

Indonesian Personal Data Protection Law Update – What to Expect from the Upcoming Implementing Regulation

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1. Introduction

Indonesia's primary framework for safeguarding personal data is established through Law No. 27 of 2022 on Personal Data Protection ("**PDP Law**"). The core objective of this legislation is to uphold the privacy rights of individuals and oversee the processing of their personal information. Although the PDP Law officially came into effect on 17 October 2022, its mandatory enforcement by relevant entities is set to commence two years later, in 2024. For an overview of the PDP Law, please see our newsletter [here](#).

As mandated by the PDP Law, nearly a year following its initial promulgation, the Ministry of Communications and Informatics ("**MOCI**") at last has made accessible to the public the draft Government Regulation on the Implementation of the Personal Data Protection Law ("**Draft Regulation**"), which is expected to provide clearer guidelines on elements of data processing that have yet to be touched upon by the PDP Law.

The Draft Regulation is an extensive document, spanning over 180 pages and comprising 245 meticulously crafted articles. As anticipated, it furnishes a wealth of specific and explanatory provisions that further elucidate the principles outlined in the PDP Law. However, based on our review to the Draft Regulation, we still note that some explanations remain less than clear, as elaborated below.

The Draft Regulation does not merely function as non-binding guidelines but rather holds legal binding authority. Therefore, businesses are obligated to follow the provisions in this Draft Regulation once enacted to ensure conformity with the regulation. Understanding the contents of this new regulation is of paramount importance, especially due to the PDP Law's extraterritorial reach, which extends beyond national boundaries. The Draft Regulation also includes the same extraterritorial application provision, namely that it extends to cover individuals, public bodies, and international organizations processing personal data within or outside Indonesia's jurisdiction. While it is clearly intended to apply within Indonesia and for Indonesian citizens residing abroad, the Draft Regulation has not provided detailed guidelines on how to determine the specific circumstances in which legal consequences are relevant; therefore, the scope of the extraterritorial application is still unclear.

2. What's New?

The Draft Regulation provides a comprehensive framework, spanning across 10 chapters, to offer further clarification on the PDP Law, including provisions and criteria to which data controllers and data processors must adhere to be deemed compliant. These chapters are as follows:

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- a. General provisions
 - b. Personal data
 - c. Processing of personal data
 - d. Rights and obligations
 - e. Transfer of personal data outside the jurisdiction of the Republic of Indonesia
 - f. International cooperation
 - g. Authority of the personal data protection agency
 - h. Administrative sanctions
 - i. Dispute resolution and procedural law
 - j. Closing provision

Notable provisions within the Draft Regulation include:

(1) Expansion of Personal Data Scope in Chapter II

In addition to the examples of specific personal data listed in the PDP Law, the Draft Regulation introduces a “mechanism” for the government to broaden the definition of “specific personal data” as the PDP Law includes ‘other data in accordance with statutory provisions’. The Draft Regulation does not provide further explanation on what is meant by “mechanism”; therefore, we suspect that this will pretty much depend on the discretion of the government, namely the MOCI after consultation with the PDP Agency.

The Ministry, namely the MOCI, in collaboration with the PDP Agency established under the PDP Law, has the authority to designate additional data as “specific personal data” if it has the potential to inflict greater harm on data subjects, including issues such as discrimination, material or immaterial loss, and violations of the law. Again, the Draft Regulation does not provide further explanation regarding the definition of “material or immaterial loss,” including details on quantifying such losses and the methodology for determining their significance (including the meaning of “greater”). As the Draft Regulation is still in the public review stage, we expect further changes on this provision.

Note that instead of using the term “sensitive personal data”, the PDP Law and the Draft Regulation refer to “specific personal data”, including health, biometrics, genetics, criminal records, and more. As set out in the PDP Law, the Draft Regulation provides that processing such data requires impact assessments and the appointment of a Data Protection Officer, with no difference in the legal basis, allowing legitimate interest to process such “specific personal data”.

Furthermore, as with the PDP Law, the Draft Regulation explicitly states that “general personal data” includes personal data combined to identify an individual, which may be done through direct reference, reference mapping, triangularization, and/or other combination, which expressly include the use of data available in the public domain. This grants the government the flexibility to extend its regulatory reach over time, which in turn introduces uncertainty for businesses.

(2) Legitimate Interest as the Legal Basis for Processing in Chapter III

The PDP Law introduces several legal basis for personal data processing, including legitimate interest. The Draft Regulation provides that private entities acting as data controllers and seeking to utilize legitimate interest as a legal basis must now conduct a legitimate interest assessment, namely an analysis to assess the balance



between the interests of the data controller and the rights of the data subjects. This analysis should demonstrate that the data controller indeed has a legitimate interest in processing the personal data; however, similar to the PDP Law, the Draft Regulation also lacks a clear explanation on what constitutes legitimate interest and does not provide any samples.

Additionally, an assessment should be carried out to ensure that this processing does not harm the data subjects in any legal way, and steps should be taken to mitigate any negative impacts. Importantly, if a data subject objects to the processing of their personal data, the data controller is required to stop the processing. Article 71 of the Draft Regulation mandates that personal data controllers must document and communicate the results of the analysis and assessment to the data subjects. Lastly, the Draft Regulation provides an obligation to personal data controllers to inform data subjects that their personal data is being processed based on fulfilling other legitimate interests, in accordance with this Draft Regulation.

The Draft Regulation expressly mandates that public bodies acting as personal data controllers are not permitted to use legitimate interests as a basis for processing personal data.

(3) Data Protection Impact Assessment in Chapter IV

The longest chapter in the Draft Regulation is Chapter IV, which deals with the rights and obligations of stakeholders, including controllers, processors, and data subjects, spanning from articles 37 to 180. Specifically concerning the obligations of controllers, the Draft Regulation provides detailed guidance on the processing of personal data that carries a high risk. In such cases, controllers are required to conduct a Data Protection Impact Assessment (“**DPIA**”) before proceeding with the processing.

High-risk processing scenarios encompass various situations, such as automated decision-making with legal implications, the processing of specific personal data, large-scale data processing and processing that restricts the rights of data subjects. The primary objective of this assessment is to evaluate and mitigate potential risks to the personal information of data subjects. The Draft Regulation obligates controllers to systematically describe their personal data processing activities, assess the necessity and proportionality of the processing, conduct a risk assessment to safeguard the rights of data subjects, and document the measures taken to protect data subjects from identified risks. If a Personal Data Protection Officer is involved, their guidance should be sought and documented. Furthermore, controllers must periodically review the impact assessment if there are changes in the risks associated with the processing and implement necessary measures to protect data subjects accordingly.

During the DPIA process, personal data controllers can seek guidance from the PDP Agency, particularly in cases where the processing may result in material or non-material harm to data subjects, and there are no viable technical or organizational measures available to mitigate these adverse effects. This underscores the significance of consulting external experts when needed to ensure the protection of the personal information of data subjects.

Regarding the PDP Agency, the Draft Regulation clarifies that the authority to make determinations lies with the PDP Agency itself. This includes the requirement that controllers and/or processors must comply with the directives of the PDP Agency in the implementation of personal data protection. Furthermore, the PDP Agency also will establish assessments of the level of protection for personal data that is equivalent or higher in the

context of overseas data transfers, as explained below.

(4) Overseas Data Transfers in Chapter V

The current PDP Law stipulates that data controllers transferring personal data abroad must either ensure (i) that the recipient country maintains a level of data protection at least equivalent to what is required in Indonesia, (ii) that there are adequate and binding personal data protection measures by the offshore data recipient, or (iii) it obtains the data subject's approval.

In the case of (i), the Draft Regulation, however, takes this a step further by requiring the data controller to confirm that the recipient country provides a level of personal data protection equivalent to or higher than Indonesian laws. It appears that the authority is supposed to play some role in making this assessment. However, it remains unclear whether this determination will solely be the responsibility of the PDP Agency, or if it will involve the Government, such as the MOCI or other parties.

If the above condition is not met, the data controller must establish adequate protection measures (point (ii)), which include the following:

- a. International agreements between the location of the personal data controller and/or personal data processor conducting the transfer of personal data and the country of the personal data controller and/or personal data processor receiving the transfer of personal data;
- b. Standard contract clauses for personal data protection provided by the PDP Agency;
- c. Binding corporate rules for a corporate group approved by the PDP Agency; and/or
- d. Other adequate and binding instruments for personal data protection recognized by the PDP Agency.

However, in cases where these requirements ((i) and (ii)) are not met, consent from the data subject may be used as a fallback option but only in limited circumstances. For the sake of completeness, the transfer of personal data based on the data subject's consent can only be carried out if:

- a. The transfer is not recurring;
- b. The transfer involves a limited number of data subjects;
- c. The transfer is necessary to fulfil provisions that do not override the interests or rights and freedoms of the data subjects
- d. The personal data controller has assessed the risks and implemented appropriate protection measures; and
- e. The personal data controller has informed the PDP Agency and the data subject about the transfer activities and the legitimate and pressing interests fulfilled by such a transfer.

Further provisions regarding the transfer of Personal Data based on consent are elaborated in the regulations of the PDP Agency.

In addition, the Draft Regulation introduces new mandates for overseas transfer, namely that data controllers are obligated to perform both a risk assessment and a legal instrument assessment before proceeding with the data transfer. According to Article 194 of the Draft Regulation, both data controllers and/or data processors have an obligation to assess the necessity of the data transfer and the potential impact of that transfer on the rights



of data subjects. This assessment should include an evaluation of the risks associated with the transfer of personal data. Detailed provisions and guidelines for conducting this assessment will be provided in the forthcoming PDP Agency regulation. It is important to note that this assessment requirement in the Draft Regulation differs from the GDPR. Under the GDPR, if the recipient country receives an adequacy decision from the EU authority, indicating that it maintains a level of personal data protection equal to or higher than that regulated under the GDPR, a transfer impact assessment is not necessary. This aspect of the Draft Regulation distinguishes it from the GDPR.

Note that the Draft Regulation also introduces the possibility of transferring personal data as ordered by a court decision, tribunal, or decision of a third-country administrative authority, but such transfers are only recognized and allowed if there is an underlying international agreement with the requesting country that justifies the transfer of personal data.

(5) Other Notable Provisions

In addition to the above, the Draft Regulation introduces several new requirements that are not provided in the PDP Law. Practically important examples are as follows:

- a. **Agreements with Data Processors:** The Draft Regulation outlines detailed provisions for agreements between personal data controllers and processors. These agreements include auditing rights, compliance with instructions, security policies, data protection standards, and incident response procedures. The agreements must be in the Indonesian language.
- b. **Record of Data Processing:** The Draft Regulation provides details on the specific items which are required to be maintained as part of the recording obligation. Personal data controllers are required to maintain records of all data processing activities, including information about the controller, data protection officer, data source, processing purposes, data types, and security measures. Personal data processors also must record their processing activities, including data transfers and security steps.
- c. **Data Breach Reporting:** As provided in the PDP Law, personal data controllers are obligated to notify data subjects and the PDP Agency of data breaches within 72 hours if the breach could result in data exposure. However, the Draft Regulation clarifies that no notification is required if the breach does not lead to data disclosure/leakage.

3. Closing Remarks

Although the Draft Regulation offers more clarity regarding PDP Law implementation, its compliance in Indonesia may pose challenges due to the GDPR's strong influence on the regulation's extensive scope, which may limit business flexibility. Furthermore, the enforcement of these regulations remains uncertain, given their specificity. There is no guarantee that this Draft Regulation will be the sole implementing regulation of the PDP Law. Additional implementing regulations also may be introduced by the future PDP Agency.

The MOCI was soliciting public input on the Draft Regulation with the comment period initially set to conclude on 14 September 2023, but extended to 25 September 2023 (Jakarta, Indonesia time). The public could share

their feedback by creating an account and submitting comments through www.pdp.id, a dedicated website established by the MOCI for this purpose. To date, there is no update on such website concerning next steps.

Considering that the PDP Law will become fully enforceable in October 2024, it is anticipated that the Draft Regulation also may take effect around the same time. In the meantime, businesses are advised to begin acquainting themselves with the forthcoming requirements.

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