

Roundtable Discussion organised by LawWiser

Digital Personal Data Protection Act, 2023

A New Dawn of Privacy in India

Tuesday, 22nd August, 2023 | The Westin, Gurgaon

Knowledge Partner

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Key Highlights

Overview:

The Digital Personal Data Protection Act, of 2023, ("the Act"), is India's much-awaited first comprehensive legislation on data protection. The Act serves as the stepping stone for laying down the foundation for strong privacy governance.

Background:

The Act will apply to the processing of personal data collected online as well as personal data which is collected offline and digitized. It applies to data collected in India and also outside India if it is for offering goods or services in India.

While this is a landmark legislation, it brings with it a host of compliances and complexities that businesses will now need to navigate – as employers, service providers, product sellers as well as purchasers, since data protection measures would need to be extended to third party vendors. It would be of immediate concern specifically to companies that are storing a large amount of personal data on an everyday basis. Cross-border data transfers is another area which impacts many businesses and needs clarity down the line.

The Roundtable Discussion:

At LawWiser, we feel that everything must be duly addressed so that it becomes a robust mechanism that benefits all stakeholders involved. To understand and analyse the Act, LawWiser organised a roundtable to delve into the nuances of the Act and its impact on industry and the end consumer. The roundtable focussed on the positives of this new law and what the stakeholders ascertain are some of the gaps that need to be addressed as the industry gears up for implementation. They also touched upon the changes from the earlier draft bill.

This document gives an overview of some of the issues that were discussed and key takeaways for stakeholders to deliberate upon. Towards the end of the document, readers will find a link to a set of FAQs which have been created and addressed by the team at [IndusLaw](#).



Speakers



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Moderators



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Broadly, some of the concerns or issues addressed during the roundtable were:



Understanding the issue of consent for data processing with respect to the obligation of the data fiduciary to prove consent



The issue of consent for taking personal data from employees for employment-related purposes by the organisation



Doubts regarding the applicability of the Act on the collection of data of Indians residing outside India and processed in India



Increased compliance issues for start-ups, understanding consequences for non-compliance. Drawing a comparative analysis with the present set of prevailing rules.



The Act provides for safeguarding data privacy. Will it be a step towards standardising the data security measures in India?



Once the Act is enforced, the security practices currently reflected in Information Technology (Reasonable security practices and procedures and sensitive personal data and information) Rules, 2011 ("SPDI Rules") will be replaced by the 'reasonable security safeguards', which may prescribe a different standard of security. Will they be robust in dealing with personal data?



At an organisational level, what are the next steps in terms of aligning with the new regulations?

Highlights of the discussion

Principles-based legislation:

The Act has been called a 'principles-based legislation' by the Government. From a reading of the Act, it is clear that some of these principles closely mirror the General Data Protection Regulation 2016/679 in the European Union ("GDPR"), and some concepts, (such as that of a data fiduciary) have been imported from existing Indian legal principles, that focus on trust in the legal relationship that is entered into between the data fiduciary and the data principal. This also is in line with the position of the Indian Supreme Court judgement in *Puttaswamy*, where privacy was declared as a fundamental right and a feeling had been created to treat it as a human right.

Balancing of fundamental rights and the need for economic growth:

Indian Government, through the Act has tried to balance the fundamental rights angle in relation to personal data, that is closely monitored by the Supreme Court as well. It seems that through this legislation the Government has attempted to convey that fundamental right to privacy and the need for robust economic growth need to be balanced somewhat.

Processing of personal data:

It has been clarified under the Act that all processing of personal data (including for any analytics etc.) shall be done either with (a) consent, or; (b) for certain legitimate uses; and the purpose as a whole must be lawful. These are the two main principles that flow throughout the Act and provide some guidance on the rights and obligations that flow from the above.

Consent for processing:

The consent taken by the data fiduciary must be clear, unambiguous, unconditional in nature and for a specific purpose. The consent notice must have clear language for what the data fiduciary is seeking the consent for and this consent notice must be provided at the time of seeking consent or prior to seeking consent for processing. Post facto consent would not be considered as valid consent for the purposes of the Act.

One of the speakers raised the question - Will this Act cover the data collected outside India of non-Indians and processed in India? The discussion was made both around conservative and liberal approaches.

Compliance challenges in instances where consent has been given prior to commencement of the Act:

Certain rights of data principals such as the right to access information about their personal data (such as the list of data processors to whom the personal data has been shared) seems to apply with retrospective effect. This may provide operational challenges for data fiduciaries who may have decades worth of information to sift through to enable this right effectively.

Data of Children:

The Act has enabled the exemption of certain data fiduciaries from obtaining of parental/guardian consent, when processing of children's data is undertaken in a verifiably safe manner to the satisfaction of the Central Government. It is not clear as to what comes under the scope 'verifiably safe'.

Highlights of the discussion

Liability for compliance:

The liability to ensure compliance with the Act will always be with a data fiduciary, who will, in turn need to impose effective contractual obligations on the data processor to ensure compliance.

This was discussed when one of the speakers presented a different perspective and asked – What is the protection that the data fiduciary or processor will be offering to data collected?

Safety measures:

While the Act does not lay out what is to be considered as a 'reasonable security standard' for personal data storage, in the absence of a clear requirement. Given that the definition of personal data under the Act also encompasses what is presently known and identified as sensitive personal data under the SPDI Rules framed under section 43A of the Information Technology Act, 2008, it is unreasonable to expect a lower compliance threshold than what exists today.

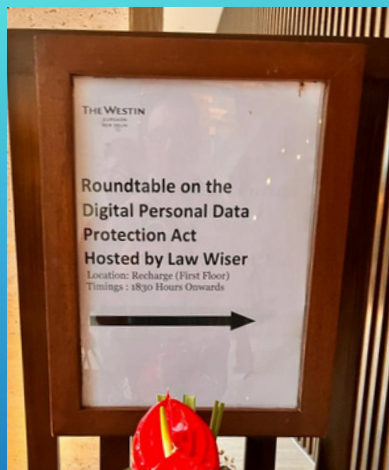
Start-ups:

While the Act has enabled exemptions for start-ups from the applicability of certain provisions, it may prove difficult in that context to ensure adequacy requirements under GDPR even if India is able to obtain an adequacy decision on the overall framework from the European Commission. Accordingly, it is likely that start-ups which deal with EU data and to whom the GDPR is applicable, will continue to be subject to standard contractual clauses that data controllers (for the purposes of GDPR) would impose on any data processing activities undertaken by them.

Significant non-compliance:

The Act lays out stringent penalties for non-compliance. However, it is noted that enhanced penalties will be imposed only if non-compliance of the provisions of the Act is 'significant'. The Act does not lay out the contours for what is considered as significant.

One of the speakers highlighted the provision that says that the Data Protection Board cannot enter the premises and seize any IT assets, but they can take assistance from police officials.



Conclusion:

It's been a 5 year wait since the Hon'ble Supreme Court's direction for the passing of this Act. However, the real test will be its application. It will be interesting to see how companies/ organisations in various sectors will adapt as per the new Act to develop strong data privacy and protection measures.

Before the Act is enforced, organisations have time to plan and prepare to be able to comply as soon the Act is brought into force. This means working on understanding the collection of digital personal data and streamlining the process as per the Act for storing/ processing of digital personal data, reviewing present data policies as per the new Act, reviewing whether the present consent mechanism needs changes, and putting in place a robust management system to prevent and address data privacy breaches. This will be a good starting point.

Although the Act draws comparisons from the GDPR, the Government asserts it to be a part of a larger policy that is essential for the digital economy. After the Act is enforced we will be able to understand better whether it serves as an effective enforcement with increased accountability and transparency or not.

For a set of detailed FAQs, please click or scan the QR code.



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