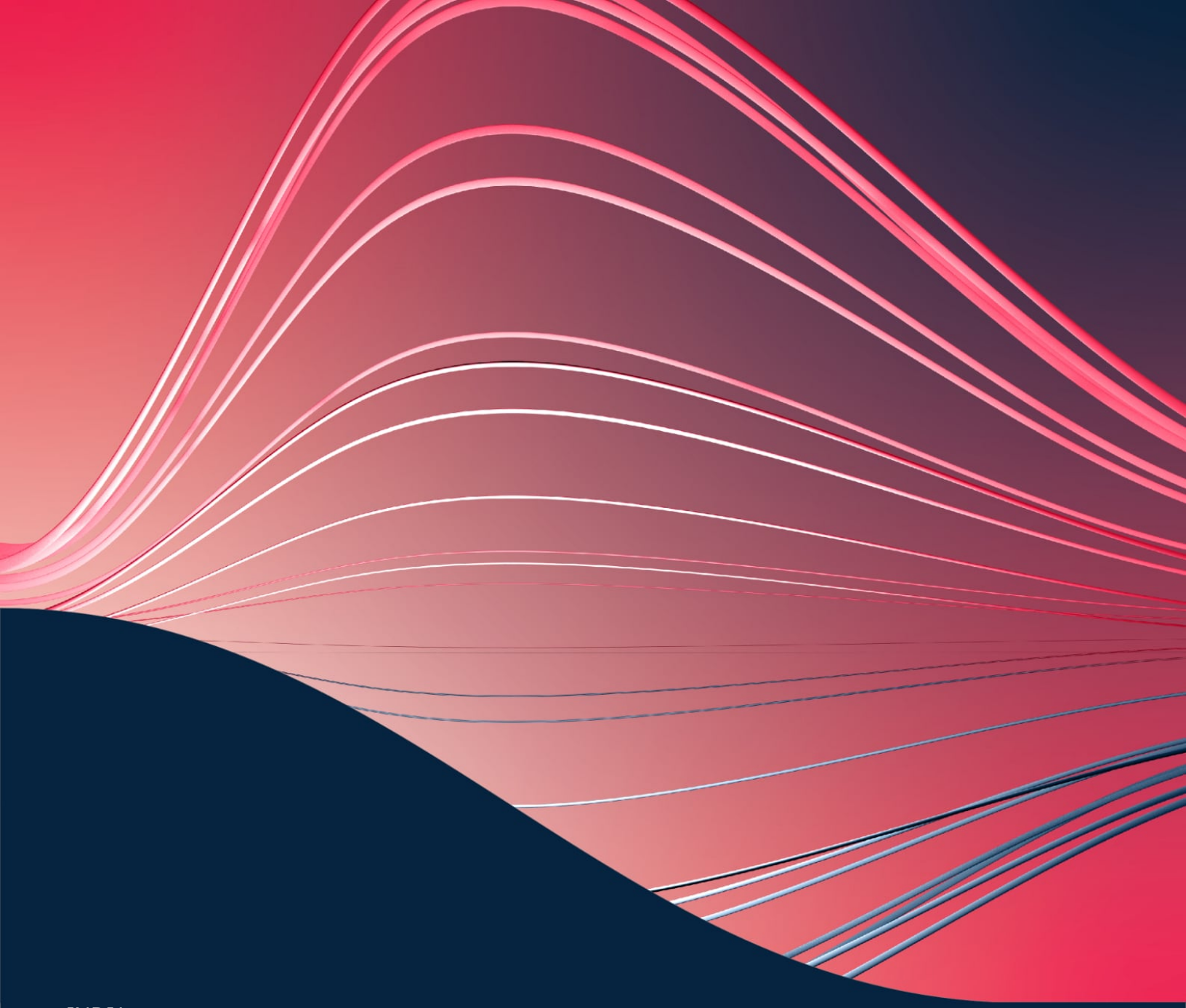

INDIA

Data Protection Laws of the World

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India

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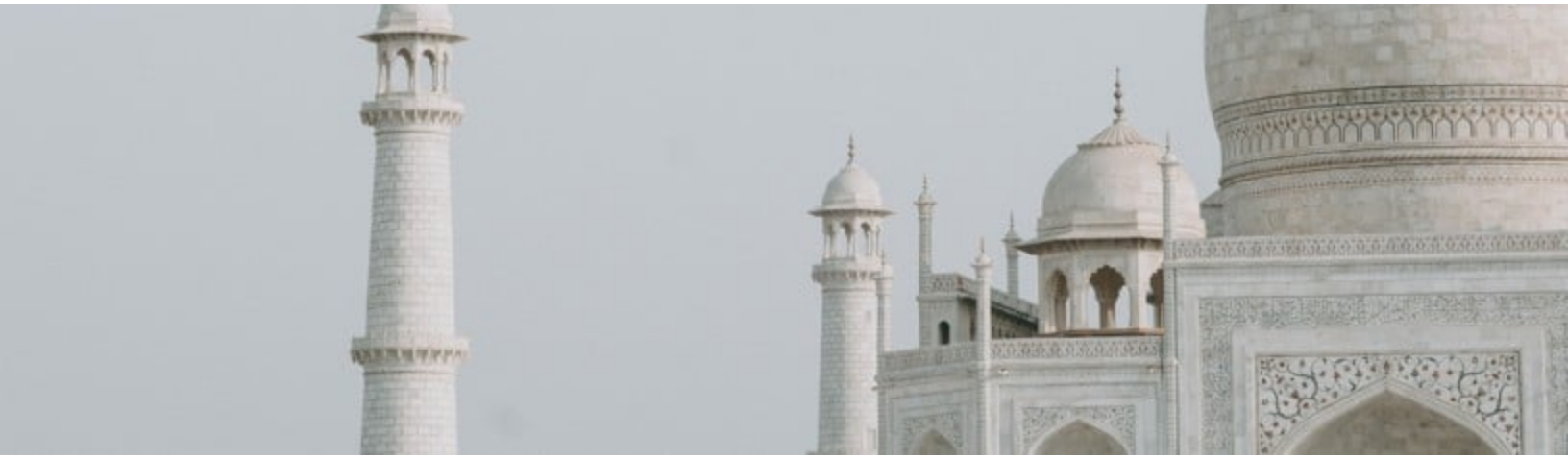

Data protection laws

Until 2023, India did not have a standalone law or framework to govern data protection. The Information Technology Act, 2000 (**IT Act**) and rules notified thereunder formed the basis around which the data protection framework revolved. This included the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 (**Privacy Rules**).

In 2017, a constitutional bench of nine judges of the Supreme Court of India in *Justice K. S. Puttaswamy (Retd.) v. Union of India* [Writ Petition No. 494/ 2012] upheld that privacy is a fundamental right, which is entrenched in Article 21 [Right to Life & Liberty] of the Constitution of India. This led to the process of formulation of a comprehensive data protection framework for India. After releasing different draft versions of a data protection legislation and considering the recommendations from different stakeholders, the Ministry of Electronics and Information Technology (**MeitY**), Government of India, released the draft of the Digital Personal Data Protection Bill in 2022 (**DPDP Bill**).

The version of the DPDP Bill which was eventually passed by both houses of the Indian Parliament marked a few significant changes to the original draft of the DPDP Bill. On August 11, 2023, the Government of India published that version as the Digital Personal Data Protection Act, 2023 (**DPDP Act**), which will form the personal data protection and regulatory regime in India. The DPDP Act introduces several compliances with respect to the collection, processing, storage and transfer of digital personal data. However, further actions on behalf of the Government are required to make the DPDP Act effective, including notifying the sections of the DPDP Act itself, repealing the Privacy Rules and notifying the rules and regulations required for effective implementation and enforcement of the DPDP Act. The DPDP Act is applicable only to personal data in digital form and does not regulate non-personal and non-digital data. Considering this, collection and handling of non-personal data is currently unregulated in India.

To clarify, the current privacy regime is contained within the IT Act and the Privacy Rules. While the Government of India (see below) has released a draft of the rules under the DPDP Act, the provisions of the Act itself have not yet come into force.

Rules

On January 3, 2025, MeitY released a draft of the Digital Personal Data Protection Rules, 2025 (**Draft Rules**), inviting comments from the public and stakeholders till February 18, 2025. The feedback received by the government will be taken into consideration after this date.

Rules related to the establishment and functioning of the Data Protection Board of India are likely to come into effect immediately upon the publication of the rules in the Official Gazette (after the DPDP Act is implemented). For the remaining rules, an extended period may be provided for entities to comply with after which these rules will come into effect. The timeline has not been specified in the Draft Rules.

Note

The DPDP Act has been drafted on the following principles:

- usage of personal data by an organization is to be done in a manner that is lawful, fair and transparent to the individuals concerned;
- usage of personal data is to be limited to the purpose for which it was collected;
- only those items of personal data that are required for attaining a specific purpose are to be collected;
- reasonable efforts should be made to ensure that the personal data of the individual is accurate and kept up to date;
- storage of data is required to be limited to such duration as is necessary for the stated purpose for which personal data was collected;
- reasonable safeguards are to be undertaken to ensure that there is no unauthorised collection or processing of personal data. This is intended to prevent personal data breach; and
- the person who decides the purpose and means of processing of personal data i.e. Data Fiduciary is accountable for such processing.

Scope and Applicability

The DPDP Act pertains to the processing of digital personal data within India, encompassing situations where the personal data is either (i) collected in a digital form or (ii) collected in a non-digitized form and subsequently converted into digital form. Consequently, the DPDP Act does not apply to the processing of personal data in its non-digitized state. The DPDP Act defines 'personal data' broadly to include any data about an individual who is identifiable by or in relation to such data. It also defines ' digital personal data' as personal data in digital form.

While the DPDP Act is applicable to Indian entities which engage in the processing of personal data, it also has extra-territorial applicability, applying to foreign entities who offer goods and services to Data Principals (as defined below) located within the territory of India and process personal data in connection to such activities. The DPDP Act does not apply to (i) personal data utilized by an individual for personal or domestic

purposes or (ii) personal data deliberately made publicly accessible by either the Data Principal to whom the personal data relates or any other individual or entity mandated by law to disclose personal data to the public.

Definitions

Definition of personal data

Under the DPDP Act, Personal Data refers to data about an individual who is identifiable either by such data or in relation to such data. This implies that anonymized data or non-personal data will not be covered by the DPDP Act.

The DPDP Act also defines 'Data Fiduciary', 'Data Processor' and 'Data Principal', among other concepts:

Definition of Data Fiduciary

Similar to 'Controller' as defined under the European Union's General Data Protection Regulation (**EU-GDPR**), the DPDP Act defines Data Fiduciary as an individual or entity that, either independently or in conjunction with others, determines the purpose and means of processing of personal data.

Definition of Data Processor

Data Processor is defined as any person who processes personal data on behalf of a Data Fiduciary.

Definition of Data Principal

Similar to 'Data Subject' under the EU-GDPR, the DPDP Act defines Data Principal as individual to whom the personal data relates. When dealing with personal data of a child under the age of eighteen years, the term Data Principal encompasses the child's parents or legal guardian. Likewise, for persons with disabilities, it includes their legal guardian, who acts on their behalf. The DPDP Act seeks to only protect personal data of natural persons and does not include data of companies.

Definition of Processing

The DPDP Act defines 'processing' to mean a "*wholly or partly automated operation or set of operations performed on digital personal data, and includes operations such as collection, recording, organisation, structuring, storage, adaptation, retrieval, use, alignment or combination, indexing, sharing, disclosure by transmission, dissemination or otherwise making available, restriction, erasure or destruction*." This definition closely aligns with the concept of 'processing' as defined under the EU-GDPR. Nevertheless, it is important to note that while the EU-GDPR's definition encompasses both automated and specific non-automated processes, the DPDP Act confines the scope of processing solely to 'automated' operations.

Data Protection Board of India

National data protection authority

The DPDP Act provides for the establishment of a Data Protection Board of India (Board), an independent body tasked with overseeing the implementation and enforcement of the DPDP Act. The Government of India is yet to establish the Board. The Board has been envisaged as an online complaint resolution mechanism, with all its proceedings being conducted online. Once established, the Board will conduct inquiries based on complaints, address personal data breaches, and issue directions and impose penalties for non-compliance. The Board is required to scrutinize the contravention, conduct an inquiry, and communicate its decision in writing. The Draft Rules prescribe that any inquiry of the Board is required to be completed within six months of the receipt of the complaint (which may be extended by up to three months at a time by recording reasons in writing).

An appeal against any order of the Board will lie with the Telecom Disputes Settlement and Appellate Tribunal (TDSAT). Other civil courts are restricted from entertaining any suit or proceeding in respect of any matter for which the Board is empowered under the DPDP Act. Thereafter, a final appeal may be made to the Supreme Court of India. Hence, a three-tier appeal mechanism has been established under this regime.

Registration

There is no registration requirement for Data Fiduciaries under the DPDP Act. However, Consent Managers are required to register themselves with the Board.

Consent Managers

The DPDP Act provides for Consent Managers registered with the Board and defines them as a single point of contact to enable a Data Principal to give, manage, review and withdraw their consent through an accessible, transparent and interoperable platform. A Data Principal may give, manage, review or withdraw their consent through a Consent Manager. Consent Managers are accountable to the Data Principal and act on behalf of the Data Principal in such manner and subject to obligations as may be prescribed. However, it is yet to be prescribed if all Data Fiduciaries are expected to integrate with the Consent Managers for seeking consent of the Data Principals and the way the Consent Manager is required to perform its functions. Additionally, the Board may impose penalties on Consent Managers, in respect of breach in observance of its obligations in relation to Data Principal's personal data, or breach of any condition of registration of the Consent Manager.

The Draft Rules contain conditions of registration that a Consent Manager must fulfil before it seeks registration with the Board as a Consent Manager and prescribes certain obligations for Consent Managers to fulfil on an ongoing basis.

Data protection officers

Under the DPDP Act, Data Fiduciaries are required to appoint a contact person to address any questions that a Data Principal may have about the processing of their personal data.

Significant Data Fiduciaries are required to appoint a Data Protection Officer for the same purpose. The Data Protection Officer is required to be based in India and will be responsible to the board of directors or any similar governing body of the Data

Fiduciary. The Data Protection Officer will also be the point of contact for a Data Principal for the purpose of grievance redressal under the DPDP Act.

Pursuant to the Draft Rules, every Data Fiduciary is required to publish on its website / app and in every response to a communication to a Data Principal for the exercise of their rights, the business contact information of the Data Protection Officer / the contact person to address any questions that the Data Principal may have, as the case may be.

Collection and processing

Legal Basis for Processing Personal Data

Under the DPDP Act, a Data Fiduciary can only process personal data for a lawful purpose and, barring limited exceptions as prescribed, is required to do so either on the basis of consent of a Data Principal or for certain 'legitimate uses.'

Consent and notice

The DPDP Act requires Data Fiduciaries to provide notice and obtain consent from Data Principals on or before processing personal data. At the time of collecting the consent, a notice is required to be given to the Data Principal, conveying the following information:

- the personal data intended for processing and the purpose for such processing;
- the manner in which Data Principals can exercise their rights under the DPDP Act;
- the manner for filing a complaint with the Board; and
- the contact details of the Data Protection Officer or any other person responsible for responding to a Data Principal's requests to exercise their rights under the DPDP Act.

Data Fiduciaries are required to give an option to Data Principals to access the request for consent and the notice in English or any of the twenty-two (22) languages specified in the Eighth Schedule to the Constitution of India. The Government of India will prescribe the manner and form of the notice in subsequent legislations.

Under the DPDP Act, Data Fiduciaries may process personal data based on consent from Data Principals which is required to be:

- free, specific, informed, unconditional, and unambiguous;
- provided through clear affirmative action; and
- limited to the personal data that is necessary for the specified purpose.

The Draft Rules require that the notice given by a Data Fiduciary to the Data Principal be:

- be presented and be understandable independently of any other information that has been, is or may be made available by such Data Fiduciary;

- give, in clear and plain language, a fair account of the details necessary to enable the Data Principal to give specific and informed consent for the processing of her personal data, which shall include, at the minimum:
  - an itemised description of such personal data; and
  - the specified purpose of, and an itemised description of the goods or services to be provided or uses to be enabled by, such processing;
- the particular communication link for accessing the website or app, or both, of such Data Fiduciary, and a description of other means, if any, using which such Data Principal may:
  - withdraw her consent, with the ease of doing so being comparable to that with which such consent was given;
  - exercise her rights under the DPDP Act; and
  - make a complaint to the Board.

Where a Data Principal has given consent to processing of their personal data prior to the commencement of the DPDP Act, the Data Fiduciary is required to provide notice containing the above details "as soon as it is reasonably practicable". The express timeline is yet to be prescribed.

Legitimate uses

The DPDP Act permits the processing of personal data for certain legitimate uses and in such cases, Data Fiduciaries are not required to provide prior or post-facto notice to or obtain consent from the Data Principals. The legitimate uses are as follows:

- where a Data Principal voluntarily provides their personal data to a Data Fiduciary and has not indicated to the Data Fiduciary that they do not consent to the use of their personal data;
- for the State or any of its instrumentalities to provide or issue benefits or services to Data Principals where:
  - the Data Principals have previously consented to the processing of their personal data for availing any benefits or services from the State or any of its instrumentalities; or
  - such personal data is available in digital form or in non-digital form and digitized subsequently from any database, register, book or other document maintained by the State or any of its instrumentalities;
- for the performance of any function by the State or any of its instrumentalities under any law currently in force in India or in the interest of sovereignty and integrity of India or security of the State;
- for compliance with any judgment or order issued under the law in force in India, or any judgement or order relating to contractual claims of a civil nature under any law in force outside India;
- responding to a medical emergency involving threat to life or immediate threat to health;

- for taking measures to ensure safety of, or provide assistance or services to, any individual during disaster, or any breakdown of public order; and
- for purposes relating to employment or those related to safeguarding the employer from loss or liability.

Retention of personal data

Data Fiduciaries are required to cease to retain personal data as soon as:

- it is reasonable to assume that the purpose for which personal data was collected is no longer being served;
- the Data Principal withdraws their consent; or
- upon a request for erasure by the Data Principal, unless retention of personal data is necessary under any other laws.

The Draft Rules prescribe specific data erasure requirements for certain classes of Data Fiduciaries: e-commerce entities or social media intermediaries having 2,000,000 registered users in India or more and online gaming intermediaries with 50,00,000 registered users in India or more.

Processing of personal data of certain classes of individuals

The DPDP Act imposes additional obligations and responsibilities on Data Fiduciaries when they are processing the personal data of children and individuals with guardians. Data Fiduciaries, before processing the personal data of children or persons with disabilities, are required to obtain verifiable consent from a parent or legal guardian, as may be applicable.

The DPDP Act explicitly defines a child as an individual below the age of eighteen years. The Draft Rules define a person with disability as an individual who (i) has long term physical, mental, intellectual or sensory impairment which, in interaction with barriers, hinders their full and effective participation in society equally with others and who, despite being provided adequate and appropriate support, is unable to take legally binding decisions; and (ii) an individual who is suffering from any of the conditions relating to autism, cerebral palsy, mental retardation or a combination of any two or more of such conditions and includes an individual suffering from severe multiple disability.

Specifically for children's data, a Data Fiduciary is required to refrain from:

- undertaking any processing that is likely to have a detrimental effect on the well-being of a child; and
- tracking, monitoring the behaviour of, or directing targeted advertisements at children.

Under the Draft Rules, Data Fiduciaries in obtaining verifiable consent of a parent or from an individual identifying themselves as the lawful guardian of a person with disability are required to verify that the person is the child's parent or person with

disability's legal guardian, and that the parent or guardian is identifiable. For a child, the Data Fiduciary must verify that the parent is an adult by using reliable identity details or a virtual token mapped to such details.

These obligations related to children's data may be exempted by the Government under certain circumstances for prescribed purposes, class of Data Fiduciaries and for certain prescribed ages (further detailed in the section on Exemptions).

The Draft Rules prescribe that the obligation to obtain verifiable consent of a parent or guardian and to not undertake tracking or behavioural monitoring or targeted advertising at children does not apply to the processing of the data of a child by (for certain prescribed purposes) clinical establishments, mental health establishments, healthcare professionals, allied healthcare professionals, educational institutions, an individual in whose case infants and children in a creche or child day care centres are entrusted and persons engaged by an educational institution, crèche or child care centre for transport of children enrolled with such institution, crèche or centre and generally, to all Data Fiduciaries where the purposes of processing is for inter alia, creating a user account for communicating by email, for ensuring information likely to cause any detrimental effect on the well being of a child is not accessible to them, for confirmation that the Data Principal is not a child, etc.

With respect to the processing of an employee's personal data, the DPDP Act considers it as a legitimate use wherein an employer will not have to obtain express consent in order to process personal data as long as the processing is carried out for employment purposes, or to protect employers from loss or liability, or to provide a benefit to an employee.

Obligations of Data Fiduciaries

The DPDP Act prescribes certain obligations on Data Fiduciaries in collecting and processing personal data:

- complying with the DPDP Act in respect of any processing undertaken by a Data Fiduciary or on their behalf by a Data Processor, irrespective of any agreement to the contrary or failure of the Data Principal to carry out their duties provided under the DPDP Act;
- engaging a Data Processor to process personal data on its behalf only under a valid contract;
- implementing appropriate technical and organizational measures to ensure effective adherence with the provisions of the DPDP Act and any rules which may be notified;
- ensuring accuracy, completeness and consistency of the personal data when such personal data is processed to make a decision that affects the Data Principal or if the personal data is likely to be disclosed to another Data Fiduciary;
- protecting all personal data in its possession or under its control by taking reasonable security safeguards to prevent personal data breach;
- in the event of a personal data breach, notifying the Board and each affected Data Principal;

- publishing the business contact information of the Data Protection Officer in the case of Significant Data Fiduciary, or the contact person who is able to answer Data Principals' questions regarding processing of their personal data;
- subject to compliance with other laws, deleting personal data by itself and ensuring such deletion by the Data Processor (if applicable), either when the Data Principal withdraws their consent or when it is reasonably assumed that the specified purpose is no longer being served, whichever is earlier; and
- establishing an effective grievance redressal mechanism to redress Data Principals' grievances.

Obligations of Significant Data Fiduciaries

The Government of India may classify a Data Fiduciary, or a class of Data Fiduciaries as a Significant Data Fiduciary (SDF) based on certain factors like the volume and sensitivity of personal data processed, the risk posed to the rights of a Data Principal, the potential impact on the sovereignty and integrity of India, the risk to electoral democracy, security of the State, and public order. Upon being notified as an SDF, entities are required to follow additional obligations:

- to designate a Data Protection Officer situated in India to serve as the SDF's representative for compliance with the DPDP Act and the primary point of contact for addressing grievances. The appointed person should be an individual responsible to the board of directors or a similar governing body of the SDFs.
- to appoint an independent data auditor to assess the SDF's compliance with the DPDP Act. The subordinate legislations under the DPDP Act will specify the periodicity for conducting such audits, and the technical and operational qualifying criteria for auditors.
- to undertake Data Protection Impact Assessments, periodic audits, and other measures that will be prescribed by the Government of India.

The Draft Rules further require SDFs to (once, in a period of 12 months from the date of being notified as an SDF), undertake a Data Protection Impact Assessment and an audit to ensure it is observing the provisions of the DPDP Act. The person carrying out the Data Protection Impact Assessment and the audit is required, under the Draft Rules, to furnish a report to the Board containing significant observations in the Data Protection Impact Assessment and the audit.

In addition, the Draft Rules require that SDFs:

- observe due diligence in verifying that the algorithmic software deployed by it for hosting, displaying, uploading modification, publishing, transmission, storage, updating or sharing of personal data processed by it are not likely to pose a risk to the rights of Data Principals.
- undertake measures to ensure that personal data specified by the Central Government is processed in a manner such that the personal data and the traffic data pertaining to its flow is not transferred outside India.

Rights and Duties of Data Principals

Under the DPDP Act, Data Principals have been given certain rights which include:

- Right to access information about personal data: A Data Principal has the right to request a Data Fiduciary for a summary of their personal data being processed and the processing activities being undertaken by the Data Fiduciary. A Data Principal also has the right to request the Data Fiduciary for the identities of other Data Fiduciaries and Data Processors with whom their personal data is being shared and a description of the personal data being shared. The Government of India may prescribe any other information which a Data Principal has the right to request from a Data Fiduciary in subsequent legislations.
- Right to correction of personal data: A Data Principal has the right to request for correction of personal data that may be inaccurate or misleading, completion of personal data that is incomplete and updating of their personal data.
- Right to erasure: A Data Principal has the right to request for erasure of their personal data, the processing of which was previously consented to, unless retention is necessary for compliance with any laws.
- Right to withdraw consent: A Data Principal has the right to withdraw consent from processing of their personal data at any time after they have provided their consent to a Data Fiduciary.
- Right of grievance redressal: A Data Principal has the right to grievance redressal provided by a Data Fiduciary or a Consent Manager, which is exercisable in respect to a Data Fiduciary's obligations and a Data Principal's rights under the DPDP Act. The time period within which a Data Fiduciary or Consent Manager is required to respond to the grievances will be prescribed in subsequent legislations.
- Right to nominate: A Data Principal has the right to nominate any other individual to exercise the rights of a Data Principal on their behalf, in the event of their death or incapacity.

The right to access information, correction and erasure will apply only in cases where the Data Principal has given consent or voluntarily provided their personal data to a Data Fiduciary for processing. These rights will not be available where personal data is being processed under the grounds of legitimate use. The manner in which these rights are to be exercised by a Data Principal will be prescribed by the Government of India.

The Draft Rules require Data Fiduciaries and Consent Managers to publish on their websites / apps the following:

- the details of the means using which a Data Principal may make a request for the exercise of their rights;
- the particulars, if any, such as the username or other identifier of such a Data Principal, which may be required to identify her under its terms of service; and
- the period under its grievance redressal system for responding to the grievances of Data Principals.

Under the DPDP Act, certain duties have also been assigned to Data Principals, which include:

- complying with all applicable laws while exercising their rights under the DPDP Act;

- prohibition of impersonation of others while providing their personal data for a specified purpose;
- not suppressing any material information while providing their personal data for any document, unique identifier, proof of identity or proof of address issued by the State or any of its instrumentalities;
- not registering false or frivolous grievances or complaints with a Data Fiduciary or the Board; and
- furnishing information that is verifiably authentic while exercising the right to correction or erasure.

Transfer

Under the DPDP Act, transfer of personal data for the purpose of processing is permitted to any country or territory outside India, except to countries which have been specifically blacklisted by the Government of India. The list of countries to which cross-border data transfers are not permitted will be notified by the Government of India. Further, Data Fiduciaries may transfer personal data to another Data Fiduciary or Data Processor only under a valid contract.

The Draft Rules state that the transfer of personal data by a Date Fiduciary (whether within or outside India) may be subject to restrictions or requirements that the Central Government may specify in respect of making such data available to a foreign State.

While the DPDP Act does not provide any guidelines or requirements with respect to the contract regulating the data transfer, such data transfer agreements may contain adequate indemnity provisions for a third-party breach and may specify a mode of transfer that is adequately secured and safe. Additionally, the DPDP Act provides for certain indirect obligations on Data Processors which may be incorporated in the data transfer agreements. These include:

- implementing reasonable security safeguards to prevent personal data breach;
- reporting of personal data breaches to the Data Fiduciary;
- erasing personal data upon receiving a communication to that effect by the Data Fiduciary; and
- restricting transfer of personal data to countries which have been blacklisted by the Government of India.

Data Localisation

While the DPDP Act itself does not provide for data localisation requirements, it recognizes that other sector-specific statutes and regulations may have restrictions on storing certain classes of data, which may include personal data.

As an aside, the Draft Rules do require Significant Data Fiduciaries to undertake measures to ensure that personal data specified by the Central Government is processed in a manner such that the personal data and the traffic data pertaining to its flow is not transferred outside India. However there is no clarity on what types of personal data will be required to be localised yet.

India's central bank, the Reserve Bank of India (**RBI**) has made it mandatory from October 15, 2018, for all payment system providers and their service providers, intermediaries, third party vendors and other entities in the payment ecosystem to ensure that all data relating to payment systems operated by them are stored in a system only in India. Interestingly, by virtue of this regulation, RBI is seeking storage of all payment system data in India, which includes the entire payment processing cycle from request to final payout, such as customer data (name, mobile number, Aadhaar number, PAN number, etc.), payment sensitive data (customer and beneficiary account details), payment credentials (OTP, PIN, passwords, etc.), and transaction data (originating and destination information, transaction reference, timestamp, amount, etc.). However, for cross border transactions which consist of both foreign and domestic components, data pertaining to the foreign leg may be stored outside India. While data pertaining to the domestic leg should be stored in India, a copy may be stored abroad.

The Securities Exchange Board of India (**SEBI**) has issued an advisory for financial sector organizations such as merchant bankers, credit rating agencies, STP service providers, debenture trustee, depositary participants and other financial institutions which are availing the Software as a Service (SaaS) based solution for managing their governance, risk and compliance functions. This advisory also lists certain critical data sets such as credit and liquidity risk data, market risk data, system and sub-system information, supplier information, system configuration data, audit / internal audit data, network topography and design, which must be stored in India. More recently, the SEBI has issued a Framework for Adoption of Cloud Services by regulated entities. If the regulated entities are engaging cloud service providers to conduct their business functions and any data pertaining to the regulated entities is on the cloud in any form, it is required to be stored within the legal boundaries of India. However, if the regulated entity has a foreign parent entity, the original data is required to be available and readily accessible in India. This implies that a copy of such data which is on the cloud may be stored abroad.

Separately, the Insurance Regulatory and Department Authority of India (Maintenance of Insurance Records) Regulations, 2015, require insurance providers to store data related to policies and claim records of insurers on systems in India (even if this data is held in an electronic form).

Additionally, while Section 128 of the Companies Act, 2013, requires every company to prepare and store, at its registered office, books of account, other relevant books and papers and financial statements for every financial year, on August 5, 2022, the Ministry of Corporate Affairs amended this rule whereby all such relevant books and papers maintained in an electronic mode are required to remain accessible in India, at all times.

Further, the Indian Computer Emergency Response Team (**Cert-In**), issued directions on information security practices, procedure, prevention, response and reporting of cyber incidents (Cyber Security Directions) dated April 28, 2022 (in force since June 28, 2022), and the frequently asked questions released on the Cyber Security Directions, require service providers offering services to users in the country to enable and maintain logs and records of financial transactions within India.

Security

Under the DPDP Act, Data Fiduciaries are required to protect the personal data under their control, with respect to any processing undertaken by them or on their behalf by a Data Processor, by taking reasonable security safeguards to prevent any kind of personal data breach. Notably, the highest quantum of financial penalty prescribed under the DPDP Act, being INR 250 Crores, is for failure on the part of a Data Fiduciary to take reasonable security safeguards to prevent personal data breach.

The Draft Rules prescribe the minimum standards that the Data Fiduciary is required to adhere to:

- appropriate data security measures, including securing of such personal data through its encryption, obfuscation or masking or the use of virtual tokens mapped to that personal data;
- appropriate measures to control access to the computer resources used by such Data Fiduciary or the relevant Data Processor;
- visibility on the accessing of such personal data, through appropriate logs, monitoring and review, for enabling detection of unauthorised access, its investigation and remediation to prevent recurrence;
- reasonable measures for continued processing in the event of confidentiality, integrity or availability of such personal data being compromised as a result of destruction or loss of access to personal data or otherwise, including by way of data- backups;
- for enabling the detection of unauthorised access, its investigation, remediation to prevent recurrence and continued processing in the event of such a compromise, retain such logs and personal data for a period of one year, unless compliance with any law for the time being in force requires otherwise;
- appropriate provision in the contract entered into between such Data Fiduciary and such a Data Processor for taking reasonable security safeguards; and
- appropriate technical and organisational measures to ensure effective observance of security safeguards.

Data Protection Impact Assessment

Under the DPDP Act, Significant Data Fiduciaries are required to appoint an independent data auditor who will undertake periodic Data Protection Impact Assessments, which has been described as a process comprising a description of the rights of Data Principals and the purpose of processing their personal data. It also includes an assessment and management of the risks to the rights of Data Principals.

Breach notification

Under the DPDP Act, in the event of a personal data breach, a Data Fiduciary is required to inform each affected Data Principal and the Board. The Draft Rules prescribe the manner in which the notification is required to be made (including the time period and the details required to be contained).

Personal data breach is broadly defined under DPDP Act as any unauthorized processing of personal data or accidental disclosure, acquisition, sharing, use,

alteration, destruction of or loss of access to personal data, that compromises the confidentiality, integrity, or availability of personal data.

Therefore, Data Fiduciaries are required to report all types of personal data breaches, regardless of the sensitivity of the breach or its impact on the Data Principal. Under the DPDP Act, neither materiality thresholds nor express timelines have been prescribed for the reporting requirement.

The DPDP Act is not the sole regulation imposing reporting requirement for data breaches. The existing cybersecurity framework also mandates reporting of cybersecurity incidents, which may include personal data breaches, to the Cert-In. In the absence of any conflicting information, both sets of regulations will be applicable.

The Government of India has established and authorized the Cert-In to collect, analyze and disseminate information on cyber incidents, provide forecasts and alerts of cybersecurity incidents, provide emergency measures for handling cybersecurity incidents and coordinate cyber incident response activities. The Information Technology (the Indian Computer Emergency Response Team and Manner of Performing Functions and Duties) Rules, 2013 (Cert-In Rules) along with the Cyber Security Directions impose mandatory notification requirements on service providers, intermediaries, data centers and corporate entities, upon the occurrence of certain cybersecurity incidents.

Cyber security incidents have been defined to mean any real or suspected adverse events, in relation to cybersecurity, that violate any explicitly or implicitly applicable security policy, resulting in:

- unauthorized access, denial or disruption of service;
- unauthorized use of a computer resource for processing or storage of information;
- changes to data or information without authorization.

Under the Cyber Security Directions, the occurrence of the following types of cybersecurity incidents are to be reported:

- targeted scanning / probing of critical networks / systems;
- compromise of critical systems / information;
- unauthorized access of IT systems / data;
- defacement of website or intrusion into a website and unauthorized changes such as inserting malicious code, links to external websites, etc;
- malicious code attacks such as spreading virus / worm / trojan / bots / spyware / ransomware / cryptominers;
- attack on servers such as databased, Mail and DNS and network devices such as routers;
- identity theft, spoofing and phishing attacks;
- denial of service and distributed denial of service attacks;

- attacks on critical infrastructure, SCADA and operation technology systems and wireless networks;
- attacks on applications such as e-governance, e-commerce, etc;
- data breach;
- data leak;
- attacks on internet of things devices and associated systems, networks, software and servers;
- attacks or incident affects digital payment systems;
- attacks through malicious mobile applications;
- fake mobile applications;
- unauthorized access to social media accounts;
- attacks or malicious / suspicious activities affecting cloud computing systems / servers / software / applications;
- attacks or malicious / suspicious activities affecting systems / servers / networks / software / applications related to Big Data, block chain, virtual assets, virtual asset exchanges, custodian wallets, robotics, 3D and 4D printing, additive manufacturing, drones;
- attacks or malicious / suspicious activities affecting systems / servers / software / applications related to artificial intelligence and machine learning.

These incidents can be reported to Cert-In via (i) email (incident@cert-in.org.in), (ii) phone (1800-11-4949), or (iii) fax (1800-11-6969). The reporting methods and formats are available at www.cert-in.org.in and will be updated from time to time. The compliance obligations under the Cyber Security Directions extend to all entities which have computer systems, networks and / or resources in India, irrespective of whether the entity is incorporated in or outside India.

Data Fiduciaries may review their data breach reporting protocols and assess each incident in accordance with the guidelines outlined in the DPDP Act and the Cert-In Rules to ascertain whether it necessitates reporting under either or both regulatory frameworks.

Enforcement

Under the IT Act, civil penalties are prescribed. If an entity that possesses, manages or handles any sensitive personal information in a computer resource that it owns, controls or operates, is negligent in implementing and maintaining reasonable security practices and procedures, and its negligence causes wrongful loss or wrongful gain to any person, the entity was liable for damages to the affected person(s). In the event of unlawful disclosure of personal information, the IT Act prescribes civil penalties which may extend up to INR 2,500,000 or approximately €27,455 (as at January 6, 2025).

Separately, the Cyber Security Directions have introduced penalty of a term of imprisonment extendable to 1 year or a fine up to INR 10,000,000 or approximately € 109,822 (as at January 6, 2025), or both, for failure to provide information to Cert-In or non-compliance with the Cyber Security Directions.

Under the DPDP Act, civil monetary penalties on Data Fiduciaries ranging from INR 50,000,000 or approximately €5,498,135 to INR 2,500,000,000 or approximately € 27,490,675 (as at January 6, 2025) have been prescribed for different contraventions. The DPDP Act also provides for a penalty of up to INR 10,000 or approximately €110 (as at January 6, 2025) for the contravention of duties by a Data Principal. The quantum of monetary penalty will be determined by the Board, taking into consideration the following factors:

- the nature, gravity, and duration of the breach;
- the type and nature of the personal data affected by the breach;
- repetitive nature of the breach;
- whether the person, as a result of the breach, has realised a gain or avoided any loss;
- whether the person took any action to mitigate the effects and consequences of the breach, and the timeliness and effectiveness of such action;
- whether the financial penalty to be imposed is proportionate and effective, having regard to the need to secure observance of and deter breach of the provisions of this Act; and
- the likely impact of the imposition of the financial penalty on the person.

The Government of India may amend the penalties that have been prescribed under the DPDP Act by issuing a notification in the future. However, the penalties cannot be modified to exceed double of the amount that has been specified under the DPDP Act currently. Therefore, financial penalty may not be more than INR 500 Crores even after amendment by the Government of India.

Exemptions

The DPDP Act provides for exemptions from the application of certain provisions, which are available to Data Fiduciaries in certain circumstances:

a. Exemptions for certain Data Fiduciaries or class of Data Fiduciaries, including startups: The Government of India will issue a notification exempting certain Data Fiduciaries or class of Data Fiduciaries, including startups, from certain provisions of the DPDP Act. This notification will be based on the volume and nature of personal data processed. Such Data Fiduciaries will not be required to comply with the following obligations:
   - issuing a notice before seeking consent of a Data Principal;
   - ensuring the accuracy and completeness of personal data;
   - erasing personal data after the purpose for which it was collected is served;

- obtaining verifiable parental consent before processing children's data and no behavioural tracking of children or targeted advertising directed at children;
- the obligations applying to SDFs; and
- providing a Data Principal with the right to information about their personal data.

b. Exemptions where personal data is processed for certain specified uses: The DPDP Act exempts entities from complying with the provisions pertaining to obligations of Data Fiduciaries, rights and duties of Data Principals and transfer of personal data outside India in cases where:
   - the processing of personal data is necessary for enforcement of any legal right or claim;
   - the processing of personal data is necessary to perform judicial or quasi-judicial, regulatory or supervisory functions by a court, tribunal or any other such body entrusted by the law to perform such functions;
   - the processing of personal data is necessary in the interest of prevention, investigation or prosecution for offences or contraventions of any law;
   - personal data of Data Principals who are not within the territory of India is processed by any person based in India, pursuant to a contract with any person outside the territory of India;
   - the processing of personal data is necessary for carrying out mergers, acquisitions and other such transactions between two or more companies which have been approved by a court, tribunal or any other competent authority; or
   - the processing of personal data is done in relation to debt-recovery activities.

c. Exemptions for research and statistical purposes: The DPDP Act will not apply to the processing of personal data which is necessary to carry out research, archiving or statistical activities, provided that the personal data is not being used to take any decision specific to a Data Principal. The Government of India will prescribe the standards in accordance with which such processing is to be carried out. The Draft Rules contain these standards
d. Exemptions for the Government of India: The DPDP Act will not apply to certain instrumentalities of the Government of India in the interest of sovereignty and integrity of India, security, friendly relations with foreign countries and maintenance of public order. The Government of India will notify the instrumentalities to which this exemption is available.

The Government of India may notify additional exemptions from the provisions of the DPDP Act for any Data Fiduciary or class of Data Fiduciaries in the five years following the implementation of the Act.

Electronic marketing

Under the DPDP Act, Data Principals have the right to withdraw their consent and restrict their personal data from being processed by an entity for specified purposes such as email marketing. Furthermore, Data Fiduciaries are required to refrain from

engaging in tracking or behavioral monitoring of children, as well as from conducting targeted advertising aimed at children.

However, in a related development, the Food Safety and Standards Authority of India (FSSAI) has made it mandatory for E-commerce FBOs (Food Business Operators) to obtain a license from the Central Licensing Authority. E-commerce FBO means any Food Business Operator carrying out any of the activities under section 3(n) of Food Safety & Standards Act, 2006, through the medium of e-commerce. Interestingly, section 3(n) covers the entire food chain as it defines "food business" as any undertaking, whether for-profit or not, and whether public or private, carrying out any of the activities related to any stage of manufacture, processing, packaging, storage, transportation, distribution of food, import and includes food services, catering services, sale of food or food ingredients. Similarly, another set of legal Rules being referred as "E-commerce & the Legal Metrology (Packaged Commodities) Amendment Rules, 2017," effective from January 1, 2018, has made it mandatory for e-commerce entities to ensure mandatory declarations about the commodity displayed on the digital and electronic network used for e-commerce transactions.

The consumer protection regime in India was recently overhauled by way of enactment of the Consumer Protection Act, 2019 (notified in July 2020) (**CPA 2019**). Under CPA 2019, sellers and service providers have the obligation to, among others, not engage in unfair trade practices including by way of misleading advertisements. Further, Consumer Protection (E-Commerce) Rules, 2020 (**E-Commerce Rules**) have been notified under the CPA to regulate e-commerce entities in India. An 'e-commerce entity' has been defined to mean any person who owns, operates, or manages digital or electronic facility or platform for electronic commerce, but does not include a seller offering his goods or services for sale on a marketplace e-commerce entity. E-commerce entities are required to set up a proper grievance redressal mechanism and consumer complaints should be acknowledged by the grievance officer within a stipulated timeline. E-commerce entities are further required to, among others, provide information in relation to refund, exchange, warranty, delivery, mode of payment, fees and charges, grievance process and other relevant information on their platform. The price (total and a break-up) of goods or services should be mentioned clearly and misleading advertisements and misrepresentations are prohibited.

In June 2022, the Central Consumer Protection Authority (**CCPA**), issued Guidelines on Prevention of Misleading Advertisements and Endorsements for Misleading Advertisements, 2022 (**the Guidelines**). The Guidelines lay down the conditions for non-misleading and valid advertisements and conditions for bait advertisements. The Guidelines prohibit surrogate advertising, and also lay down conditions for advertisements targeted at children. Moreover, the Guidelines lay down the duties of manufacturers, service providers, advertisers, and advertising agencies.

In November 2023, the CCPA further issued Guidelines for Prevention and Regulation of Dark Patterns, 2023 (**Dark Pattern Guidelines**) to restrict the use of dark patterns or manipulative practices by online platforms in designing their user interface and user experience that impair user autonomy, influence decision making, and work to the detriment of users. The Dark Pattern Guidelines apply to sellers, advertisers, and all platforms that systematically offer goods and services in India. The Dark Pattern Guidelines list certain specified dark patterns that are prohibited, including practices such as false urgency, subscription trap or confirm shaming.

Further, the National Do Not Call (**NDNC**) Registry is effectively implemented by the Telecom Regulatory Authority of India (**TRAI**). TRAI has also established the Telecom Commercial Communication Customer Preference Portal, i.e. a national data base containing a list of the telephone numbers of all subscribers who have registered their preferences regarding the receipt of commercial communications. Telemarketing companies may lose their license for repeated violation of DNC norms.

Online privacy

There is no regulation of cookies, behavioural advertising, or location data. However, this may include personal data and it is advisable to obtain user consent, such as by using appropriate disclaimers.

The IT Act contains both civil and a criminal penalties and offences for a variety of computer crimes. Under the IT Act, if any person introduces or causes to be introduced, any computer contaminant (like viruses etc.), into any computer, computer system or computer network, they may be liable to pay damages to the affected person (s). Under the IT Act, 'computer contaminant' is defined as any set of computer instructions that are designed:

- to modify, destroy, record, or transmit data or programs residing within a computer, computer system or computer network, or
- by any means to usurp the normal operation of the computer, computer system or computer network.

Further, under the IT Act, any person, who fraudulently or dishonestly makes use of the electronic signature, password or any other unique identification feature of any other person, may be subject to a prison term of up to three years and a fine up to INR 100,000 or approximately €1,098 (as at January 6, 2025).

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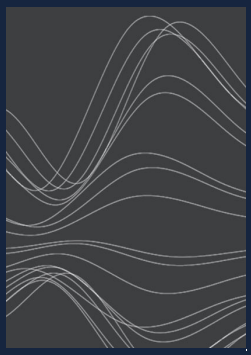

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