

HIGHLIGHTS OF THE DRAFT DECREE ON PERSONAL DATA PROTECTION

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*In order to create a legal framework for information collection and processing, to strengthen the protection of personal information, as well as to combat illegal personal information trading and sharing, the Ministry of Public Security has been developing the Draft Decree on personal data protection (**Draft Decree**) based on opinions of individuals and organizations. In this issue, NHQuang will analyze some outstanding contents of the latest Draft Decree (posted on the e-portal of the Ministry of Public Security on February 9, 2021) as follows:*

1. Definition of personal data

The Draft Decree defines “personal data” as “data about individuals or related to the identification of a specific individual or being able to identify a specific individual”. It should be noted that, so far, applicable legal documents have not specifically defined this term, but only addressed other related terms such as “personal information” (Law on Cyber Information Security 2015), “personal secret”, “family secret”, “information about private life” (Civil Code 2015). Moreover, in comparison with the definition of “data” in the Law on Electronic Transactions 2005, it can be understood that personal data (as a form of data in general) is also shown in the form of symbols, letters, numbers, pictures, sounds or other similar forms.

The Draft Decree stipulates 2 groups of personal data, including (i) basic personal data (for example: full name; date of birth/death, blood type, phone



number, citizen identity card number, social insurance number), and (ii) sensitive personal data (for example: political or religious viewpoints; health status; genetic and biometric data; sexual orientation, financial data). Basic personal data are defined in a “closed” list, while sensitive personal data are stipulated with an “open” list, which allows to include some other special personal data (in addition to ones specified in the Draft Decree) in accordance with provisions of law. The classification of personal data groups by listing (either closed or open) without any general criteria may lead to the instability of legal documents. As the first document specifically regulating personal data, the Draft Decree should set forth the criteria for personal data classification because the classification of personal data (especially sensitive personal data) is substantial to the application of relevant legal provisions (for example: application of sensitive personal data processing) to protect the legitimate rights and interests of data subjects.

2. Personal data processing

Personal data processing is the core content of the Draft Decree, especially in the context where Viet Nam still lacks legal documents on this issue. In fact, personal data processing draws great attraction of enterprises because of personal data’s importance in the economy of the Industrial era 4.0., which can be deemed a “gold mine” for suppliers, making it easier for businesses in identifying potential customers, thereby implementing appropriate advertising activities for target audience and increasing the sale of goods and services.

The Draft Decree provides that “personal data processing is a single or multiple activity(ies) that affect(s) personal data, including collecting, recording, analyzing, storing, changing, disclosing, access granting, retrieving, recovering, encrypting, decrypting, copying, transferring, deleting, destroying personal data or other related activities”. Personal data processor is defined by the Draft Decree as “a domestic or foreign agency, organization, or individual that carries out personal data processing”. Accordingly, “personal data processing” covers a wide range of activities from collecting, storing, analyzing to transferring, access granting, etc., which all require

compliance with personal data processing regulations. The situation is the same with personal data processor, of which the scope includes both domestic and foreign organizations and individuals.

In principle, all personal data processing activities must be informed to the data subject. The notice must include the following basic contents: Information about the personal data processor; Type of personal data processed and processing method; Processing time and purpose; Type of personal data processed under special circumstances or with special processing purposes which may pose risks of significant damage; Rights and procedures for exercising the rights of data subjects; Ranking in personal data protection reliability by the Committee of Personal Data Protection; Information related to cross-border personal data transfer from the territory of Viet Nam.

There are some exceptions to the obligation of notifying data subjects, in which a personal data processor does not need to notify about personal data processing in some cases, such as personal data processing that serves scientific research or statistics purposes; personal data processing under legal regulations, international agreements, or international treaties; or in cases that do not affect the rights and interests of the data subject and it is impossible to notify the data subject, etc. However, the provision to determine that personal data processing *“does not affect the rights and interests of the data subject”* is rather vague because the data processor cannot act on behalf of the data subject to determine whether the personal data processing affects their rights and interests or not. Likewise, the scenario that *“it is impossible to notify the data subject”* can also create difficulties in actual application since it is unclear whether the “impossibility” refers to the capacity of a specific data processor or general technical limit (in Viet Nam or in the country of the data processor) applied in contacting data subjects.

In fact, full and accurate notification of data collection – the first step of personal data processing, is a crucial step in ensuring the rights and interests of data subjects. It is extremely necessary to specify the exceptions that allow personal data processing without notice to data subject, and in the principle, to minimize these exceptions.

3. Cross-border data transfer

The Draft Decree stipulates that “cross-border data transfer” is *“the use of cyberspace or electronic*

devices and means to transfer personal data of Vietnamese citizens to a location outside the territory of the Socialist Republic of Viet Nam”. According to the Draft Decree, personal data of Vietnamese citizens can be transferred out of the borders when 4 conditions below are met: (i) it is consented by data subjects, (ii) the original data are stored in Viet Nam, (iii) it is proven in writing that the place receiving data has been applied personal data protection regulations at a level equal to or higher than those provided in the Draft Decree, and (iv) there is a written consent of the Committee of Personal Data Protection.

The application documents for cross-border personal data transfer include an application form and a report of impact assessment on cross-border personal data transfer. The agency receiving these documents is the Committee of Personal Data Protection – an organization of the Government, located at the Department of Cyber Security and Hi-tech Crime Prevention, the Ministry of Public Security. According to the Draft Decree, this Committee consists of no more than 6 members who have professional qualifications and legal experience on personal data protection, and operate across multiple-position work regime. In practice, such limited contingent together with the multiple-position work regime of the Committee’s members have raised concerns about the capability to receive and handle application documents for cross-border personal data transfer, especially in the context that Vietnamese enterprises are accelerating digital transformation and strengthening international cooperation.

The full text of the Draft Decree is now available on the e-portal of the Ministry of Public Security for comments within 2 months from the date of publication – February 9, 2021. Enterprises, organizations and individuals interested in personal data protection can find the full text of the Draft Decree at: <http://bocongan.gov.vn/van-ban/van-ban-moi/lay-y-kien-gop-y-doi-voi-du-thao-nghi-dinh-quy-dinh-ve-bao-ve-du-lieu-ca-nhan-519.html> and send comments to the Ministry of Public Security within the prescribed time limit.