



PERSONAL DATA PROTECTION BILL, 2018

In the wake of General Data Protection Regulation (“**GDPR**”), the Indian government had set up the Justice Srikrishna Committee to re-evaluate the data protection laws in India. The Committee has now come up with its recommendation for formalising the data protection regime and has come up with the Personal Data Protection Bill, 2018 (“**Draft Bill**”) a draft bill which is inspired considerably by the GDPR. The bill seeks to introduce several significant changes in the arena of data protection in India some of which are summarised herein below

EXTRA TERRITORIAL APPLICATION

Apart from covering processing of personal data of Indian individuals by foreign entities, the Draft Bill also proposes to cover all data processing activities in India, whether or not it involves Indian individuals. This is particularly important, given India’s extensive presence in the international business arena, with respect to outsourcing and processing. By protecting data processing of foreign individuals in India, the Draft Bill, takes a step towards rendering India as a qualifying country which can provide adequate level of data protection under the GDPR.

❖ DATA

The recommendation charts out distinction between personal data and sensitive personal data and imposes obligations based on the critical nature of the data.

Apart, from providing criteria, on which personal data will be deemed to be sensitive personal data, the recommendation also enlists a list of information that would be deemed sensitive personal data, which includes, passwords, financial data, sex life and sexual orientation, caste or tribe, health data, official identifiers etc. under the Draft Bill.

❖ DATA PRINCIPAL AND A DATA FIDUCIARY

An individual, who shares his /her personal information, is referred to as a Data Principal. Further, since such sharing of personal information is based on an expectation that such personal information be used fairly, any entity with whom the data principal chooses to share personal information with, is termed as a ‘data fiduciary’. The Draft Bill also makes a distinction between data fiduciaries,

who have control over the use of such data, and a data processor, who processes the data on behalf of a data fiduciary. While the Draft Bill vests the data fiduciaries with duties it vests the data principals with rights.

❖ CONSENT

One of the key principles of the Draft Bill is the introduction of requirement to seek explicit and specific consent from the data principals. The data fiduciaries are obligated to provide notices specifically indicating the purposes for which the data is to be utilised.

However, it is of great concern that the Draft Bill provides a blanket permission to the government to process any sensitive personal data for (i) legislative functions and (ii) provision of benefits and services to the data principals. While the overarching principle of the Draft Bill is that governmental authorities are also covered under the data protection obligations, the general exemption granted to government entities for provision of ‘benefits’ to the individuals, may raise questions, on the extent of privacy protection ensured by the Draft Bill.

❖ CHILD RIGHTS

A significant inclusion in the Draft Bill, which is a departure from GDPR, is the specific protection of rights of children as they are considered a vulnerable community requiring a greater extent of protection. Behavioural monitoring, tracking, targeted advertising and any other type of processing which is not in the best interest of the child, are specifically prohibited. Further data fiduciaries are mandatorily required to



adopt age verification mechanisms and can process data only upon parental consent.

❖ REGISTRATION AND DATA AUDIT

All data fiduciaries undertaking to process large scale profiling or sensitive personal data among other significant activities are required to conduct data protection impact assessment.

The Draft Bill, proposes to set up a Data Protection Authority of India (“**Authority**”), for overseeing processing activities in India. To enable this, significant data fiduciaries (as may be notified) are required to register with the Authority. Further the Authority under the Draft Bill has been provided with the power to register persons with expertise in the area of information technology to operate as data auditors.

❖ PENALTIES

The penalties imposed under the Draft Bill, is similar to that of the penalties imposed under the GDPR, with

the maximum penalty under the Draft Bill extending up to Rs. 15, 00,00,000/- (Rupees Fifteen Crores only) or 4% (Four per cent) of the defaulting entity’s total worldwide turnover of the preceding financial year, whichever is higher.

Additionally, criminal liability is proposed to be imposed on individuals or entities who (i) re-identify personal data which has been de-identified and (ii) obtain, transfer or sell of personal data or sensitive personal data.

While the Draft Bill is a welcome and ambitious way forward in the arena of data protection in India, especially, in light of GDPR and the ripple effect it has created across the world, it is to be seen, whether the recommendations of the committee will actually be enforced and effectuated in India and the extent of implementation of the protection guidelines.

NET NEUTRALITY IN INDIA

The Department of Telecommunication (“**DoT**”) has accorded approval to the Telecom Regulatory Authority of India’s (“**TRAI**”) recommendation dated 28th November, 2017 (“**TRAI Recommendations**”). This article summarizes the basic understanding of net neutrality and the key takeaways from the approved TRAI recommendations.

Net Neutrality

The core principle of net neutrality is that internet service providers (“**ISP**”) treat all data on the internet equally, and not discriminate or charge differently by user, content, website, platform, application, type of attached equipment, or method of communication. Over the past few years, this term has acquired a central place in many global debates on internet policy and governance. The few practices of the ISPs and Telecom Service Providers (“**TSP**”) against the principles of net neutrality are:

Blocking: A practice in which access to content on the internet is blocked to comply with regulatory restrictions or the business objectives of ISPs or network infrastructure operators to favor their own content.

Internet fast lanes: An ISP may provide preferential treatment for data stream of certain networks, based on business arrangements between networks and ISPs. Thus, content on a particular network will be delivered faster to the end user than other content, thus inducing the end user to use only the preferred network of the ISP and eliminating access to the end user.

Throttling: The term *throttling* refers to a practice wherein ISPs actively limit the number of functional end users from downloading and uploading data streams, whereby when the number of end user exceed a particular threshold, the networks speeds are considerably slowed down. For example in 2007, the Comcast America intentionally restricted end users



from using Bittorrent's peer to peer file sharing platforms.

Zero-rated services: Zero-rated services, as the name denotes refers to a practice whereby the end user is provided with content of a particular network at discounted or reduced rates thus providing a market advantage for the preferred network in the long run. For example Facebook.com recently wanted to set up free internet connections for end users in developing countries, which would have granted access to end users to networks which are managed by Facebook or their sponsors.

Key Takeaways from TRAI Recommendations

TRAI has recommended that the terms of various license agreements governing the provision of internet services in India are to be amended in order to incorporate the principles of non-discriminatory treatment of content by ISPs.

The principle of non-discriminatory treatment shall be exempt in certain services, or class of services such as 'Internet of Things' and services which are critical in nature which would be listed down by TRAI and DoT. However, the exempt certain services should comply with the following pre-requisites:

- such services are not usable or offered as a replacement for internet access services; and
- the provision of such services should not be detrimental to the availability and overall quality

of internet services. This could be monitored using various 'quality of service' parameters.

TRAI recommends that content delivery networks should not be included within the scope of any restrictions on non-discriminatory treatment, which are designed specifically to cover the providers of Internet Access Services.

TRAI recommends that for monitoring and enforcement, DoT may establish a multi-stakeholder body with framework for collaborative mechanism among the stakeholders. The multi-stakeholder body, shall be a not for profit organization led by industry experts and shall comprise members representing different categories of TSPs and ISPs, large and small content providers, representatives from research and academia, civil society organizations and consumer representatives.

TRAI proposes to supplement its existing disclosure and transparency requirements by framing additional regulations in this regard.

Conclusion

This approval of the DoT is a great step towards ensuring net neutrality in India and would encourage new and aspiring innovators and entrepreneurs to get a fair chance of offering their services without being subdued by the existing internet giants. India is one of the first nations to officially recognize the basic principles of net neutrality and take efforts towards making the internet a level playing field for all users and service providers alike.

LEX REVISORS

Amendment to the Specific Relief Act

The Parliament has passed the Specific Relief (Amendment) Bill 2018, proposing to bring significant amendments to Specific Relief Act 1963. One of the major features of the amendment is that it looks to enforce permit specific performance by courts as a general rule. The proposed amendment also seeks to prevent courts from granting injunctions in infrastructure related contracts, if such an injunction would impede the infrastructural project.

Read More at: http://164.100.47.4/BillsTexts/LSBillTexts/PassedLoksabha/248-C_2018_LS_Eng.pdf

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Offences under the Companies Act to be relooked.

Ministry of Corporate Affairs (“MCA”) has set up a Ten-member panel which seeks to review offences under the Companies Act, 2013 whereby offences are sought to be decriminalised. The proposal is with the intent to allow trial courts and special courts to pay more attention to serious offences. The Committee will be headed by Mr. Injeti Srinivas, the Secretary of MCA as well as eminent bankers and partners of top law firms of the country being its members. The committee is supposed to submit its recommendation in 30 days.

Read More at: <https://www.thehindubusinessline.com/companies/corporate-affairs-min-sets-up-committee-to-review-offences-under-companies-act/article24424844.ece>

IBBI amends the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016

The Insolvency and Bankruptcy Board of India (“IBBI”) has notified the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Third Amendment) Regulations, 2018. Salient features include setting out the procedure for withdrawal of insolvency proceedings, change in timeline for submission of claims, and mandatory requirement of contents of resolution plans.

Read more at: <http://ibbi.gov.in/webadmin/pdf/press/2018/Jul/Press%20Release-CIRP%204July.pdf>

Parliament passes law on Corruption.

The Parliament has passed the Prevention of Corruption (Amendment) Bill, 2018 to enhance transparency and accountability of the government and make anti-graft provisions under the law stringent. The Bill amends various provisions of Prevention of Corruption Act (“PCA”), 1988. The Bill provides for imprisonment from 3 (Three) to 7 (Seven) years, besides fine, to those convicted of taking bribes. Bribe givers are also proposed to be punished by the legislation for the first time whereby a punishment of imprisonment up to 7 (Seven) years, fine, or both has been prescribed.

Read more at: <https://www.thehindu.com/news/national/lok-sabha-passes-anti-graft-amendmentbill/article24506028.ece>

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