

COVID-19: Postponed Implementation Deadline for Personal Data Protection Act

Introduction

On 19 May 2020, the Thai Cabinet approved in principle a proposal made by the Ministry of Digital Economy and Society ("**MDES**") to provide a one-year long postponement of the effective date of key operative provisions of the Personal Data Protection Act B.E. 2562 (2019) ("**PDPA**") from 27 May 2020 to 31 May 2021 ("**New Effective Date**").

This move comes as good news for companies struggling to implement their personal data protection regimes by the original 27 May 2020 date. For example, by the New Effective Date, companies are required to ensure they obtain consent from the Data Subject prior to or at the time of any collection, use, or disclosure of Personal Data, except where consent is not required under the PDPA or pursuant to any other laws.

Who Does the Postponement Apply to?

On 19 May 2020, a meeting of Thailand's Cabinet approved a proposal made by the MDES as follows:

- approved in principle the draft Royal Decree Prescribing an Entity and Business in which the Data Controller is Exempted from the Personal Data Protection Act B.E. 2562 (2019) B.E. which has been reviewed and considered by the Office of the Council of State as proposed by the MDES and approved to proceed further; and
- assigned the Office of the Permanent Secretary of the Ministry of Digital Economy and Society to perform the duties of the Office of the Personal Data Protection Commission, to expedite the process of enacting the related subordinate legislation, rules and practice, in particular the matters required when the PDPA fully comes into effect.

According to the draft Royal Decree, the data controller of the entities or businesses listed below is exempted from the provisions in Chapter 2, Chapter 3, Chapter 5, Chapter 6 and Chapter 7, as well as, Section 95 of the PDPA until 31 May 2021.

- (1) Government Agency;
- (2) Government Agency of the Foreign State and International Organization;
- (3) Foundation, Association, Religious Organization and Non-profits Organization;
- (4) Agricultural Business;

- (5) Industrial Business;
- (6) Commercial Business;
- (7) Medical and Public Health Business;
- (8) Power, Steam, Water, and Waste Management Business, including related businesses thereof;
- (9) Construction Business;
- (10) Repairing and Maintenance Business;
- (11) Transportation, Logistics and Goods Storage Business;
- (12) Tourism Business;
- (13) Communication, Telecommunication, Computer and Digital Business;
- (14) Finance, Banking and Insurance Business;
- (15) Immoveable Property Business;
- (16) Professional Business;
- (17) Administration and Supporting Service Business;
- (18) Science and Technology, Academic, Social Welfare and Arts Business;
- (19) Educational Business;
- (20) Entertainment and Recreation Business;
- (21) Security Service Business; and
- (22) Household Business and Community Enterprise in which its activity could not be explicitly classified.

Personal Data Protection Act

We have provided below a brief overview of key provisions of the PDPA.

The long-awaited PDPA was published in the Royal Gazette on 27 May 2019 and certain key provisions became effective the next day. These provisions, set out in Chapters 1 and 4 of the PDPA, provide for the establishment of the following regulatory bodies:

- the **Personal Data Protection Commission** ("PDPC"), whose duties and powers include preparing a master plan for the promotion and protection of personal data, and interpreting and determining issues arising from the enforcement of the PDPA; and
- the **Office of Personal Data Protection Commission** ("PDPC's Office"), which will be a government agency with the status of a juristic person. Its role will be to promote and support the development of personal data protection.

We note that, during the period when the PDPC's Office has not yet been duly set up, the Office of the Permanent Secretary of the Ministry of Digital Economy and Society would be required to perform the duties in accordance with the PDPA.

Provisions under Chapter 2, Chapter 3, Chapter 5, Chapter 6, Chapter 7, and Section 95 of the PDPA were initially required to become effective by 27 May 2020, and would now do so on the new Effective Date.

Definitions

"Personal Data" means information relating to a natural person which is directly or indirectly identifiable to such natural person, excluding information of a deceased person.

"[Personal] Data Controller" means a natural person or juristic person who has power and duty to determine the collection, use, or disclosure of personal data.

"[Personal] Data Processor" means a natural person or juristic person who performs the collection, use, or disclosure of personal data according to the order or on behalf of the Data Controller. The natural person or juristic person who performs those acts must not be a Data Controller.

"Commission" means the Personal Data Protection Commission.

Data Protection Officer

In general, a DPO is not required, except in the following circumstances:

- (1) the Data Controller or the Data Processor is a public authority as prescribed and notified by the PDPC;
- (2) the activities of the Data Controller or the Data Processor in the collection, use, or disclosure of the personal data require regular monitoring of the personal data or the system, due to having a large number of personal data as prescribed and notified by the PDPC;
- (3) the core activity of the Data Controller or the Data Processor is the collection, use, or disclosure of Sensitive Personal Data.

We recommend monitoring the PDPC notifications/guidelines on this issue.

Processing Personal Data with Consent

Currently, there is no general requirement. Where the personal data is provided based on consent, such personal data must not be processed in a manner that is different from the purpose previously notified to the Data Subject.

With effect from the New Effective Date, the PDPA requires consent of the Data Subject prior to or at the time of such collection, use, or disclosure, except where consent is not required under the PDPA or pursuant to any other laws.

Processing Personal Data without Consent

With effect from the New Effective Date, the PDPA requires that use or disclosure of personal data without the consent of the Data Subject can be conducted for personal data collected according to the legal basis specified in Section 24 or Section 26 of the PDPA (e.g. for the purpose of performance of a contract, or where there is a legitimate interest).

According to Section 24 of the PDPA, collection of personal data can be conducted without the consent of the Data Subject where:

- (1) it is for the achievement of a purpose relating to the preparation of historical documents or archives for public interest, or for a purpose relating to research or statistics, in which the suitable measures to safeguard the Data Subject's rights and freedoms have been put in place and are in accordance with the notification as prescribed by the PDPC;
- (2) it is for preventing or suppressing danger to a person's life, body or health;
- (3) it is necessary for the performance of a contract to which the Data Subject is a party, or in order to take steps at the request of the Data Subject prior to entering into a contract;
- (4) it is necessary for the performance of a task carried out in the public interest by the Data Controller, or it is necessary for the exercise of official authority vested in the Data Controller;
- (5) it is necessary for legitimate interests of the Data Controller or any other persons or juristic persons other than the Data Controller, except where such interests are overridden by the fundamental rights of the Data Subject of his or her personal data; or
- (6) it is necessary for the compliance with a law to which the Data Controller is subject.

Stricter grounds in Section 26 of the PDPA apply to the collection of Sensitive Personal Data (i.e. personal data pertaining to racial, ethnic origin, political opinions, cult, religious or philosophical beliefs, sexual behaviour, criminal records, health data, disability, trade union information, genetic data, biometric data, or of any data which may affect the Data Subject in the same manner).

Breach Notification

With effect from the New Effective Date, the PDPA imposes an obligation on the Data Controller to notify regarding a personal data breach.

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- Notification to Office: the Data Controller must notify the Office of any personal data breach without delay and, where feasible, within 72 hours after having become aware of it, unless such personal data breach is unlikely to result in a risk to the rights and freedoms of the relevant persons.
 - Notification to the Data Subject: If the personal data breach is likely to result in a high risk to the rights and freedoms of the relevant persons, the Data Controller must also notify the personal data breach and the remedial measures to the Data Subject without delay.

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Contacts



Sui Lin Teoh
Partner

D (66) 2656 1991
F (66) 2656 0833
sui.lin.teoh@rajahtann.com



Melisa Uremovic
Partner

D (66) 2656 1991
F (66) 2656 0833
melisa.u@rajahtann.com



Piroon Saengpakdee
Partner

D (66) 2656 1991
F (66) 2656 0833
piroon.s@rajahtann.com



Supawat Srirungruang
Partner

D (66) 2656 1991
F (66) 2656 0833
supawat.s@rajahtann.com



Saroj Jongsaritwang
Partner

D (66) 2656 1991
F (66) 2656 0833
saroj.jongsariwang@rajahtann.com



Visitsak Arunsuratpakdee
Partner

D (66) 2656 1991
F (66) 2656 0833
visitsak.a@rajahtann.com



Pasiri Tayongsak
Senior Associate

D (66) 2656 1991
F (66) 2656 0833
pasiri.t@rajahtann.com



Praonapha Rakchartcharoen
Associate

D (66) 2656 1991
F (66) 2656 0833
praonapha.r@rajahtann.com



Benjarong Roongmaneekul
Associate

D (66) 2656 1991
F (66) 2656 0833
benjarong.r@rajahtann.com

Our Regional Contacts

RAJAH & TANN | *Singapore*

Rajah & Tann Singapore LLP

T +65 6535 3600
sg.rajahtannasia.com

CHRISTOPHER & LEE ONG | *Malaysia*

Christopher & Lee Ong

T +60 3 2273 1919
F +60 3 2273 8310
www.christopherleeong.com

R&T SOK & HENG | *Cambodia*

R&T Sok & Heng Law Office

T +855 23 963 112 / 113
F +855 23 963 116
kh.rajahtannasia.com

RAJAH & TANN | *Myanmar*

Rajah & Tann Myanmar Company Limited

T +95 1 9345 343 / +95 1 9345 346
F +95 1 9345 348
mm.rajahtannasia.com

RAJAH & TANN 立杰上海

SHANGHAI REPRESENTATIVE OFFICE | *China*

**Rajah & Tann Singapore LLP
Shanghai Representative Office**

T +86 21 6120 8818
F +86 21 6120 8820
cn.rajahtannasia.com

GATMAYTAN YAP PATACSIL

GUTIERREZ & PROTACIO (C&G LAW) | *Philippines*

Gatmaytan Yap Patacsil Gutierrez & Protacio (C&G Law)

T +632 8894 0377 to 79 / +632 8894 4931 to 32
F +632 8552 1977 to 78
www.cagatlaw.com

ASSEGAF HAMZAH & PARTNERS | *Indonesia*

Assegaf Hamzah & Partners

Jakarta Office

T +62 21 2555 7800
F +62 21 2555 7899

Surabaya Office

T +62 31 5116 4550
F +62 31 5116 4560
www.ahp.co.id

RAJAH & TANN | *Thailand*

R&T Asia (Thailand) Limited

T +66 2 656 1991
F +66 2 656 0833
th.rajahtannasia.com

RAJAH & TANN LCT LAWYERS | *Vietnam*

Rajah & Tann LCT Lawyers

Ho Chi Minh City Office

T +84 28 3821 2382 / +84 28 3821 2673
F +84 28 3520 8206

RAJAH & TANN | *Lao PDR*

Rajah & Tann (Laos) Co., Ltd.

T +856 21 454 239
F +856 21 285 261
la.rajahtannasia.com

Hanoi Office

T +84 24 3267 6127
F +84 24 3267 6128
www.rajahtannlct.com

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