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THE NEW DIFC DATA PROTECTION LAW

I. Background

The Dubai International Financial Centre (DIFC) passed Data Protection Law DIFC Law No.1 of 2007 (Current Law) 13 years ago. The Current Law was amended by Data Protection Law Amendment Law, DIFC Law No.5 of 2012 and by DIFC Laws Amendment Law, DIFC Law No. 1 of 2018 and now replaced by the new Data Protection Law DIFC Law No. 5 of 2020 (New Law), which will come into effect from 1st July 2020.

The foundation of the Current Law derived from the concepts of the European Data Protection Directive (Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data). The Data Protection Directive was superseded in May 2018 by the General Data Protection Regulation (Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data) (GDPR).

Evidently DIFC had to take action to adjust the Current Law to provide consistency and familiarity for businesses within the DIFC and most important reflect the principles and concepts found within the GDPR together with modifications reflecting latest technology, privacy and security law developments as well as the unique requirements of the DIFC.

However other laws issued on Federal level by the UAE, such as UAE Penal Code (with relation to invasion of privacy or the misuse of personal information), Federal Law No. 5 of 2012 on Combatting Cybercrimes, Federal Law No. 2 of 2019 governing the use of IT systems in the healthcare sector and Dubai Law No. 26 of 2015 Regulating Data Dissemination and Exchange in the Emirate of Dubai remain applicable to the DIFC, even after the enactment of the New Law.

II. Overview on changes

1. Application of the New Law

The New Law applies in the DIFC and to those who operate, conduct or attempt to conduct business in or from the DIFC in relation to Processing¹ of Personal Data², regardless of whether the Processing takes place in the DIFC or not.

¹ Processing means any operation or set of operations performed upon Personal Data, whether or not by automated means, such as collection, recording, organization, structuring, storage and archiving, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination, transfer or otherwise making available, alignment or combination, restricting (meaning the marking of stored Personal Data with the aim of limiting Processing of it in the future), erasure or destruction, but excluding operations or sets of operations performed on Personal Data by: (a) a natural person in the course of a purely personal or household activity that has no connection to a commercial purpose; or (b) law enforcement authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including safeguarding against and preventing threats to public security ("Process, Processed, Processes and Processing" - and other variants).

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It applies to Processing of Personal Data by automated means and other than by automated means where the Personal Data form part of a Filing System³ or are intended to form part of a Filing System.

2. Key features of the New Law

In the following we have outlined seven key features of the New Law, which we consider relevant and significant for Controllers⁴, Processors⁵ and Data Subjects⁶.

a) Controller and Processor obligations

The New Law imposes obligations on both Controller and Processor in relation to the protection of Personal Data. A Controller or Processor is required to implement appropriate technical and organisational measures to demonstrate that Processing is performed in accordance with the New Law. Amongst others a Controller or Processor that collects or Processes Personal Data shall implement and maintain a data protection policy in writing. The Current Law does not provide direct obligation with specific requirement for the Processor but rather refers only the Controller for providing safe Processing measures even if the Personal Data are Processed through the Processor. It also stipulates mandatory contractual requirements that apply to arrangements between Controllers and Processors.

b) Designation of data protection officer (DPO)

The New Law provides for the appointment of a data protection officer. The appointment is mandatory for a Controller and Processor who undertake High Risk Processing Activities⁷, while it is recommended for all DIFC entities.

c) Data export outside the DIFC

As it is with the Current Law the New Law also permits transfer of Personal Data from DIFC to a third-party country if adequate level of protection is ensured by laws as set out

² Personal data refers to any information referring to an identified or identifiable natural person ("Personal Data").

³ Any structured set of Personal Data that is accessible according to specific criteria, whether centralised, decentralised, or dispersed on a functional or geographic basis ("Filing System").

⁴ Controller is any person who alone or jointly with others determines the purposes and means of the processing of personal data ("Controller").

⁵ Processor is any person who processes Personal Data on behalf of a Controller ("Processor").

⁶ Data subject is the identified or identifiable natural person to whom Personal Data relates ("Data Subject"). Identifiable natural person means a natural living person who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one (1) or more factors specific to his biological, physical, biometric, physiological, mental, genetic, economic, cultural or social identity ("Identifiable Natural Person" and "Identified Natural Person" is interpreted accordingly).

⁷ Processing of Personal Data where one (1) or more of the following applies: Processing that includes the adoption of new or different technologies or methods, which creates a materially increased risk to the security or rights of a Data Subject or renders it more difficult for a Data Subject to exercise his rights; (b) a considerable amount of Personal Data will be Processed (including staff and contractor Personal Data) and where such Processing is likely to result in a high risk to the Data Subject, including due to the sensitivity of the Personal Data or risks relating to the security, integrity or privacy of the Personal Data; (c) the Processing will involve a systematic and extensive evaluation of personal aspects relating to natural persons, based on automated Processing, including Profiling, and on which decisions are based that produce legal effects concerning the natural person or similarly significantly affect the natural person; or (d) a material amount of Special Categories of Personal Data is to be Processed. Special Categories of Personal Data: Personal Data revealing or concerning (directly or indirectly) racial or ethnic origin, communal origin, political affiliations or opinions, religious or philosophical beliefs, criminal record, trade-union membership and health or sex life and including genetic data and biometric data where it is used for the purpose of uniquely identifying a natural person.

in the New Law. The New Law provides for a more enhanced regime to follow for determining adequate levels.

Importantly, however, the New Law also creates a new exceptional basis for transferring personal data outside the DIFC, even to jurisdictions that do not offer adequate protection and without consent, where the Controller can demonstrate a compelling legitimate interest and subject to a number of other limitations, such as an impact assessment, notification to the regulator non-recurrence of the transfer and the transfer concerns only a limited number of Data Subjects.

d) New requirements for privacy notices

In order to comply with the New Law, privacy notices will need to be updated. Broadly consistent with the GDPR, Controllers are now required to deliver additional information to Data Subjects in a concise and transparent form, including (among other things) the lawful basis on which personal data is processed and the recipients or categories of recipients of the Data Subject's personal data.

e) Enhanced Data Subject rights

The New Law enhances the rights of Data Subjects with respect to their Personal Data, adding the right to data portability, the right to withdraw consent including a non-discrimination right and more.

The New Law has also looked beyond the GDPR in order to reflect some of the challenges that may arise in respect of Data Subject rights as a result of the use of new technologies, recognising that the rights of rectification, erasure and objection may not always be easily compatible with certain modern ways of processing (e.g. Blockchain systems). Where this is the case, such Data Subject rights can be lawfully rendered un-exercisable, provided that sufficient information is provided to the Data Subjects concerned to enable the Data Subjects by the Controller at the outset to enable the Data Subject to weigh up the pros and cons of the Processing and reach an informed decision.

f) Sanctions

As it is the case for the Current Law, the New Law also has the ability to issue fines to parties who violate the law or conduct non-compliance. However increased maximum fine limits have been introduced.

However unlike the GDPR fine structure – which also takes reference to the company's global turnover to determine the maximum penalty fine – the maximum fine for an administrative breach by either Controller or a Processor is USD 100,000, however with the discretion for the Commissioner to determine higher fines for more severe breaches (General fines).

3. Conclusion

It appears that the New Law is very much considering practical or technological difficulties Controller or Processor may experience and may be difficult to reconcile with the exercise of Data Subject rights but at the same time safeguarding the rights of Data Subjects as much as possible. It remains to be seen whether the goal of easing data transfer compliance requirements for DIFC businesses and the international recognition of DIFC legal framework will succeed with this New Law.

Once the New Law is in enforce, businesses to which it applies will have a grace period of three months, until 1 October 2020, to prepare to comply with it, after which it becomes enforceable.

MENA LEGAL will remain attentive to any further developments and keep you informed.

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