

SPI Newsletter

## A NEW CHAPTER OF PERSONAL DATA PROTECTION IN THAILAND: HOW TO BE PREPARED?

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In light of the global attentiveness on protection of personal data, Thailand's National Legislative Assembly approved the much-anticipated draft Personal Data Protection Act ("PDPA") on 28 February 2019. It is expected that the draft PDPA will be endorsed and then published in the Government Gazette at some point in 2019. This is a very significant step for Thailand to become closely aligned with international standards, such as the EU's General Data Protection Regulation ("GDPR") (which regulates the processing of personal data relating to individuals in the EU by an individual, company, or organization—no matter where based—thereby imposing compliance obligations on Thai businesses that process personal data relating to individuals in the EU).



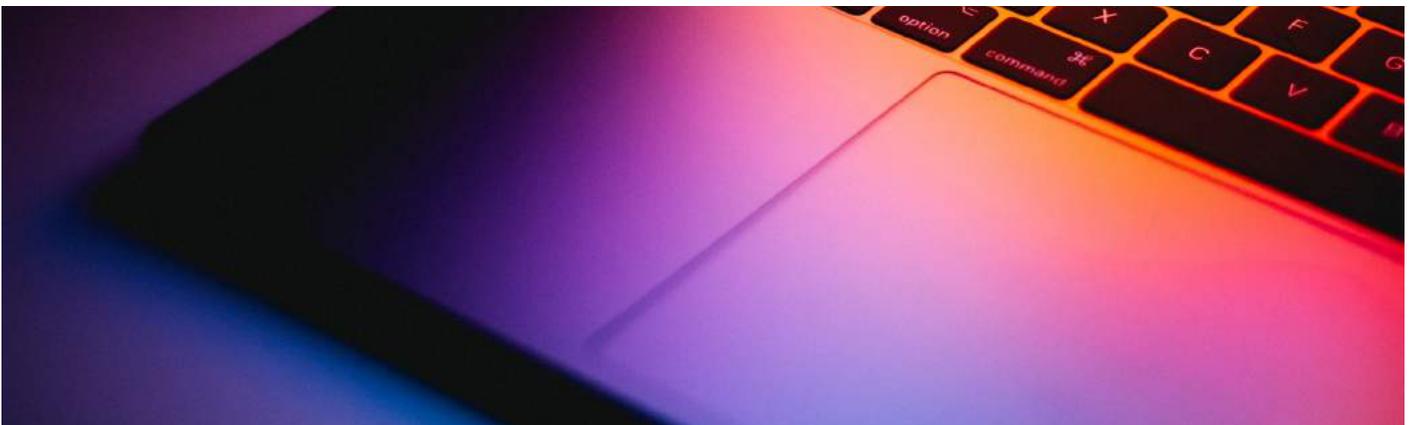
Once enacted, the PDPA will mark the first consolidated law in Thailand concerning personal data protection, after its first attempt more than two decades ago. Businesses are recommended to comprehensively explore and plan on how to improve their systems which are to be used for the processing of personal data, to ensure they are prepared for implementation when the PDPA's requirements take effect, which is expected to be one year after the PDPA is published in the Government Gazette.

To this extent, the following is a summary of the key points extracted from the draft PDPA which will likely affect businesses in terms of collecting, using and disclosing of personal data (these activities will be collectively referred to as "**processing**" of personal data).

## Scope of Application

The PDPA will apply to activities related to the processing of personal data conducted by any business entities or government agencies. Exemptions for the PDPA's application are provided for limited activities, such as personal or household activities; activities of government agencies for the purpose of defense, public security, and cyber security; prosecution of criminal offenses; and activities of the Credit Bureau for matters relating to credit card information.

Importantly, the PDPA will introduce a new regime following the extraterritorial concept of GDPR by extending its scope not only to cover the activities of an entity established in Thailand, but also foreign entities. A foreign entity will fall within the scope of the PDPA when it: (i) processes personal data of a data subject in Thailand whenever its activities are related to the offering of goods and services; or (ii) monitors the data subject's behavior in Thailand.



## Personal Data

“Personal data” under the draft PDPA is broadly defined to cover any data enabling the identification of individuals, either directly or indirectly. In addition, stricter requirements will be applied when the processing involves sensitive data which includes ethnicity, race, political opinions, doctrinal, religious or philosophical beliefs, sexual behavior, criminal records, health records, disabilities, labor union, genetic data, and biometric data.



## Processing of Personal Data

Unless otherwise allowed by the PDPA or other laws, personal data shall be processed only where the data subject's consent is obtained. To this extent, the PDPA will regulate how to collect and process personal data on the following fundamental principles:

- Consent must be freely given prior to or at the time of collection of personal data;
- Request for consent must be presented in written or electronic form, in a manner which is clearly distinguishable from other matters, in an intelligible and easily accessible form, using clear and plain language;
- Specific objectives as well as other significant information of the processing must be communicated to the data subject;
- Personal data shall be collected from the data subject; and
- Personal data shall be processed only where it is necessary for the specified purposes.

## Rights of Data Subjects

The draft PDPA provides broad protection for individuals by allowing data subjects to exercise their rights vis-à-vis data controllers or data processors. The rights granted under the draft PDPA are similar to those rights acknowledged under the GDPR as follows:

- Right to access;
- Right to data portability;
- Right to object;
- Personal data shall be collected from the data subject;
- Right to erasure / right to be forgotten;
- Right to restriction of processing; and
- Right to rectification.

Nonetheless, it is noticeable that the right not to be subject to a decision based solely on automated processing which is regulated under the GDPR is not addressed in the draft PDPA.

## Duties of Data Controller and Data Processor

The draft PDPA sets out a number of duties for a data controller to ensure that personal data under its control will be processed properly. In addition, the data controller has an obligation to inform the Office of Personal Data Protection Commission of any breach or violation concerning the personal data within 72 hours. Where the personal data is not processed by a controller but is processed by a data processor, the controller must monitor the process of collecting data. The data processor may process personal data only under specific instructions from a data controller. Otherwise, it shall be deemed a data controller, and subject to a full range of obligations and responsibilities under the PDPA. Apart from this, a data controller or a data processor having its establishment outside Thailand will be required to appoint a representative with unlimited liability in regard to the processing of personal data in Thailand.

## Data Protection Officer

In addition to other obligations, the controller and processor must designate a Data Protection Officer when either of their activities involves the following:

- When the activities of the controller or processor require regular and systematic monitoring of personal data on a large scale; or
- When core activities of the controller and processor consist of the collection, use and disclosure of sensitive information.

A Data Protection Officer shall not only monitor the process of personal data and advise a company for matters in connection with personal data, but must also cooperate with authorities when a data breach occurs.



## Transfer of Personal Data Outside Thailand

The transfer of personal data outside Thailand is restricted under the draft PDPA and will only be permitted in the event that the respective third-country or organization can guarantee an adequate level of protection. Nonetheless, the draft PDPA provides specific exceptions under which the data transfer beyond Thailand's borders is permissible, including:

- The transfer is conducted pursuant to the applicable law;
- The data subject has been informed of such inadequate protection and given consent to such transfer;
- 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;
- The transfer is necessary for the conclusion or performance of a contract concluded in the interest of the data subject between the controller and another person;
- The transfer is necessary in order to protect the vital interests of the data subject or of other persons, where the data subject is physically or legally incapable of giving consent; and
- The transfer is necessary for the tasks operated for significant public interest.

Apart from the exceptions above, the controller or the processor may transfer the personal data to a member of its group of enterprises engaged in a joint economic activity having binding corporate rules approved by the Office of Personal Data Protection Commission.

Furthermore, even without adequacy decision or binding corporate rules, the personal data may also be transferred to a third country if the controller or the processor has arranged for the appropriate safeguards, the rules and conditions of which shall be regulated further by the Personal Data Protection Commission.

It appears evident from the above that the principles on the transfer of personal data under the PDPA resemble those in the GDPR. Therefore, with the forthcoming promulgation of the PDPA, it is hoped that the responsible authority may submit a request for Thailand to be approved for the 'Adequacy Decision' under Article 45 of the GDPR which shall facilitate Thai businesses in receiving personal data transferred from EU.

### Breaches and Remedies

A data subject is entitled to file a complaint against a data controller or processor for any non-compliance with the PDPA to the Expert Committee. In addition, violations of the PDPA may result in civil and criminal liabilities and serious administrative fines. In the event that a juristic person is liable for criminal liabilities, directors, managers or a person who is responsible for such operation can also be held responsible if the violation of data protection requirements/offence is committed by an order, act, failure to give an order or failure to act as required by his or her duties.

### Recommended Action

To mitigate the risk of breaching data protection regulations under the PDPA which may have significant legal and reputational consequences, Thai companies are well advised to familiarize themselves early and comprehensively with the new requirements of the PDPA and ensure an appropriate data protection plan and procedures are implemented.

If you need any assistance with the implementation of your data protection procedures in your organization, or if you would like any further information on how the PDPA may impact on your business, we would be happy to assist you.

Please contact us on **Tel: +66 2 646 1888** or Email: **[spi-info@siampremier.com](mailto:spi-info@siampremier.com)**

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