

Decree No. 13/2023/ND-CP on personal data protection

Legal Update | May 2023

This Update highlights the following key points:

- ▶ Scope of application and categories of regulated subjects
- ▶ Broad definition of personal data and data processing
- ▶ Valid consent
- ▶ Data subject rights
- ▶ Data protection impact assessment
- ▶ Management of sensitive personal data processing and cross-border data transfer
- ▶ Protection of personal data in the business of marketing and products promotion business
- ▶ Data protection officer role
- ▶ Personal data protection authority
- ▶ Measures to protect personal data
- ▶ Required actions

After much anticipation, the issuance of Decree 13/2023/ND-CP on personal data protection (Decree 13) on 17 April 2023 by the Government constitutes a first-ever consolidated and comprehensive legal instrument on personal data protection in Vietnam, which potentially paves the way for Vietnam to be more in alignment with the international standards of the EU's General Data Protection Regulation issued on 27 April 2016 by European Union (GDPR).

With less than two months before coming into effect on 1 July 2023, Decree 13 is expected to have significant impacts on the current practice of personal data processing in Vietnam. In this Legal Update, we would like to highlight the key takeaways and implications for business of this Decree.

1. Extra-territorial scope of application

Unlike the second version of the Draft Decree on personal data protection (Draft PDPD) which touches quite lightly on the subject of application, Decree 13 states clearly the subject of application to include both local and offshore entities directly engaging in or related to personal data processing activities in Vietnam.

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However, it remains unclear whether Decree 13 will apply to personal data of foreign individuals residing in Vietnam in addition to those of Vietnamese individuals.

2. Extended categories of regulated subjects

As hinted under the Draft Decree on cybersecurity administrative penalties, Decree 13 recognizes key concepts of personal data controller (Controller) and personal data processor (Processor), and simultaneously introduces the concepts of “personal data controlling and processing entity” (Controlling - Processing Entity) and “third party”. More particularly:

- ▶ The *Controller* is an entity or individual that determines the purposes and means of personal data processing.
- ▶ The *Processor* means an entity or individual that performs the processing of personal data on behalf of the Controller, through a contract or agreement with the Controller.
- ▶ The *Controlling - Processing Entity* is an entity or individual that jointly decides purposes and means, and directly processes personal data.
- ▶ *Third party* is any organization or individual apart from the data subject, Controller, Processor, or Controlling-Processing Entity that is permitted to process personal data.

The distinguishment between Controller and Processor demonstrates the adoption of GDPR's concepts under Decree 13. This approach is quite novel compared to the Draft PDPD, which only used the term of Processor to indicate flexibly both the Controller and Processor roles.

In a complex business operation in which one entity may act as a Controller (e.g., an employer) and also play the role of Processor pertaining to the other types of personal data (e.g., a service provider), it is essential for each entity to identify its role(s) properly and comply with different obligations imposed on each role under Decree 13 accordingly.

3. Broad definition of personal data and data processing

Personal data is defined as information expressed in the form of symbols, letters, numbers, image, sound, or the like on an electronic medium that is associated with or helps to identify a specific natural individual.

Similar to the Draft PDPD, Decree 13 classifies personal data into two categories of “basic personal data” and “sensitive personal data”. The list of these both categories are very broad to ensure the utmost protection of personal data.

Personal data processing is defined as one or multiple activities that impact on personal data, including collection, recording, analysis, confirmation, storage, rectification, disclosure, combination, access, traceability, retrieval, encryption, decryption, copying, sharing, transmission, provision, transfer, deletion, destruction or other relevant activities.

4. A valid consent

“Transparency” is one of the core principles for the processing of personal data under Decree 13 which ensures the awareness of the data subject about the data processing activities. In

this regard, it is mandatory to obtain their consent and notify on the data processing beforehand, save for exceptional cases as depicted in Section 5 below.

Particularly, Decree 13 goes into detail about different requirements of a valid consent:

- ▶ **Acceptable format and form of the consent:** It must be expressed clearly and specifically in writing, by voice, by ticking the consent box, in the syntax of consent by text message, by selecting consent technical settings, or by other actions demonstrating the same. In addition, consent must be expressed in a format that can be printed out or reproduced in writing, including in electronic or verifiable formats.
- ▶ **Voluntariness and awareness of the data subject:** The consent must also be given voluntary based on the data subject's thorough understanding about the processing activities, including (i) the processing purpose(s); (ii) the type of personal data to be processed; (iii) the entities authorized to process personal data; and (iv) the data subject's rights and obligations.
- ▶ **For a single purpose:** In case of multiple purposes of data processing, consent can be given to one or some of them. A partial or conditional consent is subject to the data subject's discretion.
- ▶ **Silence or non-response** is not construed as consent.
- ▶ **Validity:** The consent is valid until the data subject decides otherwise (withdraws the consent) or when requested in writing by the competent authority.

5. Cases of data processing without data subject consent

The data subject's consent is exempted in the following cases, as previously adopted in Resolution No. 13 /NQ-CP dated 7 February 2023 by the Government:

- ▶ In urgent cases where it is necessary to immediately process relevant personal data to protect the life or health of the data subject or others
- ▶ Where the disclosure of personal data is in accordance with the law
- ▶ Where the processing of data is performed by competent state agencies in the event of a state of emergency related to national defense, national security, social order and safety, major disaster, or dangerous epidemic; when there is a threat to security and national defense but not to the extent that a state of emergency must be declared; or when the processing is to prevent and combat riots and terrorism, crime, and law violations in accordance with law
- ▶ Where the processing is to fulfill the contractual obligations of the data subject with relevant agencies, organizations, and individuals as prescribed by law
- ▶ Where the processing is to serve the activities of state authorities as provided by sector-specific laws

6. Data subject rights

Eleven data subject rights are laid down, including: (i) right to know; (ii) right to consent; (iii) right to access; (iv) right to withdraw consent; (v) right to erasure; (vi) right to restriction of data processing; (vii) right to request the provision of data; (viii) right to object; (ix) right to complain, denounce and initiate lawsuits; (x) right to claim compensation for damage; and (xi) right to self-defense.

Amongst the aforesaid rights, the exercise of the right to access data must conform with strict procedures, format and contents of the request.

Another note-worthy change in Decree 13 is the strict time limit (72 hour-period) set out to handle data subject's request in relation to some of the aforesaid rights, including (i) the right to restriction of data processing; (ii) the right to object; (iii) the right to data provision; (iv) the right to access; and (v) the right to delete data.

7. Data protection impact assessment

According to Decree 13, in all cases of data processing, the Controller, Controlling-Processing Entity, and Processor must prepare and officially issue a written dossier for data processing impact assessment that contains compulsory contents in a prescribed form. The dossier must be sent to the Department of Cybersecurity and Hi-tech Crime Prevention (A05) for review within 60 days as of commencement of the processing. This dossier must always be updated and available at any time for authority inspection.

This is a stricter requirement than the Draft PDPD, in which, an impact assessment report is only required for sensitive data processing and the cross-border transfer of data.

8. Sensitive personal data processing and cross-border data transfer

The pre-processing registration and pre-transfer registration for sensitive personal data processing and the cross-border data transfer respectively are abolished under Decree 13.

- ▶ **For processing sensitive personal data:** The Controller, Controlling-Processing Entity, and Processor need to comply with the foregoing data protection impact assessment requirement.
- ▶ **For cross-border data transfer:** Similarly, the cross-border data transfer triggers the submission of personal data cross-border transfer impact assessment dossier to A05 for their post-transfer review. More particularly, transferors of Vietnamese' personal data are required to (i) prepare a written dossier for cross-border transfer impact assessment that contains compulsory contents, (ii) send the dossier to A05 within 60 days as of commencement of the processing for their review, and (iii) notify A05 of the cross-border transfer and detail of the in-charge person after the completion of the transfer. This dossier must be available at any time for authority inspection and kept updated.

9. Protection of personal data in the business of marketing and products promotion business

Marketing and/or advertising service providers can only use customers' personal data collected during the course of their business activities to provide marketing services or introduce advertising products upon obtaining the data subject's consent. The data subject should be notified about the content, method, form, and frequency of product introduction.

10. Data protection officer (DPO)

The release of Decree 13 also marks the first time that DPO's role is legally recognized under Vietnam's law. As part of the measures to protect sensitive personal data, it is required that the Controller, Processor and Controlling-Processing Entity shall appoint a unit specializing in personal data protection (DPD) and a DPO and to inform the Ministry of Public Security (i.e., A05) of such DPD and DPO.

Some specific enterprises, e.g., micro, small, medium-size enterprises and start-up enterprises, except for those directly doing data processing business, will be exempt from the DPD and DPO appointment requirement during their first two years as of establishment.

11. Personal data protection authority

Whereas the Draft PDPD introduced a new specialized body for personal data protection - the Personal Data Protection Committee, under Decree 13, A05 will be the authority in charge which means that this authority will simultaneously manage both cybersecurity and personal data protection matters in Vietnam.

12. Measures for ensuring personal data protection

As mandated in Decree 13, measures for personal data protection must be in place from the very beginning and maintained throughout the processing of personal data.

More particularly, organizations/individuals related to personal data processing have the following obligations:

- (i) Apply managerial measures and technical measures
- (ii) Develop and promulgate regulations on personal data protection
- (iii) Apply personal data protection standards appropriate to the relevant fields, industries (optional)
- (iv) Check the network security for the system and the means and equipment for personal data processing before processing, irrecoverable deletion or destruction of the devices containing personal data
- (v) Implement solutions to accomplish the mentioned rights of data subject

For sensitive personal data, the data subjects must be informed that the information to be processed is sensitive personal data.

13. Required actions

In light of the aforesaid, both local and offshore entities involving in collecting and/or processing personal data of Vietnamese individuals or foreign individual residing Vietnam should do the followings:

- (1) Stay up-to-date with regulations in data security and data privacy
- (2) Conduct the data privacy gap assessment between their current practices and the requirements under Decree 13
- (3) Conduct a cybersecurity maturity assessment to identify vulnerabilities and weakness in the IT system that may pose the risks of data privacy compromise
- (4) Develop, review data protection framework, policies, and procedures on personal data protection in line with Decree 13
- (5) Prepare the data protection impact assessment for processing personal data as well as cross-border data transfer
- (6) Set up DPD and DPO in case of processing sensitive personal data
- (7) Design data protection awareness content provided to employees within the organization
- (8) Review the existing consent form
- (9) Review and revise template of contracts related to personal data processing
- (10) Set up managerial measures and technical measures in line with Decree 13

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