



Tax alert: Digital Personal Data Protection Bill, 2023

4 August 2023

India has been exploring the possibility of enacting a unified legislation pertaining to data privacy and protection. The draft of such a proposed law was first introduced in the Lok Sabha in 2019. However, after various recommendations, the Bill was subsequently withdrawn in 2022. A new draft titled 'Digital Personal Data Protection Bill' was then introduced in November 2022 ("**2022 Bill**"), and a further revised version of the Bill ("**2023 Bill**"), has been tabled before the Lok Sabha on 3rd August 2023.

In a nutshell



Applicability

Applies to processing of digital personal data within India, collected in digital and non-digital form (which is then digitized); and overseas, where the processing relates to offering of goods or services to individuals in India



Notice, Specified Purpose, and Consent

In notice provided by data fiduciary to provide the purpose and the consent given by the data principal, to provide a clear affirmative action for the specified purpose and limited to personal data necessary for such specified purpose



Data Export

Transfer of personal data overseas for processing will be allowed, except for those countries expressly barred by the central government, or if restricted under any laws



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Key Highlights of the Digital Personal Data Protection Bill, 2023¹

1. Key Definitions:

- 'Board' means the Data Protection Board of India ('DPB') established by the central government.
- 'Child' defined as an individual who has not completed the age of 18 years.
- 'Data Principal', includes an individual to whom the personal data relates to, also includes special classes of Data Principle such as children and persons with disabilities, where the data principal would be the 'parent' or 'lawful guardian'.
- 'Data Fiduciary', the person who alone or jointly determines the purpose of processing
- 'Data Processor' means any person who processes personal data on behalf of a data fiduciary
- 'Digital Personal Data' means personal data in digital form
- 'Personal Data' means data about an individual, who is identifiable by or in relation to such data
- 'Processing' means a set of automated operations performed on digital personal data and includes operations such as collection, recording, organisation, structuring, storage, adaption, retrieval, use, alignment or combination, indexing, sharing, disclosure or transmission, dissemination or otherwise making available, restriction, erasure, or destruction
- 'Significant Data Fiduciary' means any data fiduciary or class of data fiduciaries notified by the central government under section 10 of 2023 Bill
- 'Specified Purpose' refers to the purpose mentioned in the notice given by the Data Fiduciary to the Data Principal.

2. **Applicability:** The proposed Bill extends to digital personal data processing: (i) within the territory of India, collected in digital and non-digital form (which is then digitized); and (ii) outside the territory of India, where the processing relates to offering of goods or services to individuals within India.

However, the proposed Bill shall not apply to:

- Personal data processed for personal or domestic purpose.
- Personal data that is made available by the: (i) individual; or (ii) any person under the obligation of law is required to make such personal data publicly available.

3. **Grounds for Data Processing:** The proposed Bill identifies two grounds for processing.

A. Consent by the Individual: Consent to be quantified with a series of factors to indicate that consent shall be unconditional, unambiguous, free, specific, informed, with a clear affirmative action for the specified purpose and limited to personal data necessary for such specified purpose.

B. Certain legitimate uses: This ground includes processing for reasons related to benefit to individual, performance of state function, compliance with court order, public health emergency, employer-employee requirements to name a few

4. **Notice:** Data Fiduciaries while providing notice have to share a description of the personal data proposed to be processed, the specified purpose for which it will be processed, method to exercise rights to withdraw consent and proposed grievance redressal mechanism

5. **Obligations of Data Fiduciary:** Data Fiduciary is primarily liable to comply with the provisions of the

¹ 2023 Bill has been introduced in the Lok Sabha; once passed, the Bill will then be tabled in the Rajya Sabha. Either of the Houses may propose changes to the Bill.

proposed Bill. This further includes implementing appropriate technical/organizational measures, ensure protection of personal data (processed by Data Fiduciary or Processor), provide breach notification, erase data as required, develop a grievance redressal mechanism

6. **Concept of Significant Data Fiduciary:** The central government has powers to notify any Data Fiduciary, as a 'Significant Data Fiduciary', depending upon the volume/sensitivity of data, risk to individual's rights, impact on security/electoral democracy/sovereignty of India, and public order. The Significant Data Fiduciary shall appoint an independent data auditor, Data Protection Officer (an individual resident in India), conduct periodic audit and data protection impact assessment
7. **Processing of personal data of children or persons-with-disability:** Data Fiduciary is required to obtain verifiable consent of parent or lawful guardian. Additionally, the Data Fiduciary while processing personal data of a child, has to ensure that that it does not cause any detrimental effect on the well-being of child or undertake tracking, targeted advertisement, or behavioral monitoring of children
8. **Right & Duties of Data Principal:** The Data Principal has the right to:
 - Access information about processing and personal data
 - Correction, completion, updation and erasure of personal data given under consent or given voluntarily under a specified purpose
 - Grievance Redressal
 - Nominate an individual to exercise rights during death or incapacity of relevant individualData principal to comply with the provisions of applicable law, ensure not to impersonate another person, furnish correct and verifiable personal data, not to register false claim
9. **Cross-border Transfer of Data:** Cross-border transfer of personal data for processing permitted unless: (i) restricted by Central Government; or (ii) transfer is restricted or a higher degree of protection is specified under any law
10. **Exemptions:** The 2023 Bill provides exemptions from certain provisions of the proposed Bill, for processing activity that is necessary for enforcing legal rights, processing by court/tribunal, processing in interest of prevention/investigation of crime, processing of personal data of individuals outside India, processing necessary for a scheme of compromise or arrangement or merger or amalgamation, and processing necessary for ascertaining financial information of any person who has defaulted in payment
11. **Data Protection Board:** The central government to establish a board called as Data Protection Board which will, amongst other things, be responsible to decide on complaints made to it and impose penalties on data fiduciaries
12. **Penalties:** The Data Protection Board can issue monetary penalties on Data Fiduciaries in case of non-compliance. The maximum penalty that can be issued is INR 250 crore (US\$ 31.25 million) per instance of non-compliance. Quantity of penalty to be decided on following aspects, i.e., nature, gravity and duration of non-compliance, type and nature of personal data impacted, whether the non-compliance is repetitive in nature, gains made, or loss avoided, actions taken to mitigate the effects of non-compliance, whether the monetary penalty is proportionate and effective, impact of financial penalty on the person

The penalty schedule is set out below:

Nature of Breach	Penalty Amount
Observing obligation of Data Fiduciary to take reasonable security safeguards	Up-to INR 250 Crores (US\$ 31.25 million approx.)
Observing the obligation to give the DPB or affected Data Principal notice of a personal data breach	Up-to INR 200 Crores (US\$ 24 million approx.)
Observance of additional obligations in relation to child personal data	Up-to INR 200 Crores (US\$ 24 million approx.)
Additional obligations of Significant Data Fiduciary	Up-to INR 150 Crores (US\$ 18 million approx.)
Duties of Data Principal	Up-to INR 10 thousand (US\$ 120 approx.)
Breach of any term of voluntary undertaking accepted by the DPB (under section 32)	Up to the extent applicable for the breach in respect of which the proceedings under section 28 were instituted
Any other provision of the proposed Bill	Up-to INR 50 Crores (US\$ 6 million approx.)

The central government has the power to amend the penalty thresholds to more than double of the existing figures

13. **Appellate Procedure:** Appeals from the order of Data Protection Board are to be filed before the Telecom Disputes Settlement and Appellate Tribunal (TDSAT) established by the TRAI
14. **Some Other Key Provisions:** 2023 Bill enables the central government to exempt certain Data Fiduciaries including 'Startups' from the provisions of the Bill and block public access to a given Data Fiduciary's platform in certain circumstances

Our point of view

The Government of India has issued a simple and easy to comprehend Bill, which is built on the premise that individuals have a right to protect their data and the need for processing personal data for lawful purposes. Data fiduciaries will need to ensure that their processes and systems are aligned to the requirements as aspects like specified purpose, erasure etc. are important to consider. The rules will be important as they will stipulate the operative aspects of the Bill.



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