

NEWSLETTER

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THE MUCH-ANTICIPATED PERSONAL DATA PROTECTION LAW IS FINALLY ISSUED: IS IT TOO LATE?

Overview

In the midst of the data breach commotion, and after much anticipation, on 17 October 2022, the House of Representatives and the Government have finally enacted the law on personal data protection through Law Number 27 of 2022 on Personal Data Protection (PDP Law). The PDP Law has reduced the uncertainty surrounding Personal Data protection by specifying, among others, the different types of Personal Data, different Subjects' rights, and Controller and Processor obligations. The most significant features of the PDP Law are that (i) it highlights the requirement to obtain consent from the Subjects, including specifying the elements to be included in a notice submitted by the Controller to the Subjects (ii) it provides more specific requirements on Personal Data processing, (iii) it introduces the concept and related obligations of a Controller and Processor, (iv) it stipulates that a governmental institution will be established to implement Personal Data protection, (v) it creates the role of a Personal Data protection officer, and (vi) it introduces criminal sanctions for breaches of Personal Data protection.

We set out below the key points of the new Personal Data protection provisions under the PDP Law which may be important to businesses operating in Indonesia or whose activities may affect Indonesian citizens abroad.

Background

The rapid digitalization of information has resulted in unprecedented possibilities for the use of personal data and a solid personal data protection legal framework is undeniably necessary in today's era. As one of the most contentious public issues in Indonesia during Q3 2022,



Putu Raditya Nugraha, S.H., Adv. LLM

Senior Partner
+62 812 9410 3923
(raditya@umbra.law)

Pramudya A. Oktavinanda, S.H, LLM, PhD

Managing Partner
+62 8111 65906
(pramoctavy@umbra.law)

Theresia Azalia, S.H

Associate
(theresia@umbra.law)

Faris Alwi, S.H

Associate
(faris@umbra.law)

Shella Felicia, S.H

Associate
(shella@umbra.law)

Reggy Dio Geo Fanny, S.H

Associate
(reggydio@umbra.law)

UMBRA – Strategic Legal Solutions

Telkom Landmark Tower, 49th Floor
The Telkom Hub
Jl. Gatot Subroto Kav. 52
Jakarta 12710 – Indonesia
(+62) 21 5082 0999



UMBRA - Strategic Legal Solutions



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intensified by recent incidents involving the data breach of Indonesian citizens, the House of Representatives has fast-tracked their discussion and decision-making process surrounding the PDP Law.

After undergoing many revisions since 2015, the PDP Law is expected to set out a comprehensive and unified legal framework which addresses all matters regarding Personal Data protection. There is no change in the recently enacted PDP Law compared to the final draft of the PDP Law which was previously circulated in September 2022.

Executive Summary

The PDP Law applies to all Persons (defined as individual or corporate), Public Entities (i.e., executive, legislative, judiciary or other bodies whose principal functions and duties relate to the administration of the state), and International Organizations (i.e., organizations recognized as subjects of international law with the capacity to make international agreements). It adopts an extraterritorial approach, extending its governance to foreign entities or citizens whose actions have legal consequences (i) within the jurisdiction of the Republic of Indonesia or (ii) affecting Indonesian citizens abroad.

However, the PDP Law does not apply to Personal Data processing by individuals in the context of personal or household activities.

We provide below a summary of key provisions in the PDP Law which differ from the existing regulations:

1.	Extraterritoriality	The PDP Law explicitly states that it applies extraterritorially.
2.	Scope	The PDP Law applies to both manual data processing and electronic data processing.
3.	Type of Personal Data	The PDP Law introduces the concept of General Data and Specific Data.

4.	Rights of Subjects	<p>The PDP Law broadens the Subjects' rights by including the following additions:</p> <ol style="list-style-type: none"> 1. the right to obtain information on the identity, clarity, legal interest basis, purposes of personal data request and use, and accountability of the requesting party; 2. the right to object to decision-making made on the basis of automatic processing; 3. the right to delay or restrict Personal Data processing; and 4. the right to data portability.
5.	Personal Data Controller and Personal Data Processor	<p>The PDP Law classifies the roles of a Controller and Processor. A Processor acts upon the order, and on behalf of, a Controller.</p>
6.	Consent and Notice	<p>The PDP Law stipulates that the Subjects must expressly provide their consent for certain purposes which have been conveyed by the Controller to the Subjects. Furthermore, the PDP Law specifies the required elements that must be included in the information submitted to the Subjects by the Controller.</p> <p>Consent that has been obtained in a manner which is incompliant with certain provisions in the PDP Law will be considered null and void.</p> <p>The PDP Law also stipulates a new requirement that if the Controller is a legal entity which will conduct corporate actions such as merger, separation, acquisition,</p>

		consolidation, or dissolution, the Controller must notify the Subjects about the transfer of Personal Data prior to and after it carries out the action.
7.	Processing Personal Data relating to Children and Disabled Person	<p>The PDP Law requires that when processing Personal Data relating to children, consent must be obtained from the parent or guardian of the child as defined under the laws.</p> <p>Meanwhile, when processing Personal Data relating to disabled persons, communication must be carried out by using certain methods according to the prevailing laws, along with obtaining consent from the disabled person and/or his/her guardian.</p>
8.	Processing of Personal Data by more than 1 Controller	The PDP Law stipulates that processing of Personal Data can be conducted by 2 or more Controllers, provided that such processing must fulfil the minimum requirements stipulated in the PDP Law.
9.	Transfer of Personal Data	<p>The PDP Law permits the transfer of Personal Data to other Controllers within the jurisdiction of Indonesia provided that both parties comply with the PDP Law.</p> <p>Transfer of Personal Data to other Controllers and/or Processors outside the jurisdiction of Indonesia is permitted when conducted in-line with the obligations stipulated in the PDP Law.</p>
10.	Institution	The implementation of Personal Data processing will be carried out and supervised by an institution established by the President.

11.	Sanctions	<p>The PDP Law imposes the following new sanctions for violations of the PDP Law:</p> <ul style="list-style-type: none"> a. administrative sanctions: <ul style="list-style-type: none"> (i) removing verbal warnings; (ii) replacing administrative sanctions in the form of “announcement on the website” with the “deletion or destruction of Personal Data”; and (iii) adding sanctions in the form of administrative fines; and b. criminal sanctions for corporate violations.
12.	Dispute Settlement	<p>The PDP Law provides that disputes may be settled through arbitration, court, or an alternative dispute resolution institution according to the laws and regulations, and their respective procedural laws.</p>

Types of Personal Data

The definition of Personal Data remains equally broad under the PDP Law and Government Regulation Number 71 of 2019 on the Implementation of Electronic Systems and Transactions. Under the PDP Law, personal data means all data relating to an individual who can be identified individually and/or together with other information, either directly or indirectly, through electronic and/or non-electronic systems (**Personal Data**). Article 4 of the PDP Law further separates Personal Data into two main categories: (a) general Personal Data (**General Data**); and (b) specific Personal Data (**Specific Data**).

	General Data	Specific Data
Scope	<p>General data includes:</p> <ul style="list-style-type: none"> (a) full name; 	<p>Specific data includes:</p> <ul style="list-style-type: none"> (a) medical data and

	General Data	Specific Data
	(b) gender; (c) nationality; (d) religion; (e) marital status; and/or (f) a combination of Personal Data which may be used to identify an individual.	information; (b) biometric data; (c) genetic data; (d) criminal records; (e) child data; (f) personal financial data; and/or (g) <u>other data according to any applicable laws and regulations.</u>

The PDP Law only distinguishes the treatment of these two Personal Data categories through the following guidelines:

- (a) the Controller must assess the impact of Personal Data processing that may potentially pose a high risk for the Subject, among others, the processing of Specific Data (Article 34 (1) and (2), PDP Law); and
- (b) the Controller and Processor must appoint a data protection officer in circumstances where the core activities of the Controller include large-scale processing of Specific Data and/or Personal Data related to criminal activities (Article 53 (1), PDP Law).

Aside from the above, the PDP Law does not clearly distinguish between the treatment of these two categories of Personal Data.

Rights of Subjects

The PDP Law defines a Personal Data Subject (**Subject(s)**) as an individual to whom Personal Data is attached. Unlike in Financial Services Authority (OJK) Regulation Number 6/POJK.07/2022 of 2022 on Consumer and Public Protection in the Financial Services Sector which includes corporate data as Personal Data, this new definition under the PDP Law raises questions about whether the PDP Law covers the protection of corporate data.

The PDP Law broadens the scope of the Subject's rights relating to their Personal Data. Previously, under Ministry of Communication and Informatics (**MoCI**) Regulation Number 20 of 2016 on the Personal Data Protection in Electronic Systems (**MoCI Reg 20/2016**), the rights of data owners were limited to: (i) confidentiality of their personal data; (ii) ability to submit complaints relating to dispute settlements on Personal Data over failures of confidentiality, (iii) access or opportunity to amend and update their personal data, (iv) access and opportunity to obtain the history of their shared personal data; and (v) right to request erasure of the Subject's own particular individual data - and those rights could only be exercised toward the Electronic System Operator.

Another interesting feature in the PDP Law is that it provides affirmation for the right to sue and receive compensation for Personal Data processing violations. Previously, claims related to violation of Personal Data processing were often based on the broad scope of unlawful acts according to Article 1365 of Indonesian Civil Code or violation of Article 26 of Law Number 11 of 2008 on Electronic Information and Transaction as amended by Law Number 19 of 2016 on the Amendment of Law Number 11 of 2008 on Electronic Information and Transaction (**Law 11/2018**).

Under the new regulations, businesses should be aware that any business entity that conducts Personal Data processing either through an electronic or non-electronic system will be exposed to the risk of being sued for any violations of Personal Data processing.

Please note that several of the Subjects' other rights may be exempted for specific reasons stipulated in the PDP Law (this contrasts with the existing regulations, which do not provide any exemptions to the rights of Personal Data owners).

Introduction of Personal Data Controller and Personal Data Processor roles

The PDP Law introduces two new roles: (i) a Personal Data Controller and (ii) a Personal Data Processor. A Personal Data Controller

(**Controller**) determines the purposes for, and has control over, Personal Data processing. Meanwhile, a Personal Data Processor (**Processor**) carries out Personal Data processing **on the order** and **on behalf of the Controller**. Both definitions include (i) Persons, (ii) Public Institutions, and (iii) International Organizations.

Aside from the requirement that the Processor must process Personal Data based on the Controller's orders, the provisions of the PDP Law do not appear to differentiate between the Controller's role and the Processor's role. It remains to be seen how this new concept will be implemented in contracts related to the processing of Personal Data. This issue will require case-by-case solutions, which we are happy to discuss separately with, and can provide to our respective clients.

Obligations of Controllers

Similar to the requirement under the existing regulations, under the PDP Law, a Controller must have a valid basis for Personal Data processing, which covers:

- (a) valid approval or consent (either in writing or recorded) explicitly by the Subject for one or more set purposes which has been notified by the Controller to the Subject;
- (b) the satisfaction of obligations under an agreement where the Subject is a party to the agreement, or where the Subject's request will be satisfied upon the Subject entering into an agreement;
- (c) compliance with the Controller's legal obligations;
- (d) the protection of the Subject's vital interests relating to his / her life and survival;
- (e) the implementation of public interest or public service duties, or implementation of the duties of authorities of the Controller pursuant to the laws and regulations; and/or
- (f) the satisfaction of other valid interests by taking into account the purposes, needs, and balancing the Controller's interests and the Subject's rights.

Subject to certain exemptions (as applicable), the PDP Law specifies several new Controller obligations which were not expressly required under the existing regulations, among others, confidentiality, protection, prevention, restriction, and notification obligations. Under Article 40 of the PDP Law, a Controller is also required to stop processing Personal Data if the Subjects revoke their consent.

With respect to legal entities, the PDP Law adds a new obligation that if the Controller intends to conduct any corporate actions such as merger, separation, acquisition, consolidation, or dissolution, the Controller must notify their Subjects about the transfer of Personal Data prior to and after it carries out such corporate actions. It is not clear whether this obligation can be exempted by way of having a single initial express consent from the Subjects for future corporate actions or whether their approval is required for each corporate action on a stand-alone basis.

Obligations of the Processor

Under the PDP Law, where a Controller appoints a Processor, the Processor must carry out Personal Data processing pursuant to the Controller's order. Personal Data processing remains the Controller's responsibility as long as the Processor carries out the Controller's orders.

The Processor may involve other Processors to process the Personal Data by obtaining the Controller's prior written approval.

The introduction of Processor and Controller roles, along with their distinct rights and obligations, will impact the current practices of data processing businesses. Existing contracts executed prior to the PDP Law will not clearly distinguish between the roles of Processors and Controllers. Hence, any Personal Data processing agreements currently in force should be assessed to determine the roles between the parties of such agreements.

Approval for Personal Data processing

One basis for the Controller to conduct Personal Data processing is through obtaining valid explicit consent from the Subjects for one or more set purposes that have been conveyed by the Controller to the Subjects. When obtaining this approval, the Controller must provide the following information to the Subjects:

- (a) legality of the Personal Data processing;
- (b) purpose of the Personal Data processing;
- (c) type and relevance of Personal Data to be processed;
- (d) retention period of documents containing Personal Data;
- (e) details of the information collected;
- (f) period of the Personal Data processing; and
- (g) the rights of Subjects.

Further, the request for such consent must be made in the Indonesian language. As the PDP Law applies extraterritorially, this requirement also applies to Controllers located outside Indonesia, who must ensure that any requests for consent made outside Indonesia are also provided to the Subjects in the Indonesian language.

The approval to conduct Personal Data processing must be obtained by a written approval or recording, and such approval can be given through both electronic or non-electronic means. Under the PDP Law, any approval obtained that does not meet the requirements of the PDP Law is considered null and void. Further, any clause to an agreement which contains a request to process Personal Data without the explicit valid consent from the Subject is also considered null and void.

On the other hand, under Article 74, the PDP Law requires Personal Data Controllers, Personal Data Processors, and other parties related to Personal Data processing, to adjust to the provisions of the PDP Law “*by no later than 2 years*” from the enactment of the Law. Thus, it is not

clear whether it may be argued that the PDP Law allows 2 years grandfathering on that basis.

Further, when conducting Personal Data processing, the Controller must present evidence of the Subject's consent. However, it is not clear to whom the Controller needs to present such evidence to.

Personal Data Protection Officer

The PDP Law requires a Controller or Processor to appoint an officer to carry out the function of Personal Data protection if:

- (a) Personal Data processing is conducted for public services;
- (b) the Controller's core activities have a nature, scope, and/or purpose that requires regular and systematic monitoring of Personal Data on a wide scale; and
- (c) the Controller's core activities consist of wide scale Personal Data processing for a type of specific Personal Data and/or Personal Data related to criminal acts.

Officials or officers who carry out the Personal Data protection functions will be appointed based on professionalism, knowledge of the law, Personal Data protection practices, and the ability to fulfil their duties. Further provisions regarding officials or officers who carry out the Personal Data protection functions will be regulated in a supplementary Government Regulation.

Transfer of Personal Data

The PDP Law stipulates that a Controller can transfer Personal Data to other Controllers within the jurisdiction of Indonesia, provided that both parties comply with the provisions regarding Personal Data protection under the PDP Law. Moreover, a Controller may also transfer Personal Data to other Controllers and/or Processors outside the jurisdiction of Indonesia, provided that:

- (a) the Controller ensures that the receiving country performs Personal Data protection at a level equal to or higher than under the PDP Law;
- (b) if the above condition is not met, the Controller must ensure there is adequate and binding Personal Data protection when undergoing processing to guarantee the constitutional rights of the Subject; and
- (c) if neither of the above conditions are met, the Controller must obtain approval from the Subject.

Sanctions

Administrative Sanctions

There are several forms of Administrative Sanctions under the PDP Law: (i) written warnings; (ii) temporary cessation of Personal Data processing activities; (iii) deletion or destruction of Personal Data; and/or (iv) administrative fines (where a maximum amount of 2 percent of annual income or annual revenue of the violating entity can be applied for any violations). Any administrative sanctions applied will be supervised by an institution which will be created by the President. The creation of this institution will resolve previous confusion from MoCI Reg 20/2016. MoCI Reg 20/2016 does not provide specific information regarding the institution that is responsible for handling violations of Personal Data protection. Therefore, prior to the enactment of PDP Law, any complaints had to be submitted directly to the MoCI. From there, the MoCI would forward the complaint to an undetermined Personal Data dispute resolution team/official/institution.

Interestingly, there are 3 points that distinguish the PDP Law from administrative sanctions under MoCI Reg 20/2016:

- (a) the PDP Law removes verbal warnings. Thus, any violations of Personal Data protection will immediately result in a written warning;

- (b) it replaces the administrative sanctions in the form of “announcement on the website” with the “deletion or destruction of Personal Data”, a process which is more favourable to the Subject; and
- (c) it adds the sanctions in the form of administrative fines, which provide a more deterrent effect to perpetrators who violate the PDP Law.

Criminal Sanctions

Another significant change that should be noted is the introduction of criminal sanctions. This is because, prior to the enactment of the PDP Law, there was no specific criminal sanction for breaches of Personal Data protection. Previously, the closest and most frequently cited regulation to protect personal data was Article 32 of Law 11/2008, which prohibits any person to alter, add, reduce, transmit, tamper with, delete, move, hide Electronic Information and/or Electronic Documents of other Persons or of the public; or move or transfer Electronic Information and/or Electronic Documents to Electronic Systems of unauthorized Persons.

However, it should be remembered that the article itself does not specifically refer to Personal Data, but to Electronic Information and/or Electronic Documents. Thus, the PDP Law does not only offer a new system of sanctions related to violations of Personal Data protection, but it also adds a layer of new criminal liabilities, making it imperative for any person dealing with Personal Data to exercise their actions with due caution.

The PDP Law stipulates several restrictions on the use of Personal Data including the prohibition that one cannot intentionally and against the law: (i) obtain or gather the Personal Data belonging to another Subject, with a purpose to benefit themselves or others that can result in loss to Subject; (ii) disclose Personal Data that belongs to another Subject; or (iii) use Personal Data that does not belong to the party using it.

PDP Law also provides different arrangements for criminal sanctions against corporate crime:

- (a) Criminal sanctions may be imposed on the management, controlling party, order giver, beneficial owner, and/or the Corporation.
- (b) Corporations can only be sentenced to a fine. Further, the amount of the criminal fine imposed on a corporation may be up to 10 (ten) times the maximum criminal fine stipulated. In connection with the fine, the convicted party is given a period of 1 month to pay the fine from the time that the judicial decision becomes legally binding. If there is a strong reason, the period may be extended for a maximum period of 1 month.
- (c) In addition to being fined, a corporation may also be sentenced to additional criminal sanctions in a form set out in the PDP Law.

Settlement of Disputes and Procedural Law

Under the PDP Law, disputes may be settled through arbitration, court, or an alternative dispute resolution institution according to the prevailing laws and regulations, and their respective procedural laws. In contrast, MoCI Reg 20/2016 only stipulates that Personal Data disputes are settled through deliberation and mechanisms in accordance with laws and regulations. Thus, the PDP Law clarifies the dispute resolution mechanism set out in MoCI Reg 20/2016.

The PDP Law also allows parties to engage in private proceedings. Moreover, PDP Law clarifies what constitutes as the valid evidence that may be used, being (i) evidence based on procedural law and (ii) other evidence in the form of electronic information and/or electronic documents in accordance with laws and regulations.

Transitional Provisions

Controllers, Processors, and other parties related to Personal Data processing, must adjust to adhere to the provisions regarding Personal Data processing of the PDP Law within a period of 2 years.

All laws and regulations regarding Personal Data protection existing before the PDP Law are still valid as long as the provisions are not contrary to the PDP Law. As many provisions regarding personal data protection continue to be scattered throughout various regulations, in our view the PDP Law would apply as omnibus legislation and take precedence over any contrary rules and regulations pertaining to Personal Data protection as set forth by other governmental/regulatory authorities. It is also likely that parties will be expected to continue applying all other existing regulations that impose stricter Personal Data protection requirements, as long as such requirements are not contrary to the PDP Law.

Conclusion

At this stage, the impact of the new PDP Law cannot be assessed conclusively, as several provisions in the PDP Law will be further regulated under subsequent government regulation.

Below are the key considerations for business actors who conduct Personal Data processing:

1. **Extraterritorial Approach.** Persons/Public Entities/International Organizations whose actions in Personal Data processing have legal consequences in the jurisdiction of Indonesia or affect Indonesian citizens abroad, will need to comply with the PDP Law.
2. **New Roles.** Existing agreements executed prior to the PDP Law will need to take into account the new Controller and Processor roles. Further, now that the processing of Personal Data can be conducted by 2 or more Controllers, business actors will need to

carefully address roles and liabilities in the relevant data processing agreements.

3. **Invalidity.** Any consent obtained in a manner that does not meet the requirements of the PDP Law is considered null and void. Any clause to an agreement which contains a request to process Personal Data without a valid explicit consent from the Subject is also considered null and void.

It is unclear whether there is any grandfathering on the basis that the PDP Law allows adjustments to be carried out by the relevant party no later than 2 years from the enactment of the PDP Law.

4. **Liability.** The PDP Law provides stronger affirmation related to the Subjects' rights to sue and receive compensation for violations to their Personal Data processing.
5. **Transfer Data.** Transferring of Personal Data to other Controllers and/or Processors outside the jurisdiction of Indonesia will require the Controller to fulfil the requirements of the PDP Law.
6. **Notification Requirement.** Parties who are currently in process of completing a corporate action must take into account that the PDP Law requires a Controller in the form of a legal entity to notify their Subjects on the transfer of Personal Data **prior to and after it carries out** corporate actions such as merger, separation, acquisition, consolidation, or dissolution.

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