

# Constitutional Court Decision No. 108/PUU-XX/2022 and No. 110/PUU-XX/2022: Legal Entities as Personal Data Controllers and PDP Law as the Guardian of Public Interest in Personal Data Protection

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On Friday, April 14th 2023, the Constitutional Court of the Republic of Indonesia (“MK”) handed down two decisions regarding the Judicial Review request for Law No. 27 of 2022 on Personal Data Protection (“PDP Law”) against the Constitution of the Republic of Indonesia, namely Decision No. 108/PUU-XX/2022 (“Decision No. 108”) that was petitioned for by Leonard Siahaan, and Decision No. 110/PUU-XX/2022 (“Decision No. 110”) that was petitioned for by Dian Leonardo Benny.

In Decision No. 108, the Petitioner argued that the enforcement of Article 1 number 4 jo. Article 19 of the PDP Law would result in the Petitioner of Decision No. 108 losing the ability to appoint a legal entity which is an expert in the field of data processing as the controller and processor of personal data, which loss could potentially result in data leakage. In addition, the Petitioner also argued that Article 2 paragraph (2) of the PDP Law might indicate that there was no protection of personal data which is processed in business activities carried out at home.

The wording of Article 19 of the PDP Law itself is as follows:

*“Personal Data Controller and Personal Data Processor shall include:*

- a. Every Person;*
- b. Public Agency; and*
- c. International Organization.”*

On the other hand, in Decision No. 110, the Petitioner argued that Article 15 paragraph (1) letter a of the PDP Law violated Article 28D paragraph (1) and Article 28E paragraph (1) of the 1945 Constitution. Where some of the rights of the Personal Data Subjects are exempted when it comes to the interests of the national defence and security.

Even so, in both Decisions MK rejected the whole of the respective petitions. Despite the rejection of the petitions, these decisions have become affirmations for several provisions in the PDP Law as follows.

## Opportunity for Legal Entities to Act as Personal Data Controllers

Conversely, as the Petitioner for Decision No. 108 argued, the MK has adopted the stance that Article 1 number 4 jo. Article 19 of the PDP Law allows legal entities to act as personal data controllers.

From the definition given in Article 1 number 7 of the PDP Law, we can see the definition of “Every Person” that is found in Article 1 number 4 jo. Article 19 of the PDP Law. It is stated that “Every person is an individual or a corporation”. This Article means that “Every Person” could mean an individual person or a legal entity or corporation. This is also strengthened by Article 1 number 8 of the PDP Law where that article states that “Corporation is a collection of people and/or assets that are organized, whether incorporated or not incorporated”.

Judging from the regulated definition norms, the subject “legal entity” has been accommodated in the phrase “Every Person” contained in Article 1 number 7 and number 8 of the PDP Law.

Furthermore, provisions of Article 48 of the PDP Law also provide a mechanism whereby if the Personal Data Controller handling the processing of personal data of personal data subjects is in the form of a legal entity that carries out or experiences a merger, separation, acquisition, consolidation, or dissolution then the legal entity must notify the Personal Data Subject of the transfer of Personal Data.

So, it is clear that the PDP Law allows legal entities to act as personal data controllers.

## The PDP Law Does Not Apply to Use for Personal Non-Commercial Purposes

The Petitioner of Decision No. 108 considered that Article 2 paragraph (2) of the PDP Law is unable to provide a legal umbrella for users of personal data, especially for household-scale business actors who are vulnerable to data leakage, especially during financial transactions, which hackers can cause in order to commit economic cybercrimes.

However, the MK believes that personal data processing by individuals in household activities is a form of personal, non-commercial data processing. In fact the existence of the provisions of Article 2 paragraph (2) of the PDP Law protects activities that are only carried out within the personal or family sphere or, in other words, private domains.

MK's view is even in line with Recital (18) of the General Data Protection Regulation ("GDPR"), where the GDPR itself does not apply to the processing of personal data by a natural person in the purely personal sphere or household activity, where there is no connection to a commercial data processing. These activities, may include personal data correspondence, personal data storage, social networking activities and online activities carried out in the context of such personal or household activities.

Furthermore, it can also be noted that "personal or household activity" is also excluded in the regulation regarding personal data protection in the United Kingdom and Singapore.

Therefore, regulations on protecting personal data are crucial to protect individual rights in the community. Even if the activities in e-commerce are done at home, they cannot be excluded, as referred to in Article 2 paragraph (2) of the PDP Law.

## Fundamental Function of Public Interest in Personal Data Protection

The MK views that in Decision No. 110, the exception to the rights granted in Article 15 paragraph (1) of the PDP Law is not only for matters related to the interests of national defence and security as specified in letter a, but also for the benefit of the law enforcement process, public interest in the context of administering the state, the interest of supervising the financial services sector, monetary, payment systems, and financial system stability carried out within the framework of administering the state and also for statistics and scientific research.

According to MK, the five exceptions stated in Article 15 paragraph (1) of the PDP Law, are closely-related or even inseparable elements in the application or implementation of the PDP Law. These exceptions can only be carried out for the sake of the implementation of the laws and regulations in Indonesia.

It means that the exceptions to the interests of national defense and security are not implemented on the subjective basis from the government. Instead, the implementation shall be justifiable strictly with a basis from the provisions of the applicable and relevant laws and regulations, precisely in the level of legislative act (*Undang-Undang*).

Exceptions, as mandated in Article 15 paragraph (1) of the PDP Law, are necessary. These exceptions are a form of implementation and elaboration of the elements of public interest, and they are in line with the Elucidation to Article 3 letter c of the PDP Law.

The MK viewed that if Article 15 paragraph (1) letter a of the PDP Law was declared unconstitutional, it would result in a legal vacuum, especially about the regulation of exceptions to the rights of personal data subjects that can be overridden by the public interest, including national defence and security.

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*The article above was prepared by Dentons HPRP's lawyers*

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