KHAITAN &CO

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Data Privacy & Protection

Important Aspects for Corporate Practice

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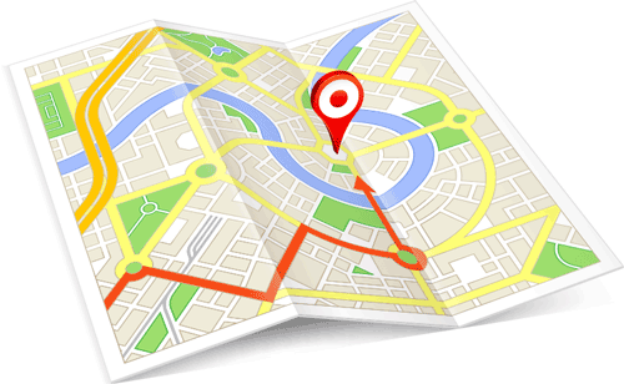
Route Map



- Why Data Privacy / Protection?
- Present Legal Framework and Case Laws
- Data Privacy / Protection in M&A Transactions
- Case Studies & Latest developments
- Best Practices
- Q&As

Why Data Privacy / Protection?

- Massive Global data flows
- Cloud Computing
- Economic Importance of data processing
- “Free” Internet Services
- [E-]commerce requires collection customer data
- “Big data” analyses and new markets
- Increased data breach instances

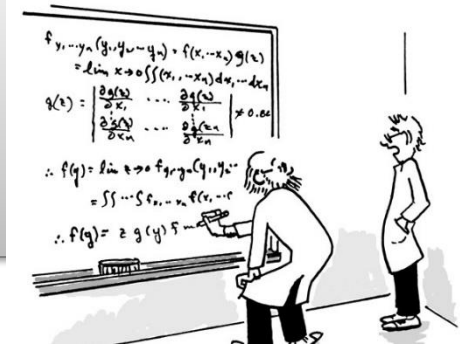
Present Legal Framework
India

- No exclusive legislation
- Whether 'Right to Privacy' is a Fundamental Right – Judicial developments
- Information Technology Act, 2000 ("IT Act")
- Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 ("Privacy Rules")
- Sectoral regulations
- Other legislations

IT Act | Few Relevant Sections

- Section 43 A:
  - Relates to any body corporate possessing, dealing or handling any **sensitive personal data or information** in a computer resource
  - Where such body corporate is negligent in implementing and maintaining **reasonable security practices and procedures**
  - Causes wrongful loss or wrongful gain to any person
  - Liable to pay **damages by way of compensation** to the affected person

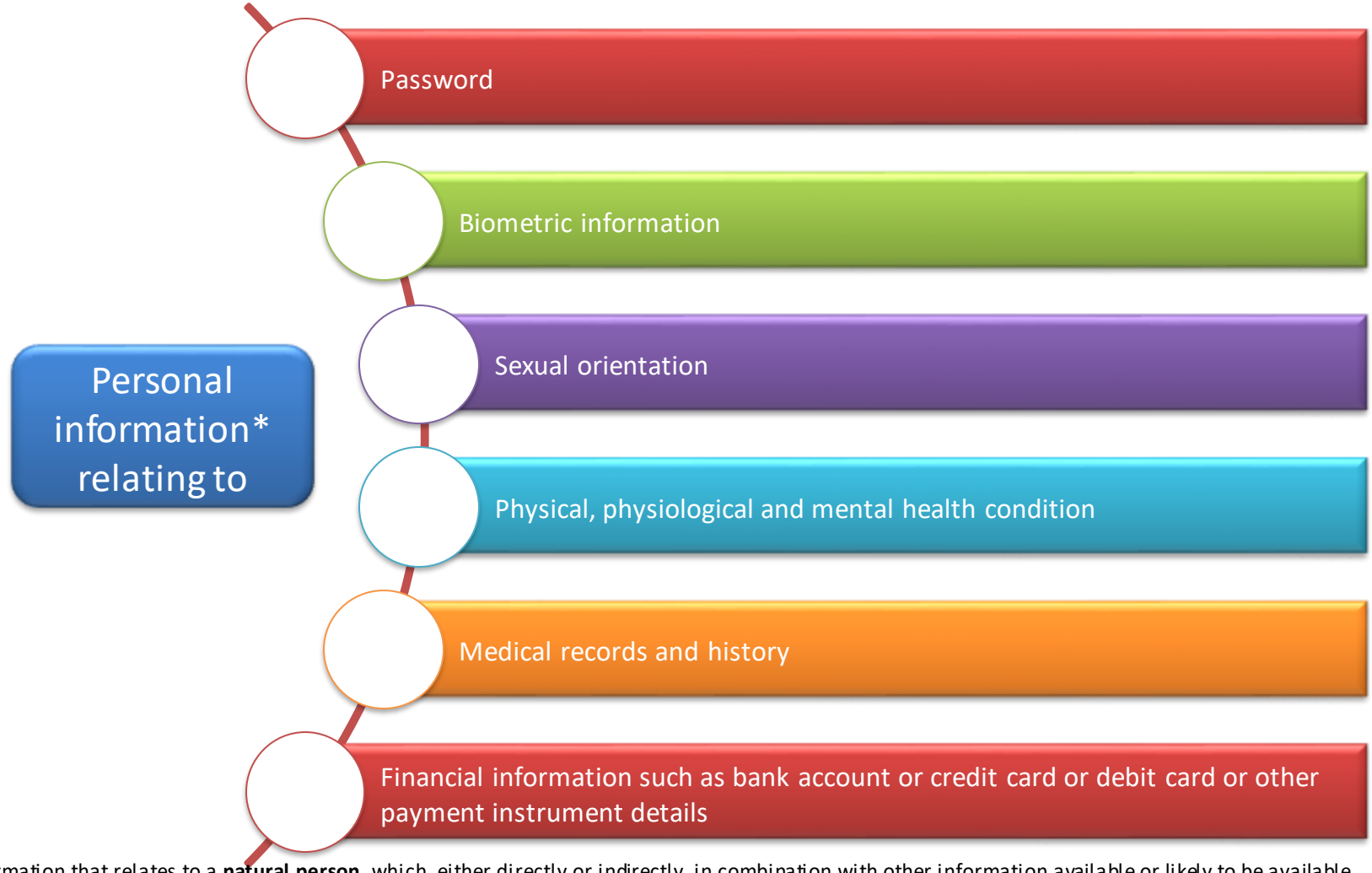
Explanation to Section 43-A



- **Reasonable Security Practices and Procedures** - security practices and procedures designed to protect such information from unauthorised access, damage, use, modification, disclosure or impairment, as may be specified in an agreement between the parties **or** as may be specified in any law for the time being in force and in the absence of such agreement or any law, such reasonable security practices and procedures, as may be prescribed by the Central Government in consultation with such professional bodies or associations as it may deem fit
- **Sensitive Personal Data or Information ("SPDI")** - such personal information as may be prescribed by the Central Government…

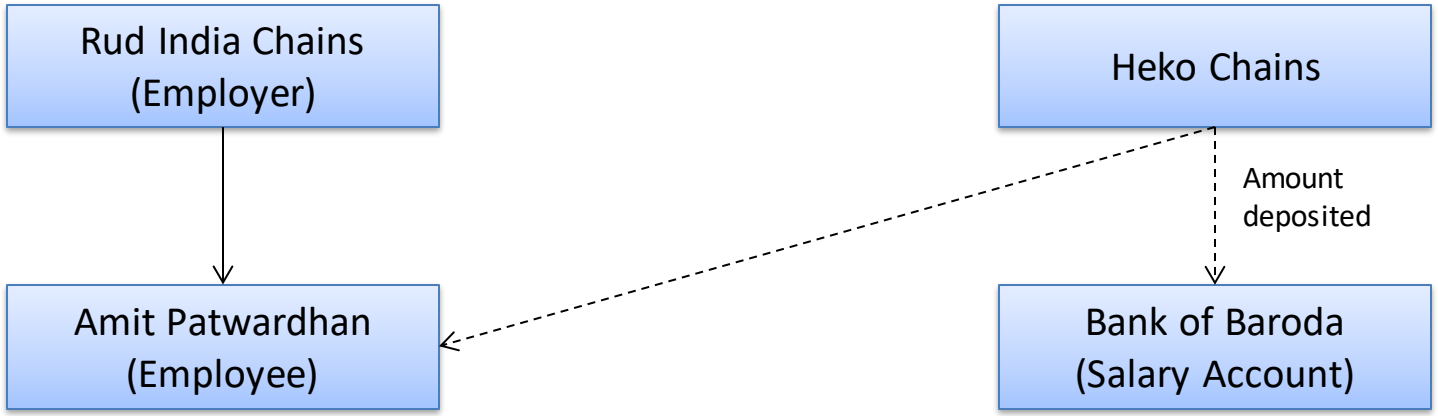
Privacy Rules | Watch-out Areas

Sensitive Personal Data or Information



* Information that relates to a **natural person**, which, either directly or indirectly, in combination with other information available or likely to be available with a body corporate, is **capable of identifying such person**

Amit Patwardhan Vs Bank of Baroda



- Bank Account Statements held to be Sensitive Personal Data
- Bank of Baroda asked to pay token compensation

Privacy Rules – What To Do

Implementation of Reasonable Security Practices and Procedures

- As per agreement; or
- International Standards IS / ISO / IEC 27001 relating to 'Information Technology - Security Techniques - Information Security Management System - Requirements' ("**Standards**"); or
- Any code of best practices for data protection prepared by an industry association and approved and notified by the Central Government ("**Code**")
- Bodies corporate who have implemented such Standards or Codes require certification from Central Government approved auditors:
  - at least once a year; or
  - in case of significant upgradation of process and computer resource

Privacy Rules – What To Do

Collection of Information

- SPDI to be collected only if necessary and required for lawful purpose
- Information to be used only for the purpose for which it is collected
- Information provider should know that:
  - information is being collected
  - the purpose of collection
  - the intended recipients
  - name and address of agency collecting and retaining the information
- SPDI not to be retained for longer period than required
- Information provider should be allowed to review / amend the information provided and the option to withdraw consent at any time
- In case of withdrawal of consent, the body corporate may not provide the goods or services for which the concerned information was sought

Privacy Rules – What To Do

Disclosure of SPDI to Third Party

- As per agreement; or
- Obtain prior permission from the provider

Consent for Purpose

- Obtain prior consent from provider of SPDI regarding purpose of usage

Transfer

- Permitted to transfer information to any person or body corporate located anywhere, who ensure the same / equal level of data protection; and
- Only if the transfer is necessary for the performance of lawful contract between the body corporate and provider of information or where such provider of information has consented to the transfer

Privacy Rules | Transfer of Data

- Same / equal level of data protection
- Performance of lawful contract
- Consent

Privacy Rules – What To Do

Privacy Policy

- Provide a Privacy Policy to information providers and publish the same on website
- Privacy Policy shall contain:
  - type of information collected
  - purpose for collection of information
  - security practices and procedures followed
  - disclosure policy

Grievance Officer

- Designate a Grievance Officer to address grievances of information providers
- Name and contact details of Grievance Officer to be published on website
- Grievance Officer to redress the grievances within one month

IT Act | Few Relevant Sections

- Section 72 A:
  - Relates to any person providing **services under lawful contract** wherein personal information is accessed
  - There is intent or knowledge of wrongful loss or wrongful gain being caused through disclosure of such personal information
  - Disclosure is made **without the consent of the person** concerned **or in breach of a lawful contract**
  - Liable to be **punished with imprisonment** up to **3 years**, or with **fine** up to **INR 0.5 Million**, or with **both**

Section 43-A and 72-A: Distinction

Particulars	Section 43-A	Section 72-A
Liability on	'Body corporate'	'Any person'
Information involved	'Sensitive personal data or information'	'Personal information'
Procurement of the information	Possessing, dealing or handling, in any manner	Procured whilst providing 'services under the terms of lawful contract'
Offence	Negligence in implementing and maintaining 'reasonable security practices and procedures' thereby causing wrongful loss or wrongful gain	Disclosure of personal information to another person without the consent of the person concerned or in breach of lawful contract

Section 43-A and 72-A: Distinction

Particulars	Section 43 – A	Section 72 - A
Mens Rea (criminal intention or knowledge)	Not Applicable	Element of mens rea should be present
Type of Information	Restricted to information in a computer resource	Information may be in any form
Penalty	Damages	Imprisonment for a term which may extend to 3 years or fine which may extend to INR 0.5 Million or both

Data Privacy/Protection in M&A Transactions

Phase – I

Phase – II

Phase – III

Phase – IV

Phase – I

- Deal structuring
- Populating data room
- Due diligence

Due Diligence – Basic Queries

- Is company collecting any SPDI from anyone (e.g. employees, clients, customers, etc)
- Reasonable security practices and procedures adopted
- Audit details of reasonable security practices and procedures
- Copy of the privacy policy (along with web link)
- Sample consent letters (or email templates, etc) that is used
- Process of destroying the SPDI collected post the period of its intended use
- Details of the Grievance Officer (including relevant web link)

Phase – II

- Drafting of Transaction Documents
- Drafting of Ancillary Documents
- Negotiation and Signing

Phase – III

- Pre-closing integration
- Regulatory approvals
- Closing

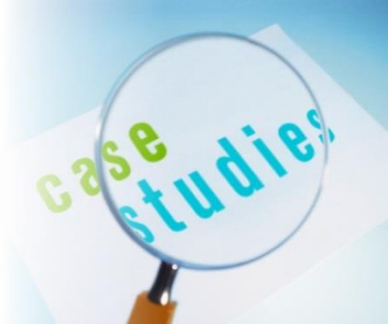
Phase – IV

- Post-closing transitional services
- Data usages / database integration
- Post-closing restructuring (if any)

Data Privacy/Protection in M&A Transactions | In a Nutshell

- Assess the sector carefully and structure
- Whether data room contains SPDI?
- Can we ring fence?
- Adequate Representations and Warranties
- Indemnities (specific indemnities, if required)
- Any employee / vendor / supplier consents?

Case Study 1 | Cartelization

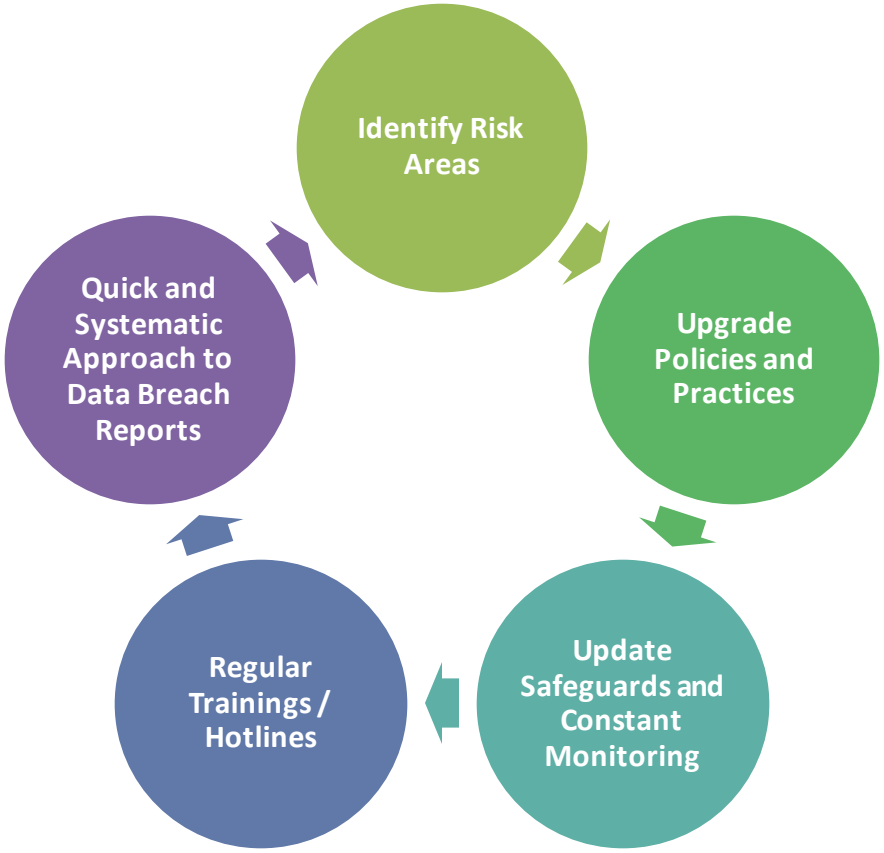


- India Co's German parent company received cartelization allegation through its electronic whistleblowing mechanism
- Employees of the India Co were allegedly involved in a cartel and their office equipment were sought to be scanned without their consent
- Employer's Code of Conduct / Email / Internet Usage policies reviewed
- Mechanism devised to review the data within India Co, ring fence SPDI, copy and transfer relevant information to Germany

Case Study 2 | Insurance Fraud

- Insurance company's customers received calls from people claiming to be from IRDA
- Callers had all details of customers, including SPDI
- Customers urged to change insurance companies
- Police / IRDA / other regulators approached
- KCO analyzed and advised on various aspects of this matter:
  - Criminal Law aspects
  - Breach of Data Privacy / Data Protection Laws
  - Breach of Insurance Laws
  - Liabilities under Consumer Protection Law
  - Others

Best Practices | In a Nutshell



Follow the 5 P's of Privacy

1. **P**rovider's agreement
2. **P**rivacy policy
3. **P**rocedures for information security
4. **P**ro-active monitoring
5. **P**urge the unnecessary

THANK YOU

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