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Indonesia

A Closer Look at Indonesia's Government Regulation Draft on the Implementation of Personal Data Protection Law

インドネシアでは 2022 年 10 月に個人データ保護法が制定され、移行期間を経て 2 年後に実質的に施行が開始されることになる。現在、同法の施行規則の整備が進められており、本年 8 月 31 日に個人データ保護法に関する政令の草案が公表され 1 ヶ月間のパブコメに付された。同草案は合計 10 章、245 条から構成される非常に詳細な規則となっており、今後の実務の運用を予測する上で貴重な資料であることから、本稿ではその重要な項目を採り上げて概説する。

Introduction

Nearly a year following the enactment of Law No. 27 of 2022 on Personal Data Protection ("**PDP Law**"), the Ministry of Communications and Information Technology of the Republic of Indonesia ("**MOCI**") on 31 August 2023 published the draft of the government regulation ("**GR Draft**") regarding the implementation of PDP Law for public discussion and consultation.

The period for public comments was closed on 25 September 2023 (extended from 14 September 2023). The public was encouraged to share feedback by creating an online account and submitting their inputs through a dedicated website established by MOCI (www.pdp.id). The GR Draft is expected to come into force in October 2024.

The issuance of the GR Draft aimed to provide a comprehensive framework and further clarification on the PDP Law. Nonetheless, we note that some provisions still lack a clear explanation.

The GR Draft spans over 188 pages, comprising a total of 10 chapters and 245 articles that specifically address the following topics:

1) General provisions;
2) Personal data;
3) Processing of personal data;
4) Rights and obligations;
5) Personal data transfers outside the jurisdiction of the Republic of Indonesia;
6) International cooperation;
7) Authority of the Personal Data Protection Agency ("**PDP Agency**");

8) Administrative sanctions;
9) Dispute resolution and procedural law; and
10) Closing provisions.

Key Provisions of the GR Draft

Key provisions of the GR Draft include the following:

Expansion of Specific Personal Data

In addition to specific personal data listed in the PDP Law, this GR Draft broadens the definition of personal data by adding "other data in accordance with the provisions of laws and regulations". It stipulates that "other data" is classified as specific personal data if it potentially can create more significant harm to personal data subjects, such as discrimination, material/non-material loss, or a violation of the law. However, the GR Draft does not provide further explanation for calculating material/non-material loss, including the method to determine the extent of "more significant harm" to personal data subjects. MOCI in coordination with the PDP Agency established under the PDP Law shall have the authority and discretion to determine and designate additional data as 'other data'.

More Detailed Obligations of Personal Data Controllers

The GR Draft sets out more specific obligations for a personal data controller. For instance, in order to enhance the security and convenience of personal data subjects, the personal data controllers are required to set up a communication line that allows the personal data subject to communicate directly with the personal data controller. In addition, the GR Draft also requires the personal data controller to establish a policy for personal data processing and an agreement with the personal data processor which sets out statutory minimum provisions as regulated under the GR Draft.

The GR Draft also provides further details on how the personal data controller can obtain consent from personal data subjects, including through electronic measures (e.g., columns and other consent features) which is not addressed yet in the PDP Law.

Mechanism for Claims and Compensation Requests

The GR Draft elaborates further on the rights of personal data subjects to file a claim and request for compensation from a personal data controller in case of error or negligence in personal data processing.

The claim can be in the form of material and non-material claims. Material claims include financial compensation equivalent to the losses incurred by personal data subjects. The amount of material claim that a personal data subject can file will be determined by the appointed party authorized to resolve the dispute outside court or by a panel of judges. On the other hand, non-material claims include corrective actions or other measures aimed at restoring the protection of personal data.

Merger, Separation, Acquisition, Amalgamation and/or Dissolution of Data Controller

PDP Law requires the personal data controller to notify the personal data subject in the event of merger, separation, acquisition, amalgamation and/or dissolution of the personal data controller. Under the GR Draft, it is further specified that the notification must occur prior to the completion of such corporate actions. Additionally, both the previous and new data controller shall enter into an agreement that governs the rights and obligations of each party with respect to the transferred personal data.

Authority of the PDP Agency

It is worth noting that the GR Draft does not elaborate on the formation of the PDP Agency despite the mandate already provided under Article 58 of the PDP Law. Consequently, it remains silent on the specific procedures to establish the PDP Agency.

Notwithstanding the above, the GR Draft elaborates on the scope of authority vested in the PDP Agency, as follows:

a. formulating and determining personal data protection policies;

b. supervising the compliance with personal data protection law and policies;

c. imposing administrative sanctions in case of violation by the personal data controller and/or processor;

d. facilitating law enforcement officers in handling personal data crimes;

e. cooperating with other countries' personal data protection agencies in order to resolve allegations on violation of cross-border personal data protection laws;

f. assessing the fulfillment of requirements for the transfer of personal data outside the jurisdiction of the Republic of Indonesia;

g. giving orders to follow up the results of supervision to the personal data controller and/or personal data processor;

h. publishing the results on the implementation of supervision of personal data protection in accordance with statutory provisions;

i. receiving complaints and/or reports regarding alleged violations of personal data protection law;

j. carrying out inspections and investigations of complaints, reports and/or monitoring results regarding alleged violations of personal data protection law;

k. summoning and presenting any person and/or public body related to an alleged violation of personal data protection law;

l. requesting information, data and documents from any person and/or public body regarding alleged violations of personal data protection law;

m. summoning and presenting the necessary experts in the examination and investigation regarding suspected violations of personal data protection law;

n. carrying out inspections and searches of electronic systems, facilities, spaces and/or places used by personal data controllers and/or personal data processors, including obtaining access to data and/or appointing third parties;

o. requesting legal assistance from the prosecutor's office to resolve personal data protection disputes.

Personal Data Breach Notification

The GR Draft provides that in the event of a personal data breach or any failure to protect personal data, the personal data controller who is responsible for the data's protection is required to promptly report the failure or breach to the PDP Agency and the affected personal data subjects. This report shall be submitted within a maximum period of 3 x 24 hours (i.e., 72 hours) from the moment the personal data controller becomes aware of the failure or breach. The GR Draft clarifies that no notification is required if the failure or breach does not lead to the disclosure or leakage of personal data.

Cross-Border Data Transfer Requirements

The current PDP Law permits the transfer of personal data to other countries as long as the data controller or the data processor as the transferor can ensure that the receiving country has an equal or higher level of personal data protection. However, the PDP Law does not specify the criteria for assessing the adequacy of such personal data protection level.

The GR Draft finally provides specific benchmarks to meet such requirements, as follows:

1. The receiving country has its own personal data protection law;
2. The receiving country has a personal data protection supervisory authority or agency;
3. The receiving country has made an international commitment or is subject to an international treaty or convention on personal data protection.

Additionally, the GR Draft stipulates that in the event the requirements cannot be fulfilled, the personal data controller must ensure that the receiving country has adequate and binding personal data protection measures. It

can be ascertained through the existence of:

(i) the international agreement entered into by and between the transferring country and the receiving country;

(ii) standard contract clauses for personal data protection provided by the PDP Agency;

(iii) binding corporate rules for a corporate group approved by the PDP Agency; and

(iv) any other instruments for personal data protection that are deemed adequate and binding by the PDP Agency.

The GR Draft also introduces new mandates relating to cross border data transfer whereby the personal data controller is required to perform risk assessment and a legal instrument assessment prior to processing the personal data transfer. In this regard, personal data controller and/or personal data processor must assess the necessity of the data transfer and its impact on the rights of personal data subjects. In addition, the GR Draft provides the possibility of personal data transfer as ordered by a court decision, tribunal or decision of a third country administrative authority. It is important to note that such personal data transfer is only allowed if there is an underlying international agreement with the requesting country which justifies the transfer of personal data.

Standard Forms and Clauses under Personal Data Agreements and Documents

In order to improve the protection of personal data subjects, the GR Draft provides standard forms and clauses for mandatory agreement and documents in processing personal data, which include:

(i) an agreement between personal data controllers and personal data processors;

(ii) a cooperation agreement for joint personal data controllers; and

(iii) a notification on personal data protection failures.

Administrative Fines

The PDP Law sets out that the administrative fines for non-compliance can reach up to 2% of a company's annual revenue or an amount determined based on violation variables. The GR Draft further specifies the variables for calculating fines:

a. any negative impact resulting from the violation;

b. the duration of the violation;

c. the type of personal data affected;

d. the number of people affected;

e. the violation discovery process;

f. the level of transparency and cooperation of the personal data controller during the investigation process;

g. the scale of the business of personal data controller or processor;

h. the financial capability of personal data controller or personal data processor to pay; and

i. other relevant elements or factors considered by the PDP Agency.

Alternative Dispute Settlement

The GR Draft introduces an alternative dispute settlement forum that allows the personal data subjects and the personal data controllers and/or processors to report the disputes to the PDP Agency. The facilitation of dispute settlement by the PDP Agency must prioritize mediation. A detailed mediation procedure is set out under the GR Draft.

Conclusion

As the GR Draft is subject to public inputs which have been solicited by the MOCI, it is highly likely that further

changes will be made before the final draft is approved by the President. In the meantime, businesses are advised to proactively review and align their data processing practices with the GR Draft to avoid potential sanctions as well as to foster trust among personal data subjects.

[Author]

Luciana Fransiska (Nagashima Ohno & Tsunematsu Singapore LLP)
luciana_fransiska@noandt.com

Luciana is an Indonesian qualified attorney in the Singapore Office. She graduated from the Faculty of Law University of Indonesia with Cum Laude predicate in early 2014 and obtained her LL.M degree in 2020 with distinction from Tilburg University, the Netherlands.
Prior to joining NO&T, Luciana worked at one of the most prominent law firms in Indonesia. She has extensive experiences in representing both private and public companies on mergers & acquisitions transactions, foreign direct investment and other general corporate matters. Her clients include companies from various industries, including consumer goods, mining, real estate and TMT.

Malaysia

Companies (Amendment) Bill 2023 — Proposed Changes to Beneficial Ownership Framework

2023 年 10 月からマレーシア会社法の改正法案の審議が進められている。重要な改正項目の一つに実質的所有者情報の開示に関する改正が挙げられている。現在の改正案が可決された場合、会社自身が実質的所有者について特定し毎年届け出ることが義務づけられる可能性があり、現行法制よりも規制が強化されることになるため留意が必要である。

On 10th October 2023, the Malaysian Companies (Amendment) 2023 Bill ("**Bill**") was tabled for the first reading at the House of Representatives to amend the provisions of the Malaysian Companies Act 2016 ("**CA 2016**") relating to, amongst others, the reporting framework and disclosure of beneficial ownership information, with an aim to improve the corporate governance framework under the CA 2016.

Background – Existing Beneficial Ownership Framework under the CA 2016

"Beneficial owner" is currently defined under Section 2 of the CA 2016 to mean "the ultimate owner of the shares and does not include a nominee of any description". Further, based on the Guideline for the Reporting Framework for Beneficial Ownership of Legal Persons ("**BO Guideline**") issued by the Companies Commission of Malaysia ("**CCM**"), it is clarified that beneficial owners are always natural persons who ultimately own or control a legal entity or arrangement, and the existing definition of "beneficial owners" covers the perspective of both, ownership and effective control.

Submission of Beneficial Ownership Information to the CCM

Section 56(1) of the CA 2016 empowers (but does not require) a company to deliver notices to its shareholders or other relevant persons (as informed by the shareholders) to obtain information of beneficial ownership of the shares in the company. In addition, Section 56(6) of the CA 2016 allows the CCM, stock exchange or the Securities Commission Malaysia to direct the company to obtain the beneficial owners' information and provide such information to it.

Although the literal reading of Section 56(1) of the CA 2016 does not require the company to obtain such beneficial ownership information, the BO Guideline clarifies that it is compulsory for companies to send the written notice under Section 56(1) of the CA 2016 at least once in a calendar year, and companies are recommended to send out notices pursuant to Section 56(1) to (3) of the CA 2016 frequently to update the CCM on the beneficial ownership of their shareholders. Further, the CCM has imposed a duty on companies to lodge beneficial ownership information together with the annual return, under the general catch-all item of "such other information as the CCM may require" under Section 68(3)(j) of the CA 2016. In this regard, the prescribed form of the annual return made available by CCM requires the company to state if any of the shareholders of the company is holding shares as a nominee or trustee, and if it is in the affirmative, to annex a separate list of information relating to such beneficial ownership.

In view of the above, generally, upon receipt of the company's notice under Section 56 of the CA 2016, the shareholder will need to inform the company whether he or she is a beneficial owner or a trustee (and in this case, to indicate the beneficial owner(s) and the nature of their interests in the shares), and whether another person is entitled to control the shareholder in exercising the voting rights, and particulars of the agreement or arrangement in respect of the control. The information obtained pursuant to these written notices must be inscribed in a separate part of the company's Register of Members.

Transitional Period under the BO Guideline

Having said that, the BO Guideline also provides for a transitional period (which has since been extended to coincide with the implementation of the Bill) ("**Transitional Period**") where during the Transitional Period, companies are required to obtain and keep the beneficial ownership information accurate and updated. After the

Transitional Period, the BO Guideline states that CCM will invoke Section 56(6) of the CA 2016 and oblige the companies to submit the relevant beneficial ownership information to the CCM.

Notwithstanding this Transitional Period, in practice, companies are required to inform the CCM about the beneficial owners of its shares via submission of the annual return, pursuant to Section 68(3)(j) of the CA 2016.

Proposed Beneficial Ownership Framework under the Bill

The Bill seeks to replace the existing provisions relating to beneficial ownership under the CA 2016 with amongst others, the key provisions below:

1. Widening of the definition of "beneficial owner"

   (a) A beneficial owner in relation to shares, means the ultimate owner of the shares and does not include a nominee of any description.

   (b) A beneficial owner in relation to a company, means a natural person who ultimately owns or controls a company and includes a person who exercises ultimate effective control over a company.

   It is also specifically provided under the proposed Section 60A that the Registrar of the CCM may issue guidelines for the purpose of identifying a beneficial owner of a company.

   In view of this widened definition of "beneficial owner", a person who is not listed as a shareholder may be categorised as a beneficial owner. Although the BO Guideline has set out certain thresholds (in terms of percentage of interest and control of voting rights) for a person to be categorised as beneficial owner, the BO Guideline was drafted based on the existing provisions under the CA 2016 and will likely be superseded or supplemented by subsequent CCM's guidelines following the enactment of the Bill.

2. Mandatory obligation on companies to obtain, and duty of beneficial owners to disclose, information of beneficial ownership

   (a) Unlike the existing Section 56 of the CA 2016, the new Section 60C of the CA 2016 (introduced by the Bill) imposes a mandatory obligation on companies to send written notices to obtain information of beneficial ownership of the company.

   (b) The new Section 60D of the CA 2016 also requires a person who has reason to believe that he or she is a beneficial owner of a company, to provide the relevant beneficial ownership information to the company.

3. Introduction of a new Register of Beneficial Owners

   (a) As compared to the existing Section 56(4) of the CA 2016 where beneficial ownership information is only inscribed in part of the Register of Members, the Bill introduces a new Section 60B which requires each company to keep a separate Register of Beneficial Owners and record details of beneficial owners of the company.

   (b) The Register of Beneficial Owners shall be *prima facie* evidence of any matters inserted in the register under the CA 2016. Any changes to the Register of Beneficial Owners, including updates to the particulars of the beneficial owners, will need to be notified to the CCM within 14 days of the change.

4. Disclosure of information of Beneficial Owners

   (a) The Bill proposes to confer upon the Minister charged with the responsibility for companies (currently, the Minister of Domestic Trade and Cost of Living), a power to prescribe the persons who may access the Register of Beneficial Owners and the relevant beneficial ownership information, and regulate the manner and the terms and conditions for such access.

(b) This is a contrast to the equivalent provision under the previous draft Companies (Amendment) Bill 2020, which sets out in that 2020 Bill, the list of persons and parties who can access the Register of Beneficial Owners and the beneficial ownership information, including the Royal Malaysian Police, Bank Negara Malaysia, Securities Commission Malaysia and the Royal Malaysian Customs Department.

Whilst not specifically prescribed under the current Bill, the explanatory notes to the Bill clarify that some law enforcement agencies and competent authorities may be given access to the Register of Beneficial Owners of a company and the relevant beneficial ownership information.

5. Application of the new beneficial ownership provisions under the CA 2016 on foreign companies

The new provisions from items 1 – 4 above will also similarly apply to foreign companies that are required to be registered under the CA 2016 for carrying on business in Malaysia.

6. Exemptions from the beneficial ownership provisions under the CA 2016

(a) The Bill proposes to confer upon the Minister charged with the responsibility for companies, a power to exempt any class of companies from the application of the beneficial ownership provisions under the CA 2016, subject to certain conditions as may be imposed by the Minister.

(b) Similar to item 4(b) above, this approach is also a contrast to the equivalent provision under the previous draft Companies (Amendment) Bill 2020, which sets out in that 2020 Bill, the categories of companies exempted from such requirements. The exempted companies are those that are licensed or regulated by Bank Negara Malaysia, Securities Commission Malaysia or traded on a stock exchange (in Malaysia or otherwise).

Whilst not specifically prescribed under the current Bill, the explanatory notes to the Bill clarify that the exemption will aim to reduce the administrative burden of companies which are already regulated under other written laws and prevent regulatory overlap.

Potential Implications

When the Bill is passed in Parliament and comes into force, a company incorporated under the CA 2016 and a foreign company registered under the CA 2016 must send written notices to their respective shareholders; and any person whom the company knows or has reasonable grounds to believe, that he is a beneficial owner of the company, or that he knows the identity of a person who is a beneficial owner of the company, to obtain information of beneficial ownership of the shares in the company.

In tandem with the aforesaid notices, the beneficial owners have a duty to notify and provide the relevant information required to be included in the company's Register of Beneficial Owners. With the foregoing information, the company is required to keep and maintain an updated Register of Beneficial Owners. Further, the Bill also seeks to codify the requirement to submit beneficial ownership information to the CCM as part of the company's annual return, under the proposed Section 68(3)(ia) of the CA 2016.

Following the enactment of the Bill into law, companies whose shareholders have adopted trust and/or nominee arrangements in respect of the company's licences and/or commercial intentions, may need to evaluate if there is any potential implication of the enhanced beneficial ownership disclosure framework under the amended CA 2016 as relevant authorities may be granted access to the companies' Register of Beneficial Owners.

Conclusion

The proposed amendments to the beneficial ownership framework under the Bill aim to enhance corporate transparency and accountability to be in line with international standards and best practices. At the time of writing this newsletter, the Bill is expected to be tabled for its second reading before the House of Representative at the end of November 2023. Pending the enactment of the Bill into law, company secretaries and agents of foreign companies should be prepared to put in place systems and relevant documents to comply with and implement the enhanced beneficial ownership framework under the Bill when the same comes into force.

[Author]

Yuan Yao Lee (Nagashima Ohno & Tsunematsu Singapore LLP)
yuan_yao_lee@noandt.com

Yuan Yao is an associate with Nagashima Ohno & Tsunematsu (Singapore office). His practice focus is on public and private M&A, take-overs, capital markets (equity), regulatory compliance and general corporate advisory matters.

Before joining Nagashima Ohno & Tsunematsu, Yuan Yao read law at University of Warwick between 2013 – 2016 and was called to the Bar of England of Wales (2017) and the High Court of Malaysia (2018). He also practiced at one of the top-tier law firms in Malaysia from 2018 till 2023.

Yuan Yao has also acted for international and Malaysian clients in respect of the transaction structures and beneficial ownership framework under the Malaysian Companies Act 2016 and other relevant statutory legislations.

[EDITORS' PROFILES]

Nobuo Fukui (Nagashima Ohno & Tsunematsu Singapore LLP Partner)
nobuo_fukui@noandt.com

Nobuo Fukui is a partner at Nagashima Ohno & Tsunematsu and a representative of its Singapore Office (Nagashima Ohno & Tsunematsu Singapore LLP). He has been stationed in Singapore since 2013 and providing legal services mainly to Japanese companies and its affiliates to expand their business into south-east Asian countries.

He is a graduate of the University of Tokyo (LL.B., 2001) and Duke Law School (LL.M., 2009). He was admitted to the Japan Bar in 2003 and New York State Bar in 2010. He worked as a foreign lawyer at Widyawan & Partners (Jakarta) from 2010 to 2013, focusing on Indonesian legal practice, and he has extensive legal experience in the Indonesia related transactions.

Rashmi Grover (Nagashima Ohno & Tsunematsu Singapore LLP Partner)
rashmi_grover@noandt.com

Rashmi Grover is an attorney in the Singapore Office. She is qualified in India and the UK. Her areas of practice include mergers and acquisitions, private equity and general corporate. She has extensive experience working in the Indian market and advising clients on corporate commercial and finance transactions including transactions involving mergers, acquisitions, formation of joint ventures, private equity investments, business/asset acquisition transactions, regulatory filings and debt issuances.

www.noandt.com

NAGASHIMA OHNO & TSUNEMATSU

JP Tower, 2-7-2 Marunouchi, Chiyoda-ku, Tokyo 100-7036, Japan
Tel: +81-3-6889-7000 (general) Fax: +81-3-6889-8000 (general) Email: info@noandt.com

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Singapore Office
(Nagashima Ohno & Tsunematsu Singapore LLP)

6 Battery Road Level 41
Singapore 049909
Tel: +65-6654-1760 (general)
Fax: +65-6654-1770 (general)
Email: info-singapore@noandt.com

Bangkok Office
(Nagashima Ohno & Tsunematsu (Thailand) Co., Ltd.)

34th Floor, Bhiraj Tower at EmQuartier
689 Sukhumvit Road, Klongton Nuea
Vadhana, Bangkok 10110, Thailand
Tel: +66-2-302-4800 (general)
Fax: +66-2-302-4899 (general)
Email: info-bangkok@noandt.com

HCMC Office
(Nagashima Ohno & Tsunematsu HCMC Branch)

Suite 1801, Saigon Tower
29 Le Duan Street, District 1
Ho Chi Minh City, Vietnam
Tel: +84-28-3521-8800 (general)
Fax: +84-28-3521-8877 (general)
Email: info-hcmc@noandt.com

Hanoi Office
(Nagashima Ohno & Tsunematsu Hanoi Branch)

Suite 10.04, CornerStone Building
16 Phan Chu Trinh, Hoan Kiem District
Ha Noi City, Vietnam
Tel: +84-24-3266-8140 (general)
Fax: +84-24-3266-8141 (general)
Email: info-hanoi@noandt.com

Jakarta Office (*Associate office)
(IM & Partners in association with
Nagashima Ohno & Tsunematsu)

Jakarta Mori Tower 14th Floor, Unit 1401
Jalan Jenderal Sudirman Kav. 40-41
Jakarta 10210, Indonesia
Tel: +62-21-25098080 (general)
Fax: +62-21-25098090 (general)
Email: info-jakarta@noandt.com

Shanghai Office
(Nagashima Ohno & Tsunematsu
Shanghai Representative Office)

21st Floor, One ICC, 999 Middle Huaihai Road
Xuhui District, Shanghai 200031, China
Tel: +86-21-2415-2000 (general)
Fax: +86-21-6403-5059 (general)
Email: info-shanghai@noandt.com

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