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Commentary: China Unveils Draft Personal Information Protection Law for Public Consultation

Introduction

On 21 October 2020, the People's Republic of China ("PRC") unveiled its highly anticipated draft personal information protection law (中华人民共和国个人信息保护法(草案))¹ ("**Draft PIPL**") for public consultation. The Draft PIPL consists of 70 articles divided into 8 Chapters.

As the first comprehensive piece of legislation addressing personal information protection in the PRC, the Draft PIPL will have a significant impact on not just organisations conducting businesses within the PRC, but also those operating overseas. This update will examine some of the key highlights of the Draft PIPL.

Key Highlights

Personal information and processing of personal information

Article 4 of the Draft PIPL defines personal information to be any information relating to identified or identifiable natural persons that are recorded by electronic means or otherwise, excluding information which has been anonymised. The processing of personal information includes the collection, storage, use, processing, transmission, provision, disclosure and other activities relating to personal information.

In addition, Article 29 of the Draft PIPL also recognises that certain categories of personal information are more sensitive as their leakage or unlawful use may subject the data subject to discrimination or severely endanger the personal safety and property of the data subject. Such sensitive personal information includes an individual's race, ethnicity, religious beliefs, personal biometrics, medical health, financial accounts, and personal location. Sensitive personal information may only be processed if such processing has a specific purpose and sufficient necessity. The data subject must also individually consent to the processing of his/her sensitive personal information, and where laws and regulations provide that written consent must be obtained, such prescriptions must be followed.

¹ Full text of the Draft PIPL may be found [here](#).

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Extraterritorial effect

Article 3 of the Draft PIPL provides that it not only applies to personal information processing activities by organisations and individuals within the PRC, but also to personal information processing activities outside the PRC where such activities fall within one of the following circumstances:

- (a) the purpose of such activities is to provide products or services to natural persons within the PRC;
- (b) such activities are to analyse or evaluate the behaviours of natural persons within the PRC; or
- (c) other circumstances as provided by laws or regulations.

Article 52 of the Draft PIPL further provides that personal information processors (“**PIPs**”) which are based outside the PRC must establish an organisation or appoint representatives within the PRC to handle personal information protection measures, and notify the Personal Information Protection Department (“**PIPD**”) of the name and contact details of such organisations or representatives.

Legal bases for the processing of personal information

Article 13 provides that a PIP is permitted to process personal information only if one of the following conditions are satisfied:

- (a) the processing has been consented to by the data subject;
- (b) the processing is necessary for the execution or performance of a contract which the data subject is a party to;
- (c) the processing is necessary for compliance with legal obligations or fulfilment of legal duties;
- (d) the processing is necessary to respond to a public health emergency or to protect the life, health or property of a natural person in an emergency;
- (e) the processing is for acts that are done in the public interest such as news reporting, media supervision, and is within a reasonable scope; and
- (f) other circumstances as prescribed by laws or regulations.

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Cross-border transfer of personal information

Article 38 of the Draft PIPL provides that where a PIP is required to transfer personal information out of the PRC for business and other needs, it must fulfil at least one of the following conditions:

- (a) it has passed the security assessment organised by the National Cyberspace Administration in accordance with Article 40 of the Draft PIPL;
- (b) it has carried out personal information protection certification which is conducted by professional organisations in accordance with the conditions prescribed by the Cyberspace Administration of China (“CAC”);
- (c) it has entered a contract (data transfer agreement) with the overseas personal information recipient which sets out the parties’ rights and obligations, and which ensures the processing of personal information by the recipient complies with the protection standards required under the Draft PIPL; or
- (d) it has satisfied other requirements imposed by other laws, regulations or conditions prescribed by the CAC.

Data localisation requirements

Article 40 of the Draft PIPL provides that Critical Information Infrastructure Operators (“CIIOs”) and PIPs which process personal information meeting a prescribed volume are required to store personal information within PRC to the extent that such personal information is collected and generated within PRC. Where such CIIOs or PIPs are required to transfer personal information out of the PRC, it is required to first pass a security assessment organised by the CAC, unless laws, regulations or conditions prescribed by the CAC provide that such security assessment is not required.

Rights of the data subjects

Chapter 4 of the Draft PIPL sets out the rights which are expressly conferred on data subjects. In particular, data subjects have the following rights:

- (a) the right to be made aware of, make decisions in relation to, restrict, and refuse, the processing of his/her personal information, unless otherwise provided by laws or regulations;
- (b) the right to access and copy his/her personal information from the PIP;
- (c) the right to request the PIP to correct inaccurate or incomplete personal information;

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- (d) the right to request the deletion of his/her personal information if (i) the agreed term of retention has expired or the purpose for which the personal information is processed has been fulfilled, (ii) the PIP has stopped supplying the product or services, (iii) the data subject has withdrawn his consent, (iv) the PIP has processed personal information in breach of laws, regulations or agreement with the data subject, or (v) it is prescribed by laws or regulations.
- (e) the right to request the PIP to explain the rules by which the personal information of the data subject is processed.

Obligations of the PIPs

Chapter 5 of the Draft PIPL sets out the obligations which are imposed on the PIPs. Amongst others, these include:

- (a) PIPs must adopt necessary measures to ensure personal information are processed in compliance with laws and regulations, and prevent unauthorised access and leakage, theft, alteration and deletion of personal data, having regards to the purposes for which personal information is processed, processing method, type of personal data, impact on the data subjects and potential security risks. Such measures include (i) designing internal management structures and operational rules, (ii) implementing tiered and categorized personal information management, (iii) adopting technical security measures such as encryption, deidentification, etc, (iv) restricting access to personal information and regularly conducting personal information security training for employees, (v) formulating personal information security incident response plans, and (vi) other measures provided by laws and regulations.
- (b) PIPs must conduct audits from time to time to determine if its processing of personal information and security measures are in compliance with requirements under applicable laws and regulations.
- (c) PIPs must carry out risk assessments and document the circumstances for processing, where it is (i) processing sensitive personal information, (ii) using personal information for automated decision making, (iii) outsourcing personal information processing to third parties, or providing or disclosing personal information to third parties, (iv) providing personal information to recipients outside the PRC, or (v) carrying out any other processing of personal information which has a significant impact on the data subject.

Data breach notification

Article 55 provides that PIPs which discover that a leakage of personal information (i.e. data breach)

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has occurred are required to immediately implement remedial measures and notify the PIPD and affected data subjects. PIPs may choose to not notify the affected data subject if its remedial measures can effectively prevent the data breach from causing harm or damage to the data subject; however, if the PIPD is of the view that the data breach may cause harm or damage to the data subject, it has the right to request the PIP to notify the data subject.

Penalties for violation

Article 62 of the Draft PIPL provides that organisations which process personal information or fail to implement necessary security measures in violation of the Draft PIPL may be fined up to RMB 1 million. In addition, officers/persons in charge of the organisation may also face personal liabilities.

Notably, the Draft PIPL also provides that where the breach is serious, the PIPD may impose a fine of up to RMB 50 million (approximately US\$7.5 million) or 5% of the organisation's annual turnover in the preceding year, in addition to other penalties such as ordering a suspension of business, revocation of licenses, etc.

Conclusion

The Draft PIPL marks a significant step in the PRC's effort to protect personal information and further supplements existing laws and guidelines, such as the Cybersecurity Law and the Civil Code of the PRC, which together form a complex framework of personal information protection in the PRC. While the Draft PIPL is currently only in its draft form and may be pending revisions following the public consultation process, given its scope for extraterritorial application, and the hefty penalties that may be imposed on organisations that are found in breach of the Draft PIPL, organisations which process personal information in their business operations, especially those operating in the PRC or those operating outside PRC but which fall within the ambit of the Draft PIPL should follow developments closely.

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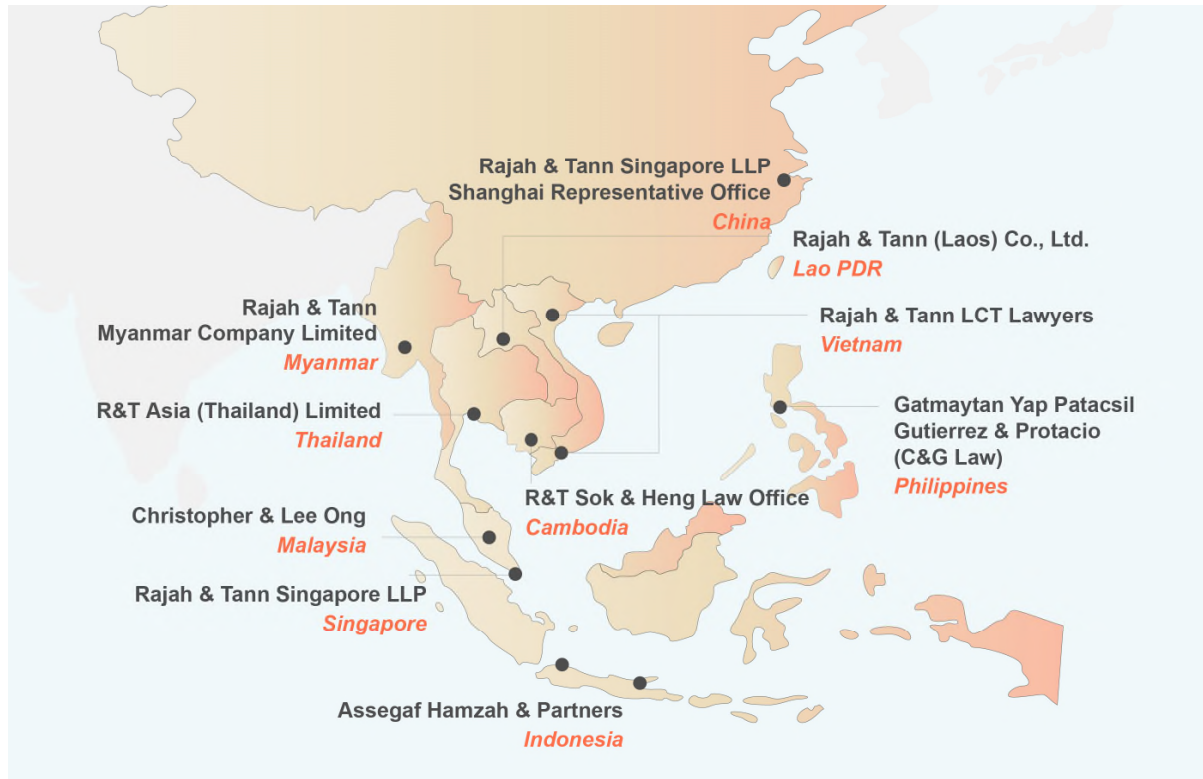
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