

## THE NEW DATA PROTECTION REGIME IN INDIA VS THE GDPR: KEY DEPARTURES

### HOMOGENOUS CLASSIFICATION OF PERSONAL DATA

The Digital Personal Data Protection Act, 2023 (DPDP Act) 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 Act'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 Act classifies certain data fiduciaries (akin to the data controllers under the GDPR) as 'significant data fiduciaries' ('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 Act 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 Act 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 Act 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 Act is any individual who has not completed the age of 18 years. However, the DPDP Act 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 Act 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 Act *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 Act 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.

This document provides some basic information pertaining to the issues and should not be construed as a legal opinion or legal advice. It may neither be relied upon by any person for any purpose, nor is it to be quoted or referred to in any public document or shown to, or filed with any government authority, agency or other official body.



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