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# UNAUTHORIZED TRANSFER OF PERSONAL DATA MIGHT BE PUNISHABLE UNDER THE INDONESIAN CRIMINAL LAW

The recent judgment by District Court of Tangerang shows that unauthorized transfer of personal data may be subject to criminal sanctions. Last month, the court issued a verdict against Adi Warnadi Ismentin who sold personal data without securing consent from the owners of the personal data. Personal data sold by Mr. Ismentin comprises of personal data he gathered from various sources such as financial institutions, car and property agents/vendors, and personal data from social media. Mr. Ismentin compiled those data and sold them to those who had interest in the personal data. For his action, the court sentenced Mr. Ismentin to 9 months in prison and a fine of IDR 1 billion (around USD 70,000).

The court held that Mr. Ismentin has violated Article 32 paragraph 2 of Law No. 11 of 2008 on Electronic and Information Transaction (“**EIT law**”), which stipulates as follows:

*every person is prohibited from intentionally and without right in any way moving or transferring electronic information and/or electronic documents to other unauthorized party's electronic system.*

Violation of such provision shall be subject to maximum imprisonment of 9 years and/or maximum of IDR 3 billion (around USD 210,000).

What is interesting about this case is despite the absence of a comprehensive personal data protection law in Indonesia, the court was still able to find a way to penalize violation of privacy. The legal ground used by the court in this case (i.e. Article 32 paragraph 2 of EIT Law) is not specifically formulated to tackle privacy issue. There is no mention of “personal data” in this provision. Instead, it only

prohibits the unauthorized transfer of electronic information and/or electronic documents.

The heart of this judgment is the inclusion of electronic personal data as electronic information. Because the personal data is transferred in the electronic form, the personal data can be considered as electronic information. Therefore, EIT Law may apply to this type of personal data.

The second important aspect is the application of the concept of “without right” and “unauthorized transfer” to this case. Under Indonesian law, the term “without right” and “unauthorized” can have a very broad meaning and multiple interpretations. The most straightforward interpretation (and agreed by most lawyers) is as follows: when an act is in contravention with someone’s right or applicable laws and regulation, such act can be considered as “without right” and “unauthorized”.

In this case, the law does recognize the right of personal data owner to consent to any use or processing (including transfer) of personal data. This right is stipulated in Article 26 of EIT Law and its implementing regulations i.e. Government Regulation No. 82 of 2012 concerning Electronic and Information Transaction (“**GR 82/2012**”) and Minister of Communication and Information Regulation No. 20 of 2016 concerning Personal Data Protection in Electronic System (“**MCI 20/2016**”). GR 82/2012 and MCI 20/2016 also stipulates additional requirements for transferring the personal data to other party. By not securing the consent from the personal data owner and satisfying the requirements under these laws and regulations, a transfer of personal data can be considered as “without right” and “unauthorized”.

### **What does it mean for businesses?**

It is no secret that flow of information (which includes personal data) is key in today’s business. The information may be transferred from one entity to another for a variety of purposes such as data analytics, HR, IT outsourcing, etc.

Due to the absence of a comprehensive personal data protection law in Indonesia and its lack of enforcement, the businesses have taken the existing personal data protection rules in Indonesia too lightly. As a result, compliance level in Indonesia is still very low.

With this ruling, the businesses must see the issue of compliance with Indonesian personal data protection rules from a slightly different point of view. Although the enforcement action from the government is still minimum, the businesses still



have to comply with the personal data principles and rules stipulated in Article 26 of EIT Law, GR 82/2012, and MCI 20/2016. The legal reason for this is because these laws and regulations are considered as binding legal instruments under the Indonesian law. Therefore, failure to comply with these legal instruments would qualify the meaning of “without right” or “unauthorized” under the law.

As we see from the personal data trade case above, being considered “without right” and “unauthorized” in transferring personal data could have a serious legal implication. It can trigger the applicability of Article 32 paragraph 2 of EIT Law and consequently lead to criminal sanction. It is very possible that the other form of violation of personal data protection rules might also trigger the applicability of other provisions under EIT Law or other relevant laws. Not only potential criminal sanction, failure to comply with the existing personal data protection rules might also lead to civil claim if such non-compliance action brings damage to other party.