

# THE DPDP ACT 2023 AND GDPR PROVISIONS: KEY POINTS OF DISTINCTIONS



**Wednesday Wisdom**  
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## DPDP ACT (INDIA)

## EU GDPR

### GENERAL APPLICABILITY

Applies to the processing of 'Personal Data' within India, collected online or collected offline and then **digitized**[2]. Personal Data is defined as any information which relates to an individual identified or identifiable in relation to such information[3]. The definition of “**Personal Data,**” thus, relies on the broad “**identifiability**” criterion, similar to the GDPR.

Applies to the processing of 'Personal Data' wholly or partly by automated means or by non-automated means where Personal Data forms part of a filing system or is intended to form part of a filing system[4].

**DPDP Act covers the Personal Data collected and processed in digital form only and excludes such data which is collected in non-digital form. EU GDPR covers all forms of data collected and processed as long as they form part of a filing system[5].**

### EXTRA-TERRITORIAL APPLICABILITY

It extends its applicability beyond the territory of India if the data of a Data Principal is processed outside the territory of India in connection with any activity related to offering of goods and services to Data Principal in India[6].

The term “**Data Principal**” refers to the individual to whom the Personal Data relates. (Data Principal is equivalent to “**Data Subject**” under the GDPR).

It applies to processing of Personal Data of the data subject in Union by data controller[7] not established in Union, where activities related to:

- a. the offering of goods or services, irrespective of whether a payment of the data subject is required, to such data subjects in the Union; or
- b. the monitoring of their behavior as far as their behavior takes place within the Union.[8]

[1]The article reflects the general work of the authors and the views expressed are personal. No reader should act on any statement contained herein without seeking detailed professional advice.

[2]Section 3(a) of DPDP Act

[3]Section 2(t) of DPDP Act/

[4]Article 2 of EU GDPR

[5]Article 4.6 of EU GDPR- a filing system is “any structured set of Personal Data which are accessible according to specific criteria, whether centralised, decentralised or dispersed on a functional or geographical basis”.

[6]Section 3 of DPDP Act

[7]Article 4(7) of EU GDPR: ‘controller’ means the natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data; where the purposes and means of such processing are determined by Union or Member State law, the controller or the specific criteria for its nomination may be provided for by Union or Member State law

[8] Article 3 of EU GDPR

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**The scope of extraterritorial applicability is similar in both. However, EU GDPR also applies to cover the monitoring of Data Subject behavior as far as their behavior takes place within the Union. There is no such provision under DPDP Act.**

### TRANSFER OF PERSONAL DATA TO OUTSIDE COUNTRY.

Personal Data may be transferred to other countries or jurisdictions except for those countries which are listed under exceptions. The government may notify the restrictions that will operate on the transfer of Personal Data by a data Fiduciary[9] to notified countries or territories outside of India.[10]

Personal Data may be transferred pursuant to an adequacy decision and certain safeguards, such as:

- a. legally binding and enforceable instruments between public authorities;
- b. Binding Corporate Rules;
- c. Standard Contractual Clauses adopted by the European Commission and SCCs adopted by a supervising authority and approved by the Commission;
- d. approved codes of conduct; and
- e. approved certification mechanisms[11]

**The DPDP Act allows for cross-border transfers to all countries unless specifically restricted by the Indian Government. Under the GDPR however, permissibility of transfer of Personal Data ranges from free transferability to a country or an international organization covered by an adequacy decision, and conditional transfers (such as adopting standard contractual clauses), to limited permission to transfer under certain circumstances.**

[9] Section 2(i) of DPDP Act: Data Fiduciary means any person who alone or in conjunction with other persons determines the purpose and means of processing of personal data.

[10] Section 16 of DPDP Act

[11] Article 44 of EU GDPR

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### RIGHTS OF INDIVIDUAL PROVIDING PERSONAL DATA

It guarantees individuals:

- a) right to access their data and
- b) right to erasure and correction[12], and
- c) right to receive notice before their consent[13] is sought which is similar to the General Data Protection Regulation (GDPR).

Additionally, it also provides:

- d) Right to Grievance Redressal: Data Principals have the right to easily reach out to a designated point of contact provided by the Data Fiduciary to raise complaints and grievances[14].
- e) Right to Appoint a Nominee: Data Principals can nominate someone who would be authorized to exercise their rights on their behalf in case of their death or incapacity.[15]

It provides below rights:

- a) Right to Access;
- b) Right to Erasure and Correction (Rectification);
- c) Right to Notice;

Additionally, it provides:

- d) Right to Data Portability: This allows data subject to receive their Personal Data in a structured, commonly used, and machine-readable format. They can then transmit this data to another data controller without hindrance. This right promotes data autonomy and facilitates switching between services.
- e) Right to Object for Processing and Automated Decision-Making: Data subject has the right to object to data processing activities based on legitimate interests, public tasks, or the exercise of official authority. It also introduces the right not to be subject to decisions based solely on automated processing, including profiling, which significantly impacts individuals' rights.

**The DPDP Act introduces two two distinct rights not found in GDPR i.e., Right to Grievance Redressal and right to appoint a nominee. However, as provided in GDPR it does not include a right to data portability, a right to object for processing based on other grounds than consent, and the right not to be subject to solely automated decision-making are missing.**

[13] Section 12 DPDP Act

[14] Section 5 of DPDP Act

[15] Section 13 of DPDP Act

[16] Section 14 of DPDP Act

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### CONSENT FROM CHILDREN

Provides specific provisions for protection of Personal Data of children.[16]

- a) defines the “children” as individuals under the age of 18.
- b) prohibits data fiduciaries from engaging in any processing of children's data that could potentially have a negative impact on the well-being of the child.
- c) Data fiduciaries are required to obtain verifiable parental consent before processing the Personal Data of any child.
- d) Similar to the requirement for children, data fiduciaries must also obtain consent from lawful guardians before processing the Personal Data of individuals with disabilities.
- e) it further explicitly prohibits data fiduciaries from engaging in tracking, behavioral monitoring of children, or targeted advertising directed at children. There are no such provisions under EU GDPR.
- f) the government may issue exemptions from these obligations for specific classes of fiduciaries, or may even lower the age of digital consent for children when their Personal Data is processed by designated data fiduciaries

It provides the age of children to be under the age of 16.

Data controller is required to take consent from the holder of parental responsibility over the child before processing the Personal Data of children under the age of 16 years[17].

The controller is required to take reasonable efforts to verify in such cases that consent is given or authorized by the holder of parental responsibility over the child, taking into consideration available technology.

Member States may provide by law for a lower age for those purposes provided that such lower age is not below 13 years.

**Both the DPDP Act and the EU GDPR aim to protect children's Personal Data through consent requirements, but they differ in terms of the age of consent, the standards for obtaining consent.**

[16] Section 9 of DPDP Act

[17] Article 8 of EU GDPR

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### GRIEVANCE REDRESSAL

It provides that data principal needs to redress their grievance before the data fiduciary prior to filing the complaint before the Board or courts.[18]

Without prejudice to any other administrative or judicial remedy, every data subject shall have the right to lodge a complaint with a supervisory authority in particular in the Member State of his or her habitual residence, place of work or place of the alleged infringement if the data subject considers that the processing of Personal Data relating to him or her infringes this Regulation.[19]

**DPDP Act and EU GDPR have a different regulatory approach towards the grievance redressal processes of the respective laws. The DPDP Act requires Data Principal to initially address their grievances with the Data Fiduciary before escalating the complaint which may aim to encourage direct resolution and mitigate unnecessary legal actions. On the other hand, the GDPR allows data subjects to directly approach the supervisory authority or courts, possibly emphasizing the importance of quick and independent redressal in cases of data protection violations.**

### NOTIFICATION IN THE EVENT OF DATA BREACH

In the event of a Personal Data breach, the Data Fiduciary shall give the Board and each affected Data Principal, intimation of such breach in such form and manner as may be prescribed.[20]

Data controller is required to give intimation to supervisory authority and data subject within 72 hours from such breach in case Personal Data breach is likely to result in a risk to the rights and freedoms of natural persons[21]

**The DPDP Act mandates the Data Fiduciary to notify the Data Protection Board and each affected Data Principal, in the event of any Personal Data breach. Unlike the DPDP, an obligation to inform the data subject of a breach is triggered under the GDPR only when there is high risk to the impacted individuals.**

[18]Section 9 of DPDP Act

[19]Article 8 of EU GDPR

[20]Section 13 of DPDP Act

[21] Article 77 of EU GDPR

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### CATEGORIZATION OF DATA FIDUCIARY AND DATA CATEGORIZATION.

It has classified data fiduciaries into "significant data fiduciaries" with additional compliance obligations such as:

- a) the appointment of a resident data protection officer ('DPO') responsible for grievance redressal;
- b) the appointment of an independent data auditor;
- c) conducting Data Protection Impact Assessments ('DPIAs'); and
- d) such other compliances as may be prescribed.[22]

Personal Data is further categorized into 'special categories' which include information that reveals racial or ethnic origin, political opinions, religious beliefs, etc.[23]

**EU GDPR does not distinguish between classes of data controllers while prescribing compliances and obligations as provided in DPDP Act. On the other hand, DPDP Act does not provide for categorization of Personal Data.**

### DATA PROTECTION AUTHORITY

It establishes a Data Protection Board of India, which would enforce regulations, award penalties, and resolve complaints. The central government will specify the Board's constitution and terms of appointment.[24]

Supervisory Authorities are the competent bodies responsible for enforcing rights and duties under the Regulation. The provisions mandate for independence in functioning, composition and financial controls from any external influences.[25]

[22] Section 10 of DPDP Act

[23] Article 9 of EU GDPR

[24] Section 18 of DPDP Act

[25] Article 51-59 of EU GDPR

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The composition of the Board and the rules of its functioning under DPDP Act is regulated by the central government and as per the provisions of DPDP Act the Board is supposed to function independently.

In contrast, the GDPR creates supervisory authorities in each EU member state, and the European Data Protection Board (EDPB)[26] guarantees that these authorities work together and that their implementation is uniform.

### PENALTIES AND COMPENSATION

The penalties for breach of any provisions have been outlined in the schedule under the Act. The penalties can range up to Rupees 250 crore rupees, and the governing board has the authority to decide the specific penalty amount within a predefined range depending on the nature and severity of the offence.

Article 83(5) of the GDPR outlines the penalties for very serious violations of the regulation. Under this article, organizations can be fined up to 20 million Euros or, in the case of an undertaking, up to 4% of the total global revenue of the prior fiscal year, whichever amount is higher.

Article 82 further provides for compensation to any person who has suffered material or non-material damage as a result of infringement of any provisions of the regulations.

**DPDP Act prescribes for non-compliance and sets forth maximum penalties for specific violations and unlike EU GDPR it does not provide any provisions for compensation.**

#### Conclusion

The EU GDPR and the DPDP Act share common goals but adopt distinct approaches and mechanisms, as outlined above. DPDP Act lays down fundamental principles and delegates many implementation aspects to secondary legislations, rules, and regulations that will be developed after the main law is enacted.

The DPDP Act, undoubtedly, presents a ray of hope for counterbalancing the interests of Data Principals while recognizing practical challenges that may be faced by businesses. It has garnered significant attention across all stakeholders, and it remains to be seen what shape it will eventually take.

[26] Article 68 of EU GDPR- Board is established as a body of Union having legal personality and is composed of the head of one supervisory authority of each Member State and of the European Data Protection Supervisor, or their respective representatives.

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