of rules regulating specific rights of data subjects, cross-border transfer of data, and processing of sensitive personal data. Noncompliance may subject stakeholders to temporary suspension of operation, and/or revocation of permission for cross-border data transfer in addition to monetary fines.

Key takeaways

- The covered subjects would include every agency, organization and individual that engage in activities relating to personal data.
- Personal data is now categorized into two types: basic and sensitive.
- De-identification and anonymization are introduced as part of the approach to protect the data subjects' identities.
- A personal data protection committee ("**PDP Committee**") will be established to oversee and ensure compliance of the covered subjects.
- Personal data processors must ensure compliance with the requirements on: (i) consent of data subject; (ii) notification to data subjects; (iii) registration with the PDP Committee; (iv) application of measures for personal data protection; and (v) issuance of personal data protection regulations.
- A child's age must be verified and the consent of their parents or guardian must be obtained prior to the processing of their personal data.
- A maximum fine of 5% of the total revenue generated in Vietnam can be imposed in case of a repeat violation.

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In depth

The Draft Decree consists of six chapters, 30 articles, replacing the skeletal content of the previous version with requirements primarily imposed on personal data processors. Below are some notable proposed regulations set out in the Draft Decree.

Governing scope

The Draft Decree states that the covered subjects would include every agency, organization and individual that engage in activities relating to personal data. The scope encompasses both local and foreign companies (whether based in Vietnam or not) involved in the processing of personal data.



Key definitions

Personal data is categorized into two types: basic and sensitive. The list of information classified as **basic personal data** includes, among other things, information as shown on ID cards, date of death, blood type, [biological] sex, education background, data that reflects an individual's activities or activity history on cyberspace. The list of information classified as **sensitive personal data** includes, among other things, political and religious views, mental and physical health conditions, genetic information, biometric data, sex/intersex status, crime records, financial data, actual geographic location and social relationships.

Processing of personal data means one or more actions having impact on personal data, including collecting, recording, analyzing, storing, changing, disclosing, authorizing access to, retrieving, revoking, encrypting, decrypting, copying, transferring, deleting and destroying personal data or other related actions.

The Draft Decree provides two main subjects involved in the processing of personal data, being the **personal data processor** and **third party**. Personal data processor means a domestic or foreign agency, organization [or] individual who conducts the activities of personal data processing. Third party means a domestic or foreign agency, organization or individual who receives personal data, and/or is engaged in the activities of personal data processing, but are neither a personal data processor nor a data subject. The Draft Decree does not provide for the concept of **data controller**.

Personal data de-identification means the process of anonymizing or deleting identifiers or replacing such identifiers with different pseudo names or codes to create new data that cannot identify a particular individual.

Personal data anonymization means the process of converting personal data into a new form of data that cannot be reversed into personal data.

Establishment of the PDP Committee

Chapter IV of the Draft Decree provides for the establishment of a PDP Committee under the MPS as an agency that would basically oversee and govern the compliance of the subjects covered under this Draft Decree. Notably, the PDP Committee would inspect and examine compliance with personal data protection regulations per company no more than twice a year. However, if the PDP Committee believes there is a violation of personal data protection regulations, additional inspection/examination would be conducted.

Relevant stakeholders are expected to notify and coordinate with the PDP Committee in detecting and addressing violations relating to personal data protection.

Rights of data subjects

The Draft Decree sets forth the following rights for data subjects under Article 5:

- consenting to or disagreeing with the processing of their personal data by personal data processors or third parties, unless otherwise provided by law
- receiving notification of personal data processors at the time of processing or as soon as practicable
- requesting personal data processors to edit, view, provide copies of their personal data
- requesting personal data processors to terminate the processing of personal data, restrict the right to access personal data, terminate the disclosure of or permission to access personal data, delete or close personal data collected, unless otherwise provided by law
- complaining to the PDP Committee in case of data breach, data misuse, and/or violation of or noncompliance with the rights related to their personal data
- claiming damages when there are grounds to prove a data breach

Responsibilities for personal data processors

A personal data processor must ensure compliance with the requirements on: (i) consent of data subject; (ii) notification to data subjects; (iii) registration with the PDP Committee; (iv) application of measures for personal data protection; and (v) issuance of personal data protection regulations. Specifically, this involves the following:

(i) Consent of data subject

Generally, the personal data processor bears the burden to prove the data subject's consent was obtained in case of dispute. Under Article 8 of the Draft Decree, consent given by data subjects shall only be valid if they are obtained on a voluntary basis and the data subjects are aware of the following:

- types of personal data being processed



- purposes of the processing of personal data
- those entitled to process and share personal data
- conditions for transferring or sharing personal data to third parties
- their rights related to the processing of their personal data

In case of sensitive personal data processing, under Article 8.5 of the Draft Decree, the processor must also explain to the data subject the nature of the data to be processed.

Consent is generally valid throughout the existence of the data subject. For the purpose of serving activities conducted by relevant state agencies, such consent is valid for 20 years after the data subject's death, unless decided otherwise by the data subject.

Exceptions where personal data processors can disclose, process, share, and/or grant third parties with access to personal data without data subjects' consents are provided under Article 10 of the Draft Decree.

(ii) Notification requirement

The Draft Decree proposes that all personal data processing activities must be notified to the concerned data subjects. In case of personal data of children (i.e., persons under 16 years of age), the processing must be notified to all relevant persons, which can be interpreted to include the children's parents or guardians.

Under Article 11.2 of the Draft Decree, the contents of the notification would include, among other things, the personal data processor's creditability rating given by the PDP Committee. Such creditability rating will be assessed based on a set of evaluation criteria that will be issued by the PDP Committee.

Exception to the notification requirement is granted in the following cases:

- The data subject fully agreed with the personal data processing contents and activities.
- The personal data processing is regulated by law, international agreement, and/or treaty.
- The rights and interests of the data subject remain unaffected and it is impossible to notify the data subject of the same.
- The personal data processing is for scientific research or statistics.

(iii) Registration with the PDP Committee

As contemplated in the previous version, the Draft Decree now elaborates on the registration requirements to be imposed on: (a) sensitive personal data processing; and (b) cross-border transfer of personal data.

(a) Sensitive personal data processing

Under Article 20 of the Draft Decree, sensitive personal data processing must be registered with the PDP Committee before the commencement of such data processing.

Exception to this registration requirement includes cases set out under Article 20.4 of the Draft Decree which mostly pertain to regulatory, judicial activities of state agencies, and other activities regulated by law.

(b) Cross-border transfer of personal data

Under Article 21 of the Draft Decree, cross-border transfer of personal data of Vietnamese citizens may only be conducted when a personal data processor fully satisfies all the following conditions:

- Data subjects' consent to the transfer is obtained.
- The original data is stored in Vietnam.
- There are written documents proving that the country, a territory or one specified sector within that country or territory to which the data is transferred has issued personal data protection regulations with the same or a higher level of protection as the regulations set out under this Decree.



- A written permission is issued by the PDP Committee.

In case the personal data processor fails to fully meet all the above conditions, the transfer can be conducted in case:

- Data subjects' consent is obtained.
- A written permission is issued by the PDP Committee.
- Commitments to protecting personal data by the personal data processor are made.
- Commitments to applying measures for personal data protection by the personal data processor are made.

No exception to registration requirement is provided.

In addition to the above requirements, the data processor must develop a system to store data transfer history for three years.

(iv) Application of measures for personal data protection

Under Article 17 of the Draft Decree, the personal data processor must apply managerial, technical and physical measures to:

- ensure the confidentiality, integrity and availability of personal data;
- de-identify and encrypt personal data;
- store, copy, extract and protect its personal data processing history.

Failure to apply the appropriate measure for the above purposes can lead to administrative sanctions under Article 22.2 of the Draft Decree.

(v) Issuance of personal data protection regulations

Under Article 18 of the Draft Decree, the personal data processor must develop and issue their own set of personal data protection regulations. Under Article 24.14 of the Draft Decree, these regulations would be appraised by the PDP Committee before they are published. From the content items subject to appraisal by the PDP Committee, it can be construed that the personal data processor must **at least** include all the items listed in this article in their own set of personal data protection regulations.

Administrative sanctions in detail

Article 22.1 of the Draft Decree proposes a monetary fine ranging from VND 50 million to VND 80 million (approximately USD 2,100 to USD 3,500) for violations in relation to rights of the data subjects, data storage, destruction, disclosure, processing, accuracy and personal data of children, etc. A third-time repeat violation of the acts listed under this article would be subject to a maximum fine of 5% of the total revenue generated in Vietnam.

Article 22.2 of the Draft Decree proposes a monetary fine ranging from VND 80 million to VND 100 million (approximately USD 3,500 to USD 4,400) for violations in relation to cross-border transfer of personal data, registration of sensitive personal data processing, and failure to apply technical measures or develop personal data protection regulations. A second-time repeat violation of the acts listed under this Article would be subject to a maximum fine of 5% of the total revenue generated in Vietnam. Furthermore, violation under this article can be subject to additional sanctions including:

- The suspension of personal data processing for one to three months;
- The revocation of the written consent for sensitive personal data processing and cross-border transfer of personal data.

For further information and to discuss what this development might mean for you, please contact us.

