

De Jure

July 20, 2018

GDP Regulations - New Age Data Protection Laws



GDPR

The European Union's Parliament approved the General Data Protection Regulation (**GDP Regulation**) and the same has come into effect on and from May 25, 2018. The objective of the GDP Regulations is to protect personal data¹ of natural persons (*residing in European Union*) (**Data Subject**) which are collected or processed by establishments. Such establishments may be registered in the European Union or outside the European Union. The applicability of the GDP Regulation shall extend to the following establishments registered:

- 1) in the European Union (irrespective of the location where the processing of the personal data takes place, i.e. whether within the European Union or outside the European Union);
- 2) outside the European Union where the processing activities is in relation to goods or services offered to Data Subject have been undertaken (*whether or not the transaction involves monetary benefits*);
- 3) outside the European Union where the laws of any one of the countries in the European Union applies.



Considering that GDP Regulation has an extra territorial applicability any establishment registered in India will also have to comply the provisions of the GDP Regulation.

In this article, we have discussed certain provisions of the GDP Regulations and few aspects which an entity registered in India would be required to consider in the event it is being categorised as a controller² or a processor³.

¹ The term personal data means any information relating to an identified or identifiable natural person, where such identifiable natural person can be identified, directly or indirectly, by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person. Further the GDP Regulation also provides for special categories of personal data to mean data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, the genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation.

² The term controller means a natural or legal person, public authority, agency or other body which either alone or jointly with others determines the purposes and means of the processing of personal data.

Establishment of Representative within European Union

Subject to certain exceptions, an establishment registered outside the European Union which either processes or monitors personal data of the Data Subject is required to establish a representative in one of the Member States of the European Union where the Data Subject is located. Such representative is authorised by the controller or processor to be addressed in particular by supervisory authorities and Data Subject, on all issues related to processing, for the purposes of ensuring compliance with the GDP Regulation. It is pertinent to note that the appointment of the representative shall not absolve the liability of the controller or processor and they would continue to be liable for breach of the GDP Regulation.

Designation of a Data Protection Officer

Data controllers and processors are required to also designate a data protection officers (**DPO**) in certain situations namely (i) processing is carried out by a public authority or body, (ii) the core activities of the controller or processor consist of processing which, by its nature, scope or purposes, requires regular and systematic monitoring of Data Subject on a large scale, or (iii) the core activities consist of processing on a large scale of special categories of data. A group of undertakings may appoint a single DPO provided that DPO is easily accessible from each such establishment. Further the DPO is required to have sufficient expert knowledge in data protection laws.

Data controllers and processors are required to ensure that the DPO is involved in and properly and in a timely manner in all issues which relate to the protection of personal data. GDP Regulation requires that the DPO must directly report to the highest management level and must not be told what to do in the exercise the tasks and must not be dismissed or penalised for performing those tasks.



³ The term processor a natural or legal person, public authority, agency or other body which either collecting, organising, storing, altering, retrieving, using, disclosing, combining and erasing personal data, amongst other activities on behalf of the controller.

Transfer of data outside of the European Union



The GDP Regulation allows transfers of personal data outside the European Union (i.e. being a third country or international organisation) provided the personal data is being sent to a country that the European Commission is of the view that such places provide adequate level of protection to the personal data. The countries such as Andorra, Argentina, Canada (commercial entities), Faroe Islands, Guernsey, Israel, Isle of Man, Jersey, New Zealand, Switzerland and Uruguay have been approved so far by the European Commission.

The European Commission is also empowered to approve other third country or international organisation to whom the personal data may be transferred. The European Union Protection Board has also adopted guidelines, which address derogations to transferring personal data outside of the European Union.

Penalty

A Data Subject may lodge a complaint with the supervisory authority against the establishment who has failed to comply with the provisions of the GDP Regulation. These establishments would be subject to penal actions which have been classified in two categories namely (a) violations which are serious in nature where the fines may extend upto 4% of the annual global turnover of the preceding year or upto EUR 20 million whichever is higher, and (b) violations which are less serious where the fines may extend upto 2% of the annual global turnover of the preceding year or upto EUR 10 million whichever is higher.

Conclusion

With the growing need for know your customer norms and information sought by various establishments on their website, the Companies dealing in the personal data of the Data Subject will now have to comply with the GDP Regulation, besides complying with the provisions of the local laws. Any failure to comply with the provisions of the GDP Regulations will attract heavy penalty on the establishments.

It would be hence advisable for the establishments to revisit and update the privacy policy.

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