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TECHNOLOGY, MEDIA, & TELECOMMUNICATIONS.

THE DIGITAL PERSONAL DATA PROTECTION BILL 2022

– HIT OR MISS?

THE LINK LEGAL PRIVACY & CYBERSECURITY GROUP.

INTRODUCTION.

Laws governing data protection and privacy in India have had a journey of its own. Following the Supreme Court's judgment in JUSTICE KS PUTTASWAMY (RETD.) VS. UNION OF INDIA where the right to privacy was recognized as a fundamental right, the Indian Government made several attempts to regulate data privacy in India. As these attempts (in the form of the Personal Data Protection Bill proposed in 2018, 2019, and 2021) received extensive feedback and criticism from stakeholders and tech giants, they were withdrawn in August 2022.

Following the withdrawal, on November 18th, 2022, the Ministry of Electronics and Information Technology ("Meity") unveiled its latest attempt at a data protection framework titled the Digital Personal Data Protection Bill, 2022 ("DPDP Bill"). Compared to its predecessors, the DPDP Bill is a short and concise document which proposes to ease cross-border data flows, have an overriding effect in case of conflicting provisions, and enhance penalties for breaches.

Let's see how different the DPDP Bill is, from the previous bills.

APPLICABILITY & SCOPE.

The DPDP Bill proposes an uncomplicated definition of personal data, *ie*, any data about an individual who is identifiable by or in relation to such data. In stark contrast to the previous bills, the DPDP Bill does not contemplate different categories of data such as 'sensitive personal data' and 'critical personal data'. The DPDP Bill also removes 'non-personal data' from its ambit thereby fixing one of the most controversial points from the previous bills.

The scope of the DPDP Bill is limited to processing of 'digital personal data', *ie*, personal data, which is either collected online, or which, where collected offline, is subsequently digitized. With respect to processing, the DPDP Bill proposes to allow data fiduciaries to process personal data in accordance with the DPDP Bill for any purpose not expressly forbidden by law. This is a significant departure from the previous bills, which required that processing be done only for specific, clear, and lawful purposes.

Further, much like its predecessors, the DPDP Bill also has extraterritorial applicability which shall apply to processing of digital personal data outside the territory of India, if such processing is in connection with any profiling of, or activity of offering goods or services to data principals within the territory of India.

NOTICE & CONSENT.

Under the DPDP Bill, data fiduciaries are required to provide an 'itemized' notice in clear and plain language that describes the personal data sought to be collected and the purpose for such a collection. The DPDP Bill also proposes retrospective applicability, *ie*, where personal data is already being processed under consent obtained prior to the commencement of the DPDP Bill, a fresh notice in the manner described above has to be given as soon as it is reasonably practicable.

Consent continues to remain the primary ground for processing personal data under the DPDP Bill. However, the DPDP Bill has introduced the concept of 'deemed consent'. Deemed consent may apply in certain situations such as, where the data principal voluntarily provides or is expected to voluntarily provide personal data, for purposes related to employment, and for fair and reasonable purpose after taking into consideration certain prescribed factors.

DATA PRINCIPAL RIGHTS.

Unlike the previous bills, the DPDP Bill does not provide the right to data portability to data principals. Instead, a new right, namely the right to nominate in the event of death or incapacity of the data principals has been extended. Further, instead of a standalone right to be forgotten, the DPDP Bill subsumes this right under the right to erasure. The

DPDP Bill also gives data principals an enhanced right to file a complaint with the Data Protection Board of India in case they do not receive a satisfactory response from the data fiduciary within seven days.

DATA LOCALIZATION.

In a move lauded by industry stakeholders, the DPDP Bill has done away with the data localization mandate. The previous bills restricted the cross-border flow of 'sensitive personal data' and 'critical personal data' with an aim to maintain 'digital sovereignty'. The DPDP Bill instead proposes to allow cross border data flow to 'countries and territories' notified by the Central Government. However, in its present form, neither does the DPDP Bill list down the territories nor does it provide any guidance or criteria for making this notification.

SIGNIFICANT DATA FIDUCIARIES.

The Bill retains the concept of Significant Data Fiduciaries ("SDFs"), a class of data fiduciaries to be identified by the Central government if they handle high volume and sensitivity of personal data or impact the sovereignty and integrity of India, security of state, or public order.

As before, such SDFs are subject to additional obligations like appointing a data protection officer, an independent data auditor, conducting periodic audits, and data protection impact assessments.

ENFORCEMENT.

While the previous bills contemplated a multi-layered enforcement structure with adjudicating officers and an appellate body, the enforcement mechanism under the DPDP Bill is straight forward. The DPDP Bill proposes setting up the Data Protection

Board of India (“Board”), an independent body, primarily responsible for determining non-compliances and imposing penalties. The Board is proposed to function in a digital manner which may include online filing of complaints and virtual hearings. While the composition of the Board will be specified at a later stage, the Central government is empowered to appoint the members of the Board and set out the terms and conditions of their appointment, thus raising questions around the independence of the Board.

PENALTIES.

With respect to penalties, the DPDP Bill departs from the previous bills in more ways than one. For starters, the upper cap on the penalties has been increased to INR 5 billion, a number much higher than what was provided for under the previous bills. Further, unlike the predecessors, the DPDP Bill does not list the offences and instead uses a subjective term like ‘significant non-compliance’. Lastly, in an unprecedented move, the DPDP Bill places significant duties on data principals, which include compliance with the ‘provision of all applicable laws’ when

exercising rights and not registering ‘false or frivolous’ complaints with the data fiduciary or the Board. Non-compliance with such duties may lead to penalties of up to INR 10,000.

CONCLUSION.

Safe to say, the DPDP Bill is a significant departure from the previous bills. A bird's-eye view of the DPDP Bill would reveal that it is more lenient than its predecessors. Erasing the data localization mandate is surely a move in the right direction and will play a catalyst in boosting the tech industry in India. Further, the proposed phase-wise implementation of the DPDP Bill will give companies the much-needed time to comply with the added obligations. However, much remains to be seen as the DPDP Bill fails to provide specific procedural guidance for various aspects which may be addressed in the rules and regulations.

Note:

**Feedback on the DPDP Bill
may be submitted to Meity
by January 2nd, 2023.**

This article has been authored by the members of the Privacy & Cybersecurity Group at our Technology, Media, & Telecommunications practice.

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