

# De Jure

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## EU GDPR and Data Privacy – Is India Ready?

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**“The identity I stole was a fake!  
Boy, you just can’t trust people these days!”**

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Information is the new age weapon. Today, it can cause more physical damage than one can fathom. Over a period of time large amount of data is held in computers and mobile phones. Research firms, advertisers, retailers, credit card companies, food joints, cable and internet service providers, they all have access to personal information of individuals. In fact, with the increased use of internet on mobile phone, it is an open secret that the internet companies and service providers collect information including the websites visited, application usage, product specific information, video streaming, movie rental, online purchase, usage of internet and other similar information. They even have access to the contact information saved on the device, details of the call logs and message records.

When we hear and read about the unauthorized access to private and sensitive information, one is in a state of shock. Right from habits, interests, family, financial, medical records, all such information is collected. The concern is not about collection or use of personal information but the misuse of technology to exploit personal sensitive information for unauthorized purposes. In fact, not only individuals but global information solutions company like Equifax, one of the big accountancy firms like Deloitte, Uber, Pizza Hut, Yahoo to name a few, have all been at the receiving end due to data breaches. More recently, Cambridge Analytica, the data analytics firm has been accused of harvesting personal information of Facebook users without their permission to build a system that could target voters with personalised political advertisements.



So the question which comes to mind is what is privacy? While privacy is considered as too amorphous for a precise definition, the term broadly connotes, the right to be left alone, or freedom from intrusion. In the realm of information, privacy is the right to have some control over personal data like name, identification number, location, physical, physiological, genetic, mental, economic, cultural or social identity of any natural person.

Data security is sometimes confused for data privacy. In order to appreciate the difference, it is essential to understand that processing of personal or sensitive data can be categorized into collection, use and disclosure of the same. While security is necessary for protecting data which has been collected in electronic form in any manner, privacy deals with unauthorized collection, arbitrary use and disclosure of the personal data.

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Supreme Court of India in a recent judgment has unequivocally held the right to privacy as an intrinsic part of the right to life and personal liberty and as a part of the freedoms guaranteed by the Indian Constitution. This right just like other fundamental right is not absolute but comes with reasonable restrictions.

In August 2017 a committee headed by Justice B. N. Srikrishna was constituted to examine issues related to data protection, recommend methods to address them, and draft a data protection law. The objective was to ensure growth of the digital economy while keeping personal data of citizens secure and protected. The committee presented a White Paper and has suggested a broad framework to protect data in the country.

Data protection and privacy has been an area of concern amongst various countries of the world. The increase in data breach emphasises the need to regulate the collection, storage and use of personal and sensitive data. In order to address this requirement, 28 member states of the European Union (EU) have recently adopted the General Data Protection Regulation (GDPR), a more stringent regulation as compared to the replaced Data Protection Directive, 1995.



The EU GDPR is touted as a law that will provide more control to the people on their personal information. It brings a paradigm change in the rules which govern the collection, storage or processing of personal data of data subject. It introduces new rights for individuals, such as the right to data portability and as the right to be forgotten. This enables not only the transfer of personal data to another service provider but also mandates the transferee company to erase all the personal data of the data subject. In fact, earlier silence was conveniently taken as consent. With the GDPR in place, it will now be difficult to have long winding, misleading and deceptive terms and conditions which are neither easily understood nor ever read. Considering, now the user will need to give an affirmative consent before the personal data of the user can be used by any business, the true intent cannot be conveniently wrapped in often vague and seemingly innocuous statements. There is also restriction on the use of personal data only for specific purpose for which it is lawfully collected.



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Any unconsented utilization of any personal data is non-compliance of the GDPR. Further, the companies are also required to appoint a data protection officer to ensure compliance of the provisions of GDPR.

The penalty for non-adherence to GDPR could be up to €20 million or 4% of the worldwide annual revenue of the prior financial year, whichever is higher.

The GDPR has extra territorial implication and is not only limited to the EU but extends to any entity in any country which collects, processes, manages and/ or stores personal data of data subject residing in EU. EU is a significant trade partner for India. The value of import and export in goods and services between the two trading partners have increased consistently in the past years.



This implies that any Indian entity (*be it in information technology, financial services, pharmaceutical, etc.*) which has access to personal data of data subject, is required to comply with GDPR in relation to such personal data. The business entities in India are grappling with the ramification of GDPR.

In light of this new development, the Information Technology Act, 2000 (**IT Act**) together with the Information Technology (*Reasonable Security Practices and Sensitive Personal Data or Information*) Rules, 2011 (**Rules**) are felt to be insufficient to address the issue of data privacy. Though the IT Act is being criticized, it is pertinent to note that the IT Act and Rules have few similarities to GDPR. The GDPR and the Rules require that data should be collected for lawful purpose and only when such collection is necessary to meet the said purpose. Just like in GDPR, the Rule does not permit the data to be retained for period longer than necessary. Another similarity is the option to withdraw consent by the data subject. Although, the IT Act imposes criminal liability, the GDPR limits itself to exemplary fines with the objective to dissuade any future personal data breach.

While India is in the process to enact a full-fledged privacy law, it has got a reference point in EU GDPR. The need of the hour is to ensure growth of the digital economy while keeping personal data of citizens secured and protected. This is a wake-up call for the Indian business entities. They need to be cautious while dealing with personal data not only of data subject residing in the EU but also generally.

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