

January, 2023 No.55

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India

The Draft Digital Personal Data Protection Bill, 2022

2022 年 11 月 18 日、インドの電子情報技術省は、プライバシー法案であるデジタル個人データ保護法の草案を発表した。これは 2018 年以来 4 回目の草案であり同国における包括的なデータ保護体制を確立することを目的として、制定作業が進められているものである。本稿ではこの草案の概要について解説する。

Background

On 18 November 2022, the Ministry of Electronics and Information Technology released the draft Digital Personal Data Protection Bill ("Bill")¹. This is the fourth iteration of India's proposed privacy law since 2018, with the goal of establishing a comprehensive data protection regime in the country. The purpose of the draft Bill is, *inter alia*, to provide for the processing of digital personal data in a manner that recognizes both the right of individuals to protect their personal data and the need to process personal data for lawful purposes.

Currently, the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011, made by the Central Government in exercise of its powers under the Information Technology Act 2000, outline the security practices and procedures to be followed by a body corporate or any person collecting, receiving, possessing, storing, dealing or handling information of users on behalf of the body corporate.

Key Provisions of the Draft Bill

The key provisions of the draft Bill in its present form are as follows:

Applicability of the Draft Bill: The draft Bill only applies to personal data² collected online or offline that has been digitized. The draft Bill also applies to processing of digital personal data outside India, if such processing is done in connection with any profiling of, or activity of offering goods or services to data principals³ within India.

Notice, Consent, and Deemed Consent: The draft Bill provides that consent for processing personal data must be

1 The draft Bill can be accessed at

https://www.meitv.gov.in/writereaddata/files/The%20Digital%20Personal%20Data%20Protection%20Bill%2C%202022_0.pdf

2 Under the draft Bill, "Personal Data" means any data about an individual who is identifiable by or in relation to such data. There is no concept or definition of sensitive personal data under the draft Bill unlike its previous iterations.

3 Under the draft Bill, "Data Principal" means the individual to whom the personal data relates and where such individual is a child includes the parents or lawful guardian of such a child.

freely given, specific, informed and unambiguous indication of the data principal's wishes by which the data principal, by a clear affirmative action, signifies agreement to the processing of personal data for the specified purpose. Thus, the draft Bill emphasizes on obtaining express consent of data principals by presenting a request in plain and clear language. Prior to or at the time of requesting a data principal for consent, a data fiduciary⁴ is required to give to the data principal an itemized notice in clear and plain language containing a description of personal data sought to be collected by the data fiduciary and the purpose of processing of such personal data. A data principal has the option to access such request for consent in English or any language specified in the Eighth Schedule to the Constitution of India.

The draft Bill also provides for the concept of “deemed consent” in certain specific situations, including where the data principal voluntarily provides their personal data to the data fiduciary and it is reasonably expected that they would provide such personal data (for instance, making reservation in a hotel), or for the performance of any function under any law, or the provision of any service or benefit to, or the issuance of any certificate, license, or permit for any action or activity of, the data principal, or for compliance with any judgment or order issued under any law, in public interest, including for prevention of fraud, credit scoring, as well as for other ‘fair and reasonable’ purposes.

Duties of data fiduciary: The draft Bill prescribes certain duties of a data fiduciary. Data fiduciary is responsible for complying with the provisions of the law in respect of any processing undertaken by it or on its behalf by a data processor⁵ or another data fiduciary, make reasonable efforts to ensure that personal data processed by or on behalf of the data fiduciary is accurate and complete, implement appropriate technical and organizational measures to ensure effective adherence with the provisions of the law, protect personal data in its possession or under its control by taking reasonable security safeguards to prevent personal data breach, and cease to retain personal data as soon as it is reasonable to assume that retention is no longer necessary for legal or business purposes.

Significant Data Fiduciary: The draft Bill has retained the concept of “Significant Data Fiduciary” as in the previous iteration of the data protection bills. The Central Government has the powers to notify any or a class of data fiduciaries as “Significant Data Fiduciaries” considering relevant factors, including the volume and sensitivity of personal data processed, risk of harm to the data principal, potential impact on the sovereignty and integrity of India, and public order. A significant data fiduciary is subject to additional obligations. Among other things, a significant data fiduciary is required to appoint a “Data Protection Officer” who shall be based in India and represent the significant data fiduciary⁶, appoint an “Independent Data Auditor” who shall evaluate the compliance of the significant data fiduciary, undertake other measures as may be prescribed.

Rights and Duties of Data Principals: Data principals have several rights under the draft Bill, including the right to know whether their personal data has been processed and the right to correct and erase personal data that is no longer necessary for the purpose for which it was processed. Interestingly, the draft Bill also sets forth certain duties for data principals, such as complying with all applicable laws while exercising their rights and not providing false particulars or registering a false or frivolous grievance or complaint.

No Requirement for Data Localization/Cross-Border Transfer: The draft Bill, unlike the previous iteration of the data protection bills, does not make it obligatory for data fiduciaries to store critical personal data in India. Instead, the draft Bill specifies that the Central Government after an assessment of necessary factors (which have not been specified in the draft Bill) will notify countries or territories outside India to which a data fiduciary may transfer personal data, in accordance with such terms and conditions as may be specified.

Penalties: The draft Bill proposes to establish a “Data Protection Board of India” (“Board”), the primary function of which is to determine non-compliance and impose penalty. The Board would be empowered to impose penalties of up to INR 500 crore (approximately USD 62 million) in each instance. The draft Bill also prescribes monetary

4 Under the draft Bill, “Data Fiduciary” means any person who alone or in conjunction with other persons determines the purpose and means of processing of personal data.

5 Under the draft Bill, “Data Processor” means any person who processes personal data on behalf of a data fiduciary.

6 While significant data fiduciaries are required to appoint a data protection officer, every data fiduciary must appoint a person to act as the point of contact for anyone who wishes to file a grievance.

penalties for certain violations, which do not exceed do not exceed INR 250 crores (approximately USD 31 million).

Personal Data Breach: The draft Bill prescribes that in the event there is unauthorized processing of personal data or accidental disclosure, use, alteration, destruction of or loss of access to personal data, that compromises the confidentiality, integrity or availability of personal data, the data fiduciary or data processor must notify the Board. The Board may, in such event, direct the data fiduciary to adopt any urgent measures to remedy such personal data breach or mitigate any harm caused to data principals.

Conclusion

The draft Bill departs substantially from its previous iterations which were influenced from the GDPR model of privacy legislation. The draft Bill is concise and more reader friendly. Several provisions of the draft Bill also contain illustrations that provide a better understanding of the provisions. The specifics of the proposed legislation will be outlined in the rules that will be issued in the future. The draft Bill is in a preliminary stage and the Central Government invited comments from various stakeholders on the draft Bill by December 17, 2022; therefore, it remains to be seen how the final legislation will look. In its current form, the draft Bill appears to be friendly to commercial interests. Once implemented, companies (both domestic and foreign) to which the law will apply would need to take appropriate measures to comply with their obligations under the enacted law, including giving notice, seeking consent from data principals, appointment of authorized individuals to communicate with data principals, and data breach response.

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Indonesia

New Government Regulation Replacing Omnibus Law

2021 年 11 月 25 日、インドネシア憲法裁判所は雇用創出に関する法律（通称：オムニバス法）の制定が法的手続きに則っていないことを理由に条件付き違憲である旨判示し、2 年以内に必要な手続きが採られない場合には同法が無効となるとの判断を下した。この決定を受けて、インドネシア政府は、2022 年 12 月 30 日付けで雇用創出に関する法律代替規則（2022 年第 2 号）をオムニバス法に替わる規則として施行した。同規則は今後インドネシア議会での承認がさらに必要となるが、本稿では同規則における改正点等について概観する。

Background

On 25 November 2021, the Indonesian Constitutional Court issued Decision No. 91/PUU-XVIII/2020 (“**CC Decision**”) which ruled that the Omnibus Law was deemed conditionally unconstitutional since its formation did not follow the mandatory procedures and consequently mandated the government to amend several parts of the Omnibus Law within a period of two years from the pronouncement of the CC Decision.

In response to CC Decision, the government of Indonesia officially issued a Regulation in Lieu of Law (*Peraturan Pemerintah Pengganti Undang-Undang* or “**Perppu**”) No. 2 of 2022 on Job Creation (“**Perppu 2/2022**”) to revoke and replace the Omnibus Law, which is effective as of 30 December 2022. All implementing regulations of the Omnibus Law, however, remain in effect, valid and legally binding to the extent that they are not contrary with the provisions of Perppu 2/2022.

The issuance of Perppu 2/2022 is said to be in line with the urgent need to deal with the global economic conditions and recession as well as the need to avoid the impact of increased inflation and the threat of stagflation in 2023.

Key Changes

While maintaining most of the provisions under the Omnibus Law (including those pertaining to the application of risk-based business licensing), Perppu 2/2022 introduces some substantial changes. We briefly elaborate below some of the differences relating to the simplification of basic requirements for business licensing (particularly relating to environmental related approvals and building approvals) and the employment sector:

A. Simplification of Basic Requirements for Business Licensing

1. Environmental Related Approvals

Perppu 2/2022 stipulates changes regarding the environmental approvals as stated under Law No. 32 of 2009 on Environmental Management and Protection (“**Environmental Law**”), as follows:

Issue	Omnibus Law	Perppu 2/2022
Imposition of administrative sanction for failure in obtaining required business licensing or approvals for B3 waste management	Added Article 82A, 82B, and 82C to the Environmental Law (which include reference to, among others, Article 59 paragraph (1)*) and in essence, stipulated that any person who carries out business and/or activity who has business licensing or approval as referred to in Article 59 paragraph (1) not in accordance with the obligation in the business licensing or the approvals	Removes a reference to Article 59 paragraph (1) in Articles 82A, 82B and 82C of Environmental Law.

	and/or violates the provision of laws and regulations in the field of environmental protection and management, shall be subject to administrative sanction.	
	Amended Article 109 of Environmental Law to include the absence of business licensing or approval as referred to in, among others, Article 59 paragraph (1), to be subject to imprisonment and fines.	Removes the reference to Article 59 paragraph (1).
<i>*Article 59 paragraph (1) of the Environmental Law stipulates that any person who produces B3 waste is required to carry out B3 waste management.</i>		

Due to the removal of reference to Article 59 paragraph (1) under the abovementioned relevant articles of Environmental Law, it is currently perceived that no administrative sanction is imposed in case of non-compliance in securing business licensing or approvals for B3 waste management or that the administrative sanction is not applicable even if B3 waste is not managed as referred to in Article 59 paragraph (1) of the Environmental Law.

2. Building Approvals

To provide more clarity, Perppu 2/2022 adds one new definition in Law No.28 of 2002 on Buildings ("**Building Law**"), as follows:

Issue	Omnibus Law	Perppu 2/2022
Definition of Building Approvals	Did not provide any definition	<p>Adds a definition of Building Approvals under Article 1 number 19 of the Building Law, which reads:</p> <p><i>"Building Approvals are permits that are granted to building owners in order to construct new buildings or change, expand, reduce and/or maintain buildings in accordance with technical building standards."</i></p> <p>Replaces the term "approval" under Article 6 paragraph (3) of the Building Law with</p>

		<p>“Building Approval”, to be read as follows:</p> <p><i>“Alterations in the functions of the building must secure a new Building Approval from the Central Government”</i></p>
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B. Manpower

Perppu 2/2022 introduces several new provisions that differ from the amendments made to Law No. 13 of 2003 on Manpower (“**Manpower Law**”) under the Omnibus Law, as follows:

Issue	Omnibus Law	Perppu 2/2022
Outsourcing	Removed Article 64 of Manpower Law which allows a company to subcontract part of its work to another company under a written outsourcing agreement	<p>Reinstates Article 64 of Manpower Law with addition of paragraphs (2) and (3):</p> <p>(1) allows a company to subcontract part of its work to another company under a written outsourcing agreement</p> <p>(2) the government shall determine part of the work referred to in paragraph (1)</p> <p>(3) further provisions regarding the determination of the part of work referred to in paragraph (2) shall be regulated in a Government Regulation</p>
Variable used for minimum wage calculation formula	Added Article 88D in which paragraph (2) provides that the minimum wage calculation formula should contain variables that relate to economic growth or inflation	In addition to two existing variables, certain indexes are now introduced as a third new variable for the minimum wage calculation formula
Government authority to stipulate minimum wage calculation formula	Did not address this issue	Adds new Article 88F which allows the government under certain circumstances to

		stipulate a minimum wage calculation formula that differs from the minimum wage calculation formula as referred to in Article 88D paragraph (2) of the Manpower Law
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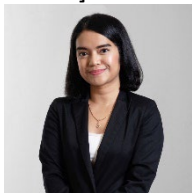
In relation to the above, businesses are still in “wait and see” mode on how the government will further regulate the outsourcing arrangements and minimum wages in 2023 through implementing regulations.

Conclusion

Although Perppu 2/2022 has been issued and applicable since its issuance date, it should be noted that Perppu 2/2022 still has to be approved by the House of Representatives of Indonesia (DPR) to become law. If it is rejected, then Perppu 2/2022 shall be revoked and a law on the revocation will need to be issued.

The DPR is expected to approve or reject Perppu 2/2022 during the Trial Period III of 2022/2023. While waiting for such approval, it remains to be seen in practice whether Perppu 2/2022 can finally accommodate the demand from the workers and civil society who went against the Omnibus Law. In the meantime, business actors are advised to take note of the above changes and further review of the implementing regulations may be required to fully understand the impact of Perppu 2/2022 on their businesses.

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Thailand

Thailand's Royal Decree on Digital Platform Services - Update from the Draft to the Recently Enacted Law

デジタルプラットフォームサービス事業を規制する勅令が制定され、本年 8 月 20 日に施行される。当該勅令は、2021 年時点で公表されていた草案段階と比較すると、規制対象となるデジタルプラットフォームサービスの定義、適用除外等に重要な変更が行われている。

Introduction

Following our [previous article](#) where we discussed the draft royal decree concerning the regulation of digital platform services in Thailand, the Royal Decree on Digital Platform Services B.E. 2565 (2022) (the “**Royal Decree**”) has now been published in the Royal Gazette on 23 December 2022 and will take effect from 20 August 2023. Comparing to the Draft Decree on Digital Platform Services which was previously disclosed for the public hearing (the “**Draft Decree**”), many revisions have been made to the Royal Decree. Significant revisions include the revision to the definition of “Digital Platform Services” (as discussed below), exemption from the application of the Royal Decree, and criteria of the services which are subjected to the duties under the Royal Decree.

Under the Royal Decree, service providers of Digital Platform Services (the “**Service Providers**”) shall be required to notify the Electronic Transaction Development Agency of Thailand (“**ETDA**”) before the commencement of their business operations. In addition to the notification requirement, the Service Providers are also subjected to duties under the Royal Decree which are intended to provide protection for platform users. The key takeaways of the Royal Decree are as follows:

(1) Digital Platform Services which are subjected to the Royal Decree

Under Section 3 of the Royal Decree, digital platform services which are regulated under the Royal Decree (the “**Digital Platform Services**”) are defined as “the provision of an electronic medium which has a data management system to create a connection by using a computer network between business operators, consumers or users that results in an electronic transaction, whether or not any service fee is collected therefrom, except for Digital Platform Services which are used for offering goods or services of a sole Service Provider itself or by its affiliated companies acting as a representative of the said Service Provider, whether or not such goods or services are offered to third parties or affiliated companies”. The definition of Digital Platform Services under the Royal Decree focuses on digital platforms which are used as mediums to provide a connection between business operators and consumers that results in an electronic transaction, such as, social networks, marketplace websites, or search engines.

Notwithstanding the above, the Royal Decree shall not apply to the following Digital Platform Services:

- (a) Digital Platform Services which offer goods or services of a sole Service Provider itself or by its affiliated companies acting as a representative of the said Service Provider (as mentioned above in the definition of Digital Platform Services);
- (b) Digital Platform Services which are governed under the regulations of the Bank of Thailand and the Securities and Exchange Commission (Section 4 (1));
- (c) Digital Platform Services provided by government agencies that are not directly related to commercial business or are not primarily focused on making a profit, provided that such platforms have already been notified to the ETDA (Section 4 (2)); and
- (d) Other Digital Platform Services which may be exempted by ETDA’s announcement (Section 8 paragraph 3).

It is noteworthy that a marketplace website, which acts as a medium between sellers of products and consumers, does not fall within the exemption in (a) above, and thus, the operation of a marketplace website shall require notification under the Royal Decree. This notification requirement under the Royal Decree is in

addition to the notification to the Office of the Consumer Protection Board under the Direct Sale and Direct Marketing Act B.E. 2545 (2002) which is the law that currently governs the operations of e-commerce business in Thailand.

(2) Notification requirement and other duties under the Royal Decree

Under the Royal Decree, the Service Providers of the Digital Platform Services shall have the duty to notify ETDA before starting business operations as well as comply with other duties stipulated therein. The stringency of such duties can be classified into four (4) categories depending on the scale and characteristics of the concerned Digital Platform Services as follows:

No.	Types of Digital Platform Services	Characteristics	Duties under the Royal Decree
(a)	General Digital Platform Services (Section 8 (1) and (2))	(i) having annual net income (before deducting expenses) generated by the provision of services in Thailand of more than 1,800,000 THB (in case of a natural person), or more than 50,000,000 THB (in case of a juristic person); or (ii) having more than 5,000 monthly average users in Thailand.	The Service Providers of General Digital Platform Services shall have the duty to notify ETDA, and comply with duties as prescribed in Chapter II of the Royal Decree, for example, filing annual report, disclosing the terms and conditions of the services to their users. In case of certain types of platforms, such as, marketplace and search engine platforms, they are additionally required to notify their users of the terms and conditions before or upon using the services.
(b)	Large-scale Digital Platform Services (Section 18 (1))	(i) having annual net income (before deducting expenses) generated by the provision of services in Thailand of more than 300,000,000 THB for each type of service, or more than 1,000,000,000 THB for all types of services; or (ii) having users in Thailand comprising more than 10% of the total population in Thailand.	In addition to the notification requirement and general duties as mentioned in category (a), the Service Providers of Large-scale Digital Platform Services shall also be required to implement a risk management system, appoint compliance officers and third-party auditors and apply any other measures as announced by ETDA.
(c)	Specific Digital Platform Services (Section 18 (2) and (3))	(i) being a Digital Platform Service, whose operations may expose risk and have a high level of impact on financial or commercial stability, trustworthiness and acceptance of electronic information systems or may cause harm to the public as announced by ETDA; or (ii) being a Digital Platform Service that affects national security or health and	In addition to the notification requirement and general duties as mentioned in category (a), the Service Providers of the Specific Digital Platform Services shall be required to implement a risk management system and apply any other measures as announced by ETDA.

No.	Types of Digital Platform Services	Characteristics	Duties under the Royal Decree
		hygiene, environment, energy, telecommunications, transportation and logistics, and infrastructure as announced by ETDA under the recommendation of competent authorities.	
(d)	Other Digital Platform Services (Section 8 paragraph 4)	Digital Platform Services which do not have the characteristics as prescribed in (a), (b) and (c) above.	Other Digital Platform Services that do not fall within any of the categories above still have the duty to notify basic information of its services, such as, name and address of Service Providers, name of digital platform services and contact person information, etc. In this regard, they are not required to comply with other duties as prescribed in Chapter II of the Royal Decree except for a duty of submitting the annual report of some basic information to ETDA, such as the value of the transaction on the digital platform service, net income (before deducting expenses) in Thailand, total number of users and number of users for each service.

In addition to the above, the Service Providers in category (a), (b) and (c), shall have the duty to implement remedy measures and compensate affected persons from providing digital platform services business. In case of cessation of business operations, they shall have the duty to notify ETDA as well as their users in advance, within the timeframe specified in the Royal Decree depending on the types of Digital Platform Services provided.

(3) Digital Platform Services provided outside Thailand

Under Section 9 of the Royal Decree, Service Providers of Digital Platform Services who are located offshore, but provide their services to users in Thailand (the “**Offshore Service Providers**”) shall also have the duty to notify ETDA of their business operations. In this regard, the Offshore Service Providers will be deemed as providing services to users in Thailand if they have any one of the characteristics as prescribed under Section 10 of Royal Decree, such as, the display of their services whether in part or in whole is in Thai language, the domain name of websites contain indication of Thailand such as “.th”, Thai law is used as the governing law of the transactions concluded on the platforms, or the Offshore Service Providers have offices or staff to support users in Thailand.

In addition to the notification requirement, Offshore Service Providers are also required to appoint a coordinator in Thailand for their business operations under Section 11 of Royal Decree. The coordinator shall act as a contact person of the Service Providers in Thailand with ETDA and shall perform relevant duties, such as, filing annual reports or notifying any change to the terms and conditions of the Digital Platform Services to ETDA. The coordinator of the Offshore Service Providers must be appointed in writing, reside in Thailand and shall not perform any activity that is subject to the Foreign Business Act B.E. 2542 (1999).

Section 11 Paragraph 2 of the Royal Decree clarifies that the duty to appoint the coordinator in Thailand shall not be deemed as the requirement to establish the entity of the Offshore Service Providers in Thailand. Moreover, contrary to the Draft Royal Decree, Section 11 of the Royal Decree no longer stipulates that the coordinator shall act as a representative to the Offshore Service Providers which shall assume any liability relating to the provision of Digital Platform Services.

(4) Penalty

Any Service Provider of Digital Platform Services who fails to comply with the notification requirement under the Royal Decree or violates any provision therein may be subjected to the order issued by ETDA under Section 13 paragraph 3 of the Royal Decree suspending the provision of its service in Thailand until the violation under the Royal Decree is rectified. In addition, such Service Provider can also be subject to imprisonment for a term not exceeding one (1) year or to a fine not exceeding 100,000 THB, or to both, under the Electronic Transactions Act B.E. 2544 (2001).

Next step

Service Providers who are currently operating their Digital Platform Services before the enforcement of the Royal Decree are allowed to continue their business operations, provided that they notify ETDA within 90 days after the Royal Decree becomes effective on 20 August 2023. Until then, it can be expected that ETDA may issue relevant sub-regulations as well as guidelines to clarify issues under the Royal Decree, especially the characteristics of platforms which fall under the definition of the regulated Digital Platforms Services.

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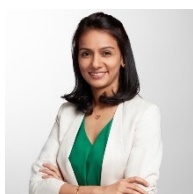
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