

## **TECHNOLOGY, MEDIA, AND TELECOMMUNICATIONS (TMT) SERIES - MALAYSIA**

*This article is the first in a series exploring the Malaysian legal position with respect to various commonly asked questions in relation to the Technology, Media, and Telecommunications (“TMT”) legal regime in Malaysia.*

*In Part A of our TMT Series, we will be answering various queries pertaining to the Personal Data Protection legal regime in Malaysia.*

### **PART A: PERSONAL DATA PROTECTION**

#### **1. What key protections exist for personal data?**

The Personal Data Protection Act 2010 (“**PDPA**”) and its subsidiary legislation regulates the processing of personal data in commercial transactions and applies to anyone who processes and has control over or authorises the processing of any personal data in respect of commercial transactions.

The PDPA establishes 7 key principles which must be complied with by data users when processing personal data: (i) consent; (ii) notice and choice; (iii) disclosure; (iv) security; (v) retention (vi) data integrity; and (vii) access. The PDPA also requires data users to have adequate security and indemnity measures to inhibit the theft, misuse, unauthorized access, accidental disclosure, alteration or destruction of personal data under their care.

Codes of practice may be implemented by various data user forums or the Personal Data Protection Commission for various classes of users in differing sectors. These codes of practice would have a binding effect on the various classes of users registered with the Personal Data Protection Commission.

Following the implementation of the European Union’s General Data Protection Regulation (“**GDPR**”), the Malaysian government is reviewing the PDPA to comply with international requirements on personal data protection, including the GDPR. However, there is no definite timeframe for the implementation of updates to the PDPA.

If you have any related questions/queries please do not hesitate to contact us:

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## 2. Are there restrictions on the transfer of personal data overseas?

A data user shall not transfer any personal data of a data subject to a place outside Malaysia unless specified by the Minister, upon the recommendation of MCMC or, by notification published in the Gazette.

Notwithstanding the above, a data user may transfer personal data out of Malaysia in the following circumstances:

- (a) *“the data subject has given his consent to the transfer;*
- (b) *the transfer is necessary for the performance of a contract between the data subject and the data user;*
- (c) *the transfer is necessary for the conclusion or performance of a contract between the data user and a third party which:-*
  - (i) *is entered into at the request of the data subject; or*
  - (ii) *is in the interests of the data subject;*
- (d) *the transfer is for the purpose of any legal proceedings or for the purpose of obtaining legal advice or for establishing, exercising or defending legal rights;*
- (e) *the data user has reasonable grounds for believing that in all circumstances of the case—*
  - (i) *the transfer is for the avoidance or mitigation of adverse action against the data subject;*
  - (ii) *it is not practicable to obtain the consent in writing of the data subject to that transfer; and*
  - (iii) *if it was practicable to obtain such consent, the data subject would have given his consent;*
- (f) *the data user has taken all reasonable precautions and exercised all due diligence to ensure that the personal data will not in that place be processed in any manner which, if that place is Malaysia, would be a contravention of this Act;*

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- (g) *the transfer is necessary in order to protect the vital interests of the data subject; or*
- (h) *the transfer is necessary as being in the public interest in circumstances as determined by the Minister."*

**3. What is the maximum fine that can be applied for breach of data protection laws?**

Non-compliance with the PDPA may result in the organisation, upon conviction, being liable to a fine ranging from RM100,000 to a maximum of RM500,000 and/or to imprisonment ranging from 1 to 3 years.

**4. What additional protections have been implemented, over and above the GDPR requirements?**

The PDPA has yet to be amended to address the GDPR requirements its implementation. No additional protections have been implemented in Malaysia since the coming into force of the GDPR and the GDPR presently imposes stricter requirements in comparison. For example:

(a) Consent

PDPA: Does not define what 'consent' entails save that consent collected has to be in a form that can be maintained by the data user and any consent obtained should be presented distinguishable from consent given for other matters. The collection of consent by way of an "opt-out" method is permitted under certain circumstances.

GDPR: "consent" has to be freely given, specific, informed and unambiguous indication of the data subject's wishes by a statement or a clear affirmative action. The "opt-out" method of obtaining consent may not apply to the GDPR.

(b) Data Protection Officer

PDPA: Requires data users to identify a contact person in a data protection notice, for data subjects to direct any queries they may have regarding the use of their personal data. There is no requirement to specifically appoint a data protection officer under the PDPA.

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GDPR: Certain organisations are required to specifically appoint a data protection officer to, *inter alia*, act as a liaison to data subjects in respect of issues relating to the processing of personal data.

(c) Data Breach & Reporting

PDPA: Does not impose any obligation on data users to report data breaches to the Commissioner.

GDPR: Data controllers are obliged to report data breaches to the appropriate supervising authority within 72 hours, and to the relevant data subjects if the breach is likely to result in a high risk to the rights of the data subject.

(d) Right to be Forgotten / Right to Erasure

PDPA: Does not grant data subjects a right to be forgotten or right to erasure, although they may withdraw their consent for the processing of their personal data. While the effect of such withdrawal is unclear, the exercise of such right may require the data user to delete the personal data of the data subject.

GDPR: If a data controller is requested by a data subject to erase the data subject's personal data, the data controller must comply with the request without delay unless the situation falls within an exemption.

(e) Data Portability

PDPA: Provides that data subjects may request for their information from a data user, however, it is unclear on the manner/method/medium in which such information is to be given. It does not provide data subjects with a right to request for their personal data to be transferred to different data users.

GDPR: Data subjects have a right to request for their information held by a data controller to be provided to them in a machine-readable form. Data subjects may also request for their personal data to be transferred from one data controller to another in certain circumstances.

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However, where the personal data of children is to be processed, the PDPA imposes stricter requirements, in that the personal data of children under the age of 18 may only be processed after consent is given by the child's parent/guardian, as opposed to children under the age of 16 as required by the GDPR.

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