Smart Data Privacy Laws

Achieving the Right Outcomes for the Digital Age

Executive Summary
June 2019

Introduction

Sensing the huge opportunity of digital transformation, governments are keen to establish a regulatory environment that supports data-driven economic growth while strengthening trust in technology. Many countries are therefore considering data privacy laws for the first time, while others are reappraising their existing approaches.

In today's global economy, organisations' use of personal data can no longer be contained or regulated in isolation within a single country. The future frameworks that will allow governments, businesses and, most importantly, individuals to benefit from the data revolution must respect national laws, traditions and cultures. However, they must also coalesce around an emerging consensus that data privacy laws should protect the privacy of individuals while enabling innovation and data flows critical to the digital economy.

This Executive Summary of GSMA's Smart Data Privacy Laws Report[1] provides a guide for those involved in drafting and reviewing data privacy rules or legislation. It distills what has been learned from data privacy law implementation to date into guiding principles by which a proposal can be measured.

In brief, for data privacy law to be successful, it must provide effective protection for individuals. At the same time, it should provide organisations with the freedom to operate, innovate and comply in a way that makes sense for their businesses and can secure positive outcomes for society. The law should be guided by principles that put the responsibility on organisations to identify and mitigate risks while remaining flexible, technology and sector neutral, and allowing data to move across borders easily.

Without adhering to these guiding principles, there is a serious risk that the resulting law or regulations will end up being too prescriptive, too rigid and too rapidly outdated. Conversely, if these guiding principles are adhered to, all stakeholders can win: organisations can prioritise their resources to achieve effective privacy outcomes while operating and innovating responsibly; supervisory authorities can target their resources to focus on prevention of harm; and governments and individuals can safely enjoy the economic and societal benefits of digital transformation.

Towards horizontal data privacy frameworks

To realise the benefits of data-driven innovation for society and the economy, individuals need to be empowered and trust that their data is being used fairly and securely. The rules that govern the use of personal data, however, vary significantly — from sector to sector, from technology to technology and from country to country. This can be confusing for people who rightly expect the same protection regardless of who is using their data and how it is processed. It can also be confusing for businesses as they navigate this complex regulatory landscape.

Data privacy laws that address data privacy across the whole economy, regardless of sector or technology can:

- Cater to fundamental interests AND economic considerations
- Foster trust
- Facilitate cross-border data flows and local data-driven economic activity
- Provide a platform for enhancing business reputation
- Reduces the need for sector-specific privacy rules

1. https://gsma.at/smart-data-privacy-laws

Guiding Principles for Smart Data Privacy Laws

A smart data privacy law is one that:

Takes the local national law, traditions and culture as its starting point
Local circumstances such as the constitution, customs, culture or economy should always be the starting point to ensure that the data privacy law answers local needs.

Finds alignment with existing international norms and data privacy frameworks
A wide variety of frameworks should be explored to see what works best for local circumstances. At the same time, as much alignment with international data privacy frameworks will aid interoperability and cross border data flows that are so crucial to the economy.

Is underpinned by the concept of accountability
A data privacy law should incentivise and/or require accountability mechanisms, drawing on good practice that exists in other legal instruments. Organisations should not only comply, but be able to demonstrate how they comply. Good data governance practices should be taken into consideration for administrative procedures or when deciding on enforcement action. This encourages effective compliance and promotes a high level of privacy protection.

Is based on flexible principles rather than excessively prescriptive requirements
Overly prescriptive rules can become outdated whereas principles require the organisation to think about how to comply and allow the law to develop and change over time.

Is based on preventing or limiting the risk of harm
Provisions that target harm to individuals such as Privacy-by-Design, or thresholds for reporting data breaches are more effective as they encourage organisations to identify and mitigate risk.

Applies horizontally without reference to a specific sector or technology
Horizontal data privacy laws give individuals a consistent level of protection and define a common baseline for all organisations participating in the data-driven economy.

Achieves the right balance between *ex ante* and *ex post*
Individuals are best protected by setting expectations, encouraging good behaviour and enforcing (ex post) when there has been an infringement. Where accountability mechanisms leave day-to-day responsibility for reducing risk to organisations some prior (ex ante) formalities may be needed.

Has a definition of personal data that is in line with international definitions
A broad definition allows the law to apply to all processing of personal data regardless of sector and instead to focus on risk of harm to individuals.

Provides a range of flexible lawful grounds for processing, not just consent
Consent is not appropriate for all processing activities. Some flexible grounds require the organisation to balance competing interests and risks which produces better privacy outcomes.

A smart data privacy law is one that:

Includes a range of rights to empower individuals
Rights can help individuals to understand what data an organisation holds about them and to exert a reasonable level of influence over the use of that data.

Has a pragmatic approach to data breach notifications
When a data breach occurs all energy should be focussed on remediation and mitigating risk of harm. Notification of all suspected data breaches regardless of severity is counterproductive.

Promotes cross-border data flows
Allowing data to flow while protecting privacy has beneficial consequences for society and the economy. The data privacy law should provide an array of mechanisms to allow data to flow.

Establishes an independent supervisory authority for data privacy
An independent supervisory authority for data privacy is pivotal for building trust. It can raise awareness, encourage good practice, deal with complaints, investigate and enforce.

Provides a range of remedies, enforcement measures and sanctions that are proportionate to the harm and take an organisation's good practices into account
Remedies, enforcement measures and sanctions are necessary to give genuine and proportionate redress for individuals who have suffered significant harm.

The GSMA represents the interests of mobile operators worldwide, uniting more than 750 operators with over 350 companies in the broader mobile ecosystem, including handset and device makers, software companies, equipment providers and internet companies, as well as organisations in adjacent industry sectors. The GSMA also produces the industry-leading MWC events held annually in Barcelona, Los Angeles and Shanghai, as well as the Mobile 360 Series of regional conferences.

For more information, please visit the GSMA corporate website at www.gsma.com and public policy website at www.gsma.com/publicpolicy

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