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INDIA'S DIGITAL PERSONAL DATA PROTECTION ACT 2023 HIGHLIGHTS



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OVERVIEW OF DIGITAL PERSONAL DATA PROTECTION ACT 2023

- The Digital Personal Data Protection Act 2023 (**DPDP 23**) was passed by both the houses of the Parliament and received Presidential assent. It was published in the Official Gazette on 11 August 2023.
- Central Government will notify the dates on which various provisions of DPDP 23 will come into force.

TERRITORIAL AND EXTRA-TERRITORIAL APPLICABILITY

Personal data	Any data about an individual who is identifiable by or in relation to such data
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- DPDP 23 will apply to personal data collected within India in: (i) digital form; and (ii) non-digital form but digitized subsequently.
- It covers processing of personal data outside India, if such processing is in connection with an activity related to offering goods or services to data principals (akin to data subjects) within India.
- Does not apply to personal data made publicly available.

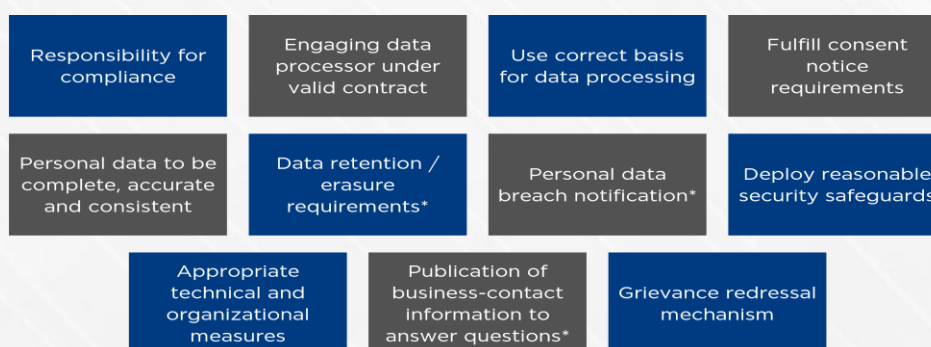
KEY EXEMPTIONS

- Exemptions from certain obligations for processing personal data in India of individuals outside India, pursuant to a contract between an Indian entity and a foreign entity (e.g., outsourcing).
- Based on volume and nature of personal data being processed, Central Government could also exempt certain data fiduciaries (akin to data controllers) from requirement of notice, etc.

NOTICE AND CONSENT FOR PROCESSING OF PERSONAL DATA

- Consent should be free, specific, informed, unconditional, unambiguous, and through a clear affirmative action indicating an agreement for processing for specified purposes.
- DPDP 23 provides for certain 'legitimate uses' other than consent – e.g., employment related purposes, compliance with judicial orders or legal obligations.

DATA FIDUCIARY'S OBLIGATIONS



*Central Government to notify rules

ADDITIONAL OBLIGATIONS FOR CHILDREN'S PERSONAL DATA

- 'Verifiable consent' from parents / lawful guardians is mandatory for personal data of children or persons with disability.
- Embargo on behavioral monitoring or targeted advertising or processing which is 'likely to cause any detrimental effect on the well-being of a child'.
- Central Government may notify a lower age of children (i.e., below 18 years) only for such processing by a data fiduciary which is done in a verifiably safe manner.

ADDITIONAL OBLIGATIONS FOR SIGNIFICANT DATA FIDUCIARIES

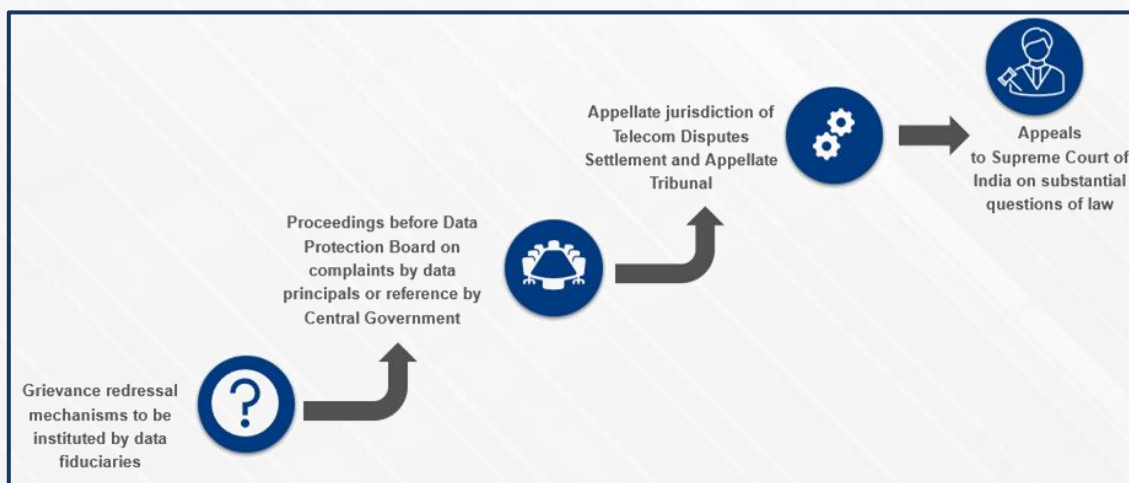
- Central Government to notify significant data fiduciaries (**SDF**) based on parameters such as volume and sensitivity of data handled.
- Additional obligations such as appointment of a data protection officer **residing in India**, appointment of an independent data auditor, undertaking of data protection impact assessments, etc.

CROSS-BORDER DATA TRANSFER

- Cross border transfer allowed to all jurisdictions by default.
- Central Government may, however, restrict transfer to certain notified countries/ territories outside India.
- Other stricter laws (such as sectoral regulations) relating to cross border transfer to prevail.

COMPLAINTS REDRESSAL, DISPUTE RESOLUTION AND ENFORCEMENT

- Establishment of a Data Protection Board of India (**DPBI**) having power to adjudicate complaints under DPDP 23 and impose penalties.



- DPBI can direct parties to resolve disputes through mediation.
- DPBI may accept voluntary undertakings to undertake or refrain from taking an action, during proceedings before it.

FINANCIAL PENALTIES

- Depending on the nature of breach, penalties ranging from a maximum of INR 50 crores (USD 6 million) to INR 250 crores (USD 30 million) can be imposed on a data fiduciary.

May extend to INR 250 crores (approx. USD 30 million)	Failure of data fiduciary to take reasonable security safeguards to prevent personal data breach
May extend to INR 200 crores (approx. USD 24 million)	Failure to notify Data Protection Board of India and affected data principals in case of personal data breach
May extend to INR 200 crores (approx. USD 24 million)	Non-fulfilment of additional obligations in relation to personal data of children
May extend to INR 150 crores (approx. USD 18 million)	Non-fulfilment of additional obligations by significant data fiduciaries
May extend to INR 10,000 (approx. USD 120)	Non-compliance with duties of data principals
May extend to INR 50 crores (approx. USD 6 million)	Residuary penalty

- For breach of voluntary undertaking, up to the extent applicable for breach.
- When an instance of contravention involves multiple breaches, cumulative penalty above INR 250 crores (USD 30 million) can be imposed.

DPDP 23 VS THE GDPR: KEY DEPARTURES

HOMOGENOUS CLASSIFICATION OF PERSONAL DATA

DPDP 23 applies to all categories of personal data in digital form and does not further classify it into special categories of personal data. On the other hand, the European Union (EU)'s General Data Protection Regulation (GDPR) classifies the personal data into special categories (e.g., personal data revealing racial or ethnic origin, political opinion, religious or philosophical beliefs, or trade union membership; genetic data; biometric data, etc.).

A DIFFERENT TAKE ON EXTRA-TERRITORIAL APPLICABILITY

As a deviation from the GDPR, the DPDP 23's extra-territorial applicability is limited to cases where a data fiduciary outside India processes personal data in connection with any activity of offering goods or services to data principals in India. GDPR also applies to data controllers established outside the EU where processing activities undertaken by them are related to the monitoring of the data subject's behavior within the EU.

CATEGORIZATION OF DATA FIDUCIARIES

In contrast to GDPR, the DPDP 23 classifies certain data fiduciaries (akin to the data controllers under the GDPR) as SDF. Such categorization may take place owing to the prescribed factors like volume and sensitivity of personal data processed, risks to the rights of data principals (akin to data subjects under GDPR), impact on national security, public order, etc. SDFs are required to undertake certain incremental obligations (e.g., appointment of Data Protection Officer, carry out Data Protection Impact Assessment and independent data audit, etc.).

NO DIRECT OBLIGATIONS FOR DATA PROCESSORS

The DPDP 23 primarily obligates the data fiduciary for compliances, including for processing undertaken by data processors. Data processors do not have any specific obligations. It largely boils down to the terms of the contract between the data fiduciary and data processor. However, the GDPR is directly applicable to data processors as well, and data processors have distinct obligations (e.g., conditions for engagement of sub-processors, maintaining records of processing activities, implementation of appropriate technical and organisational measures, etc.).

DISTINCT MANDATE REGARDING NOTICE

Contrary to the GDPR, the DPDP 23 stipulates that a notice is only necessary where the legal basis for processing personal data is consent. Additionally, there are requirements to provide the notice in local Indian languages, which can be up to 22 in number.

NON-AUTOMATED PROCESSING HAS BEEN EXCLUDED

When it comes to the definition of 'processing', the DPDP 23 only covers processing of personal data by partly or wholly automated means. In other words, non-automated methods have been excluded from its ambit. In contrast, GDPR does not draw such a distinction and covers non-automated, semi-automated and wholly automated means in the definition of 'processing'.

NUANCES REGARDING CHILDREN'S DATA

Under GDPR, individuals below the age of 16 years are considered as children (such age may be lowered by member states of the EU, provided it is not lowered below 13 years). A key distinction in this regard is the definition of a child which under the DPDP 23 is any individual who has not completed the age of 18 years. However, the DPDP 23 allows the government to, in case of verifiably safe data processing activities of data fiduciaries, lower the age of majority from 18 years. Such instances may become clearer in due course.

DELINEATING PERSONAL DATA BREACHES

While GDPR follows a risk-based approach for notifying authorities about personal data breaches, the DPDP 23 does not provide for any specific criterion or threshold for notifying personal data breaches to the Data Protection Board of India (Board) and the affected individual / data principal.











CROSS-BORDER TRANSFER OF PERSONAL DATA

In comparison to GDPR, the DPDP 23 *prima facie* prescribes a relatively simplified process for the cross-border transfer, where transfer will be enabled to all jurisdictions, unless specifically prohibited. However, specific conditions may be prescribed by the Government in due course.

CONSENT MANAGERS

The DPDP 23 has introduced the novel concept of 'consent managers'. There is no equivalent concept under GDPR. Consent managers will be persons registered with the Board and will act as a single point of contact to enable data principals to give, manage, review and withdraw their consent through an accessible, transparent and interoperable platform.

DPDP 23: IMMEDIATE NEXT STEPS FOR BUSINESSES

If already compliant with GDPR, identify the incremental steps	 1	 6	Formalize engagements with data processors through contracts
Catalogue types and sources of personal data processed by the entity	 2	 7	Revisit privacy notices/policies and language translation requirements
Assess grounds for processing personal data (i.e., consent or certain legitimate uses)	 3	 8	Recalibrate grievance redressal mechanism
Explore possibility of exemptions (e.g., for court approved mergers)	 4	 9	Map countries to which cross-border transfers of data take place
Implement technical and organizational measures, including preparation for personal data breach	 5	 10	Additional compliances for children's data (if applicable)

OUR VALUE PROPOSITION

TRAINING AND SENSITIZATION

- Presentation to the leadership / board members highlighting key aspects of DPDP 23.
- Training and sensitization sessions for key functions / mid-management.
- Elaborate masterclass with relevant stakeholders (e.g., legal / compliance / privacy teams) who will implement the programme.

GAP ANALYSIS

- Interviewing of relevant stakeholders to identify verticals / functions where personal data is involved.
- Customized questionnaires for the identified verticals / functions.
- Detailed report basis interviews / responses to questionnaires.

EFFECTING RECOMMENDATIONS

- Creating step plan in order to implement recommendations, spell out action items, identify relevant participants, etc.
- Assistance from a legal perspective, wherever required (e.g., drafting / reviewing of privacy notices, consent requests, agreements, etc.).
- Regular interactions with the implementation team and monitoring progress.

OUR CREDENTIALS

OUR CORE TEAM



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AWARDS AND RECOGNITIONS

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Supratim Chakraborty,
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ALB: Data Protection Law Firm of the Year

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**Data Protection Lawyer of the
Year 2023**
Harsh Walia



**Data Privacy &
Protection**
Supratim Chakraborty

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