



The Digital Personal Data Protection Bill, 2023

Background

- As of 9 August 2023, the Digital Personal Data Protection Bill, 2023 (“**DPDP Bill 2023**”), as introduced by Shri Ashwini Vaishnaw, Minister of Railways, Communications, and Electronics and Information Technology, was enacted by both Houses of the Parliament, i.e., the Lok Sabha and Rajya Sabha. The DPDP Bill 2023 will now be sent to the President of India for her assent, upon which it will become the ‘Digital Personal Data Protection Act, 2023’ by publication in the Official Gazette.
- The DPDP Bill 2023 seeks to replace the existing data protection regime in India, i.e., Section 43A of the Information Technology Act, 2000 read with the rules issued thereunder. The DPDP Bill 2023 does not contain specific transitional provisions, such as timelines for issuance of rules and notifications. Instead, the Central Government has the power to bring into force different provisions on different dates.

Key Highlights of the DPDP Bill 2023

Scope of the DPDP Bill 2023

- The DPDP Bill 2023 focuses on governing personal data (“**PD**”) without creating tiered categories of PD (such as sensitive PD or critical PD). ‘PD’ refers to data about an individual – being a data principal – who is identifiable by or in relation to such data. If PD relates to a child, the data principal would be their parent or lawful guardian, and if it relates to a person with disability, the data principal would be their lawful guardian – *a criterion which was not present in the Digital Personal Data Protection Bill, 2022 (“DPDP Bill 2022”)*. Notably, the DPDP Bill 2023 does not regulate non-personal data.
- The DPDP Bill 2023 applies to the processing of digital PD (defined as PD in digital form). Specifically, the DPDP Bill 2023 will govern certain processing activities that take place within India. It will also govern extra-territorial processing of digital PD, if such processing is in connection with any activity of offering goods or services to data principals within India.
- The DPDP Bill 2023 will not apply when PD is made or caused to be made publicly available either by the data principal themselves, or by any other person who does so on account of

a legal obligation – *a criterion which was not present in the DPDP Bill 2022.*

Cross-Border Data Transfers

- The Central Government can, by notification, restrict the transfer of PD by a data fiduciary to any country or territory outside India. *This ‘blacklist’ approach is a significant departure from the DPDP Bill 2022 where transfer was permitted only to countries notified by the Central Government.*
- Notably, the DPDP Bill 2023 also clarifies that if any other existing Indian law provides for a higher degree of regulation vis-à-vis transfer of PD outside India, then such other law will continue to apply. This clarification is likely to accommodate existing sectoral laws containing cross-border data transfer restrictions, such as the Reserve Bank of India’s data localisation mandate.

Consent and Notice Requirements

- Consent continues to be the primary ground for processing of PD. The DPDP Bill 2023 specifies a high standard for consent. That is, consent should be a free, specific, informed, unconditional, and unambiguous indication of the data principal’s wishes, provided via a clear affirmative action.
- Every request for consent should be accompanied with a notice given by a data fiduciary. A notice should include information on how a data principal may exercise their right to withdraw consent and of grievance redressal, and how they may file a complaint with the Data Protection Board (“**Board**”), in a manner in which the Central Government may prescribe. *The requirement of providing such additional information and the Central Government prescribing the formats in relation to such notice is new to the DPDP Bill 2023.*
- A similar notice should also, as soon as ‘reasonably practicable’, be provided for processing PD, where consent was obtained before the commencement of the DPDP Bill 2023. The law does not stipulate a lookback period for the purpose of this exercise. *That said, the DPDP Bill 2023 clarifies that data fiduciaries may continue processing PD until a data principal withdraws consent.*



Legitimate Uses

- The DPDP Bill 2023 has revisited the concept of 'deemed consent' as proposed by the DPDP Bill 2022. Under the DPDP Bill 2023, a data fiduciary may process PD of a data principal without their consent for certain 'legitimate uses'. These include:
 - for specified purposes where a data principal voluntarily provides their PD to a data fiduciary and has not indicated that they do not consent to the use of their PD. *The requirement of there not being any indication of lack of consent is new to the DPDP Bill 2023.*
 - for purposes of employment or for safeguarding an employer from loss or liability. The use of the phrase "*safeguarding an employer from loss or liability*" is new to the DPDP Bill 2023, however, it continues to relate to incidents such as corporate espionage and safeguarding proprietary rights.
 - for fulfilling an existing legal obligation on a person to disclose information to the State (as defined under Article 12 of the Indian Constitution) or its instrumentalities. This is, however, subject to the processing being in accordance with information disclosure requirements under any other law in force.
- Despite multiple stakeholder requests to include 'contractual necessity' and 'legitimate interests' as additional grounds of processing PD without consent, the DPDP Bill 2023 does not include these grounds. This approach varies from global best practices, such as the European Union's General Data Protection Regulation.

Obligations of Data Fiduciaries

- A data fiduciary has the primary responsibility for ensuring compliance with the law in respect of any processing undertaken by it or by a data processor on its behalf.
- As part of this, the DPDP Bill 2023 imposes certain requirements on data fiduciaries for erasing PD. The law stipulates conditions under which every data fiduciary should erase PD, such as when it is reasonable to assume that a specified purpose is no longer being served. Further, the Central Government can prescribe time periods for different classes of data fiduciaries for determining when such purpose is deemed to no longer be served – *a criterion which is new to the DPDP Bill 2023.*
- The DPDP Bill 2023 also imposes PD breach reporting obligations on a data fiduciary. 'PD breach' is defined widely under the law to include any 'unauthorised processing' or 'accidental disclosure' of PD that compromises the confidentiality, integrity, or availability of PD.

Processing PD of Children

- The DPDP Bill 2023 continues to define a 'child' as an individual who has not completed 18 years of age (i.e., the age of majority in India).
- Data fiduciaries involved in processing PD belonging to a child or a person with disability with a lawful guardian are required to obtain verifiable parental or guardian consent prior to processing such PD. *The requirement of obtaining verifiable consent for a person with disability is new to the DPDP Bill 2023.*

- In addition, data fiduciaries are barred from tracking or behaviourally monitoring children, or directing targeted advertising at them. They are also not permitted to undertake processing of PD that is likely to cause any detrimental effect on the well-being of a child.
- That said, the Government may exempt classes of data fiduciaries from the obligations on verifiable consent and tracking / monitoring / targeted advertising, subject to any conditions that it may prescribe. Further, by way of a new provision, the Central Government is also empowered to notify the age above which certain data fiduciaries will be exempt from these obligations, if it is satisfied that the processing of children's PD is carried out by a data fiduciary in a 'verifiably safe' manner.

Obligations of Significant Data Fiduciaries ("SDFs")

- The law continues to recognise an 'SDF' as a special category of data fiduciary, notified by the Central Government based on certain factors. SDFs have additional obligations under the law, such as (a) carrying out periodic audits; (b) undertaking data protection impact assessments; and (c) appointing an independent data auditor and a data protection officer. A 'data protection officer' is someone who should be based in India and responsible to the Board of Directors / relevant governing body of the SDF. They are also required to be the point of contact for the grievance redressal mechanism set up by the SDF.

Data Processor Obligations

- The DPDP Bill 2023 does not directly impose any obligations on data processors. *This is a departure from the DPDP Bill 2022, wherein data processors were required to implement appropriate technical and organizational measures to comply with the law and were subject to PD breach reporting obligations.*
- However, as noted above, a data fiduciary is required to ensure compliance with the law, including when processing is undertaken on its behalf by a data processor. As part of this, data fiduciaries will have to ensure data processors stop processing PD once consent is withdrawn, erase PD when a processing activity is completed, and protect PD under their possession or control. It is likely that data fiduciaries may contractually pass on such obligations to data processors.

Additional Exemptions

- Exemptions from the requirements relating to the obligations of a data fiduciary, rights of a data principal and cross-border data transfers have been granted in respect of processing PD for BPO operations. That is, in instances where PD of data principals not within the territory of India is processed pursuant to any contract entered with any person outside the India by any person based in India.
- The DPDP Bill 2023 extends these exemptions to processing activities for a scheme of compromise or arrangement or merger or amalgamation of two or more companies, etc., as approved by the relevant authorities, or for ascertaining the financial information and assets and liabilities of a debtor. *This was not*

contemplated under the DPDP Bill 2022.

- The State and its instrumentalities have broad exemptions from obligations under the DPDP Bill 2023, including a blanket exemption that may be granted to any notified instrumentality on grounds such as national security and public order.
- The Central Government may also notify certain data fiduciaries (or classes of data fiduciaries), including start-ups, as exempt from certain provisions of the law. Further, within 5 years from commencement of the law, it may notify any provision(s) that will not apply to certain data fiduciaries (or classes of data fiduciaries) for a specified period.

Data Principal Rights

- Key rights (except for the right to data portability) that were available to data principals under previous iterations of the DPDP Bill 2023 have been retained. For example, data principals have the right to: (a) access information about their PD processed by a data fiduciary to whom consent has been given or where consent is assumed; (b) seek correction, completion, updation, or erasure (under certain circumstances) of PD; and (c) avail grievance redressal within timelines to be prescribed by the Central Government, including escalating complaints to the Board. Few of these rights may be limited in connection with certain instances where processing is undertaken on the grounds of 'legitimate use'.

Consent Managers

- The DPDP Bill 2023 introduces the concept of 'consent managers', which are envisaged as a single point of contact for data principals to give, withdraw and otherwise manage their consent through an 'accessible, transparent and interoperable' platform. A consent manager is required to be registered with the Board and be accountable to the data principal. Consent managers can also make complaints to the Board on behalf of the data principal, and may themselves be subject to inquiry by the Board in the event of a breach of any of their registration conditions.

Data Protection Board

- The Board's functions include: (a) inquiring into PD breaches and directing urgent remedial or mitigation measures in such cases; (b) inquiring into and imposing penalties in case of a person's

non-compliance with the law; and (c) issuing binding directions to any person for the effective discharge of its functions under the law. The Board, however, does not have the power to enact subordinate legislation under the DPDP Bill 2023.

- The DPDP Bill 2023 contains a detailed mechanism on appeals. Persons who are aggrieved by any order or direction passed by the Board may file an appeal before the Telecom Disputes Settlement and Appellate Tribunal, and thereafter to the Supreme Court within specific timelines. *This provision is new to the DPDP Bill 2023.*

Powers of Central Government

- The DPDP Bill 2023 empowers the Central Government to issue notifications and prescribe rules. This leaves a substantial aspect of the law to be set out in subordinate legislation.
- In addition, the Central Government can direct the Board or any intermediary (as defined under the Information Technology Act, 2000) to, for the purposes of the law, furnish any information to it. The Central Government can also issue a blocking order to a Government agency or intermediary to, in public interests, prevent a data fiduciary from offering goods or services to data principals within India, upon receiving a reference from the Board. *Both these powers of the Central Government are new to the DPDP Bill 2023.*

Voluntary Undertakings & Penalties

- Any person subject to proceedings before the Board relating to non-observance with the DPDP Bill 2023 can provide a voluntary undertaking to remedy the same. Acceptance of a voluntary undertaking by the Board creates a bar on further proceedings under the DPDP Bill 2023 regarding the contents of such undertaking. *The DPDP Bill 2023 now also specifies that a breach of a voluntary undertaking will be deemed to be a breach of the law itself.*
- The DPDP Bill 2023 envisages a civil liability regime in case of non-compliance. Penalties, which have been stipulated in a Schedule, range from INR 10,000 (~ USD 121) to INR 250 crores (~ USD 30 million). *These are in line with the penalties envisaged under the DPDP Bill 2022, except for the addition of a penalty in case of breach of a voluntary undertaking accepted by the Board.*

Please get in touch with the SAM Co. attorney you regularly work with if you would like to discuss any aspect of the DPDP Bill 2023 in more detail.

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