

ARTICLE NO.1

DIFFERENCES IN THE DEFINITION OF PERSONAL DATA BETWEEN THE VIETNAMESE DRAFT LAW ON PERSONAL DATA PROTECTION AND GDPR AND THEIR IMPACT ON THE LEGAL FRAMEWORK

Abstract: *The differences in the definition of personal data between the Draft Law on personal data protection ("Draft Law") and the EU General Data Protection Regulation ("GDPR") have significant implications for data protection frameworks. While both aim to safeguard individuals' privacy, their varying definitions affect the scope of protection and the legal framework's effectiveness. This article explores these differences, focusing on how they impact the overall legal landscape for data protection in Vietnam and the potential challenges that arise from these discrepancies.*

Keywords: #PersonalData #GDPRvsDraft Law #DataPrivacyLaw #LegalFramework #GDPRCompliance

1. Personal data definitions

Before examining the definition of "personal data" provided by the Draft Law and the GDPR, it is necessary to clarify the implications of the terms "information" and "data".

a. Distinction of "information" and "data"

In the realm of information science, the concepts of "data" and "information" are foundational elements within the broader conceptual approaches for defining "data, information, knowledge, wisdom." According to Charles Ess and Borgman (1999)¹:

- **Information:** Collocations of data that become meaningful to humans. Information can include but is not limited to data, can be perceived through many forms that go beyond data as can only be generated, stored, transmitted by computers.
- **Data:** Units of binary code intended for storage, processing, and transmission by computers. As building blocks, data are not immediately meaningful to humans but can be processed to form broader information.

With the development of computer science, humans are now able to convert "information" into "data" and create electronic devices to process the "data" and receive "information". In 1946, the ENIAC (Electronic Numerical Integrator and Computer) were invented, consist of nearly 18,000 vacuum tubes, the ENIAC can amplify weak electrical signals to receive radio and television transmitter, or to switch between an "off" state and an "on" state, representing the binary values "0" and "1," respectively. These states form the basis of binary code, a language used to communicate with machines.

¹ JOURNAL OF THE AMERICAN SOCIETY FOR INFORMATION SCIENCE AND TECHNOLOGY - February 15, 2007

It is important to highlight that, unlike data, information cannot be directly exchanged between humans and machines. For example, in order for an audio recorder to capture sound, it must be equipped with an analog-to-digital converter, which transforms sound waves (analog signals) into digital electrical signals. Therefore, using the terms "data" and "information" interchangeably can lead to significant misunderstandings, particularly when developing appropriate regulations.

b. Definitions of personal data

The terms "information" and "data" have a significant impact on the approach taken by legislators in the process of developing legal frameworks for personal data protection. By examining the approaches taken by the Draft Law and the GDPR, we can reveal the following key insights:

The Draft Law:

- Defines personal data as **electronic information** expressed in various forms (symbols, letters, numbers, images, sounds) associated with an individual or used to identify an individual. It categorizes data into general personal data (non-sensitive information linked to a person's identity) and sensitive personal data (data related to an individual's privacy and personal life)².
- Includes a sub-term "Information used for identification of an individual", referring to information resulting from an individual's activities and identifiable when combined with other stored information and data.

GDPR:

- Defines "personal data" as any information relating to an identified or identifiable natural person, which means, regardless of format (electronic or non-electronic), if the "information" relating to an identified or identifiable natural person³, it will be treated as "personal data". It encompasses all categories of information, whether private or public, and protects both objective and subjective information. The Court of Justice of the European Union, in its *Stamedia* decision, notably stated that data made available to an indefinite number of people remains protected under the GDPR⁴. This protection extends not only to the personal and professional information of the individual but also to objective information—verifiable and potentially contestable—as well as subjective information, which includes evaluations or judgments made about an individual⁵.

² Article 2(1) of the Draft Law.

³ Article 4(1) of the GDPR.

⁴ CJEU, 16 December 2008, *Tietosuojavaltuutettu v. Satakunnan Markkinapörssi Oy and Satamedia Oy*, C-73/07.

⁵ CJEU, 20 December 2017, *Novak*, C-434/16, pt 34.

- Protection applies to identified or identifiable individuals, using various elements such as name, ID number, location data, online identifier, or even distinctive aspects of their physical, physiological, genetic, mental, economic, cultural, or social identity. In assessing whether a person is identifiable, all reasonable means that might enable the data controller or any other person to identify this individual directly or indirectly should be considered⁶. It excludes data related to legal entities and deceased persons⁷.

2. Narrower scope under the Draft Law

By restricting its scope to electronic information only, the Draft Law limits the format of personal data to be protected. In comparison, the GDPR includes both physical and digital data in its definition. This limitations risks leaving certain types of non-digital personal data, such as physical documents or written records, unprotected. Thus, while the GDPR ensures comprehensive and global data protection, the Draft Law could create gaps in protection for cases involving non-electronic data processing, thereby compromising the confidentiality of information in these contexts.

3. Implications for the Vietnamese legal framework

- **Conflict with Existing Legislation:** The Draft Law may conflict with existing Vietnamese legislation, such as the Cybersecurity Law and the Law on Cyberinformation Security, leading to practical challenges in enforcement. For example, while the Cybersecurity Law introduces the concept of "personal secrecy" and strictly prohibits any infringement on it, it fails to clearly define which types of information fall under this category. This ambiguity creates practical challenges in determining whether a breach constitutes a violation of personal data or an infringement of personal secrecy, resulting in a significant gap due to inconsistent terminology and divergent regulatory approaches. Similarly, the Law on Cyberinformation Security characterizes "personal information" as any data that can be linked to an individual's identity, and Article 84 of Decree 15/2020 outlines penalties for violations related to its collection and use. In practice, however, law enforcement often struggles to differentiate between breaches of personal information and violations of personal data, especially when both occur simultaneously. This further complicates the regulatory landscape, leaving uncertainty as to which provision should take precedence.
- **Fragmentation of Legal Framework:** The absence of a dedicated penalty regime for personal data violations, combined with fragmented regulations, creates compliance challenges for businesses and individuals. Additionally, data that transitions from paper to digital format may be subject to different regulatory requirements, creating additional compliance challenges for both businesses and individuals.

⁶ Recital 36 of the GDPR.

⁷ Recital 27 of the GDPR.

4. Challenges

The limited scope of the Draft Law could, as it stands, seriously undermine its ability to ensure effective and comprehensive privacy protection. To align with international standards, particularly those established by the GDPR, additional regulatory measures or targeted amendments are necessary. Expanding the scope to encompass all forms of personal data, whether electronic or non-electronic, would enable Vietnam to establish a more coherent and robust legal framework for data protection. Such an approach would enhance individuals' trust in data management practices, provide stronger privacy safeguards, and foster greater international cooperation on data protection standards.

A revised definition could be formulated as follows: *"Personal data refers to any information, in any form, whether electronic or non-electronic, that relates to an identified or identifiable natural person. This includes data expressed through symbols, numbers, letters, images, sounds, or other means capable of directly or indirectly identifying a person. Personal data is divided into two categories: general data and sensitive data"*.

This enhanced definition would align Vietnam's legal framework with international standards while providing more comprehensive protection tailored to the contemporary challenges of personal data management.

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