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LAW OFFICES INDIA

TMT LAW NEWSLETTER

SPECIAL EDITION

DIGITAL PERSONAL DATA PROTECTION BILL, 2022



INTRODUCTION:

The Ministry of Electronics and Information Technology (“MeitY”) recently introduced the Digital Personal Data Protection Bill, 2022 (“Digital Data Bill, 2022”), that elucidates upon the framework to protect the digital personal data within the Indian territory. Earlier this year, the Data Protection Bill 2021 (“DP Bill 2021”), based on the recommendations of the Joint Parliamentary Committee, was withdrawn. The present note aims to highlight the salient features of the Digital Data Bill, 2022, and discuss the major changes and shift in approach between the two bills. Following is summary & analysis of the Digital Data Bill, 2022, divided concept wise; the key changes are highlighted in bold, and the new clauses/provisions introduced by the Digital Data Bill, 2022, have also been stated here:

SCOPE OF DIGITAL DATA BILL, 2022:

The Digital Data Bill, 2022 aims to regulate the processing of digital personal data within the territory of India where such personal data is (a) collected online; and (b) collected offline but digitised. Further, it also aims to regulate the processing of digital personal data outside the territory of India, where such processing is in connection with any profiling of data principals in India, or activity of offering goods or

services to data principals in India. **Interestingly, the scope of DP Bill 2021 was comparatively broader and it included within its ambit ‘nonpersonal data’ and ‘data in physical form’.**

List of data sets excluded from the scope of Digital Data Bill, 2022:

The Digital Data Bill, 2022 lists out the data sets which are excluded from the scope of the law which are as follows: (a) non-automated processing of personal data; (b) offline personal data; (c) personal data processed by an individual for any personal or domestic purpose; and (d) personal data about an individual that is contained in a record that has been in existence for at least 100 years.

Categorization of data: The DP Bill, 2021 categorized personal data into two categories of ‘critical personal data’, and ‘sensitive personal data’, and prescribed compliances accordingly. However, the Digital Data Bill, 2022, has done away with such categorization, and has prescribed all the compliances for personal data, without any differentiation.

PROCESSING OF PERSONAL DATA:

Grounds for processing of personal data: The Digital Data Bill, 2022 requires that the personal data of the data principal may only be processed for a lawful purpose for



which (a) the data principal has given consent; or (b) the data principal is deemed to have given consent. The Digital Data Bill, 2022 requires the data fiduciary to give to the data principal an itemised notice, on or before requesting consent, in clear and plain language containing a description of personal data sought to be collected by the data fiduciary and the purpose of processing of such personal data. **The Digital Data Bill, 2022 does not provide for the exhaustive list of the particulars of the notice as prescribed under the DP Bill 2021.**

Further, the Digital Data Bill, 2022 prescribes that a data principal would be deemed to have given consent to the processing of her personal data if such processing is necessary, for purposes, including but not limited to (a) compliance with any judgment or order issued under any law; (b) in public interest, including for prevention and detection of fraud etc; (c) responding to a medical emergency involving a threat to the life or immediate threat to the health of the data principal or any other individual etc.

ADDITIONAL REQUIREMENTS FOR PROCESSING OF CHILDREN'S PERSONAL DATA:

The Digital Data Bill, 2022 prescribes a mechanism for processing children's personal data, based on verifiable parental consent. Further,

the Digital Data Bill, 2022 provides an exemption from obtaining the verifiable consent from a child's parents, in case the data fiduciary is providing counselling/child protection services, to the concerned child. The manner and form of obtaining such verifiable consent has not been detailed out.

It is noteworthy that the DP Bill 2021 mandates a data fiduciary to verify the age of a child, in the manner prescribed, before processing personal data of a child, as well as obtain a parental consent of the parents/guardians of the children, whereas the Digital Data Bill, 2022 has retained only the requirement of obtaining parental consent.

OBLIGATIONS OF A SIGNIFICANT DATA FIDUCIARY:

Determination of significant data fiduciary: The Digital Data Bill, 2022 prescribes that the Central Government may notify any Data Fiduciary or class of Data Fiduciaries as Significant Data Fiduciary, on the basis of an assessment of relevant factors, including, the volume and sensitivity of personal data processed; risk of harm to the Data Principal; potential impact on the sovereignty and integrity of India; risk to electoral democracy; security of the State; public order; and such other factors as it may consider necessary;



Duties of a significant data fiduciary: The Digital Data Bill, 2022 prescribes that a significant data fiduciary shall appoint a data protection officer who shall represent the significant data fiduciary and be based in India. The data protection officer shall be an individual responsible to the board of directors or similar governing body of the concerned significant data fiduciary and will act as the point of contact for the grievance redressal mechanism under the provisions of the Digital Data Bill, 2022. Also, a significant data fiduciary is mandated to appoint an independent data auditor who shall evaluate the compliance of the significant data fiduciary, with the Digital Data Bill, 2022, and undertake such other measures including data protection impact assessment and periodic audit in relation to the objectives of the Digital Data Bill, 2022.

The DP Bill 2021, among other factors, for the purpose of determination of a significant data fiduciary, prescribes the turnover of the concerned data fiduciary, whereas such factor is absent from the Digital Data Bill, 2022. The DP Bill 2021 also prescribed that certain social media platforms can automatically qualify to be a significant data fiduciary, in case it crosses a certain viewer base, however the Digital Data Bill, 2022 has done away with such requirement. In fact, the Digital Data

Bill, 2022 has done away with the distinction between other data fiduciaries and social media platforms to qualify as significant data fiduciaries.

ESTABLISHMENT OF DATA PROTECTION BOARD OF INDIA:

The Digital Data Bill, 2022 provides for the establishment of an independent body known as Data Protection Board of India ("**Board**"), which is to be constituted by the Government of India. The Board is empowered to determine non-compliance with the provisions of Digital Data Bill, 2022, impose financial penalties and perform such functions, which would be prescribed by the Government. Further, the Board also has the power to direct the parties to attempt resolution of the dispute through mediation or other process of dispute resolution. **The Digital Data Bill, 2022 replaces the Data Protection Authority of India as stipulated in the DP Bill, 2021, with the Board and significantly limits its role and several aspects of its functioning remain within the Central Government.**

POWERS OF GOVERNMENT OF INDIA:

Power to exempt other personal data processing: The Digital Data Bill, 2022 retains similar wide ranging powers for the Government, as were



set out in DP Bill 2021, and allows the Government to exempt any instrumentality of the State, from processing personal data in accordance with the Digital Data Bill, 2022, in the interests of sovereignty and integrity of India and for research, archiving or statistical purposes if the personal data is not to be used to take any decision specific to a data principal, from the application of provisions of Digital Data Bill, 2022.

Power to exempt certain data fiduciaries: The Government is also empowered to exempt certain data fiduciaries from the application of the provisions of the Digital Data Bill, 2022.

Review and Appeal: For the purposes of discharging its functions, the Board is required to issue directions to such persons which are in violation of the Digital Data Bill, 2022. The Board, on a representation made to it or suo moto may also review its order issued under the provisions of the Digital Data Bill, 2022. An appeal may be made to the High Court within sixty days from the date of the order appealed against. Furthermore, the civil court is prohibited from entertaining any suit or action in respect of the matters connected to the Digital Data Bill, 2022.

CROSS-BORDER TRANSFER OF PERSONAL DATA & DATA LOCALIZATION:

The Digital Data Bill, 2022 provides for the transfer of personal data to such countries or territories outside India, and on such terms and conditions as assessed and notified by the Government subsequently. The Digital Data Bill 2022 is silent on the basis for the identifying such countries and for prescribing the terms and conditions and hence the implantation aspects remain to be seen.

Earlier, the DP Bill, 2021 prescribed certain conditions for transfer of only sensitive personal data and critical personal data and mandatorily required that such data must be stored in India.

DUTIES OF DATA PRINCIPAL:

The Digital Data Bill, 2022 casts certain duties upon the data principal, which among others, includes requirement of complying with the provisions of the Digital Bill, 2022, while exercising its rights, not registering false or frivolous grievance or complaint with a datafiduciary or the Board, not furnishing false particulars or suppress any material information or impersonate another person under any circumstances. A penalty of up to ₹10,000 has also be prescribed for non-compliance with these duties. **Notably, earlier versions of the Bill, like DP Bill, 2021, and the Personal Data Protection Bill 2019, did not provide for the duties of the data principal.**



RIGHTS OF DATA PRINCIPAL:

In addition to the right to obtain information about personal data being processed by the Data Fiduciary, the Digital Data Bill, 2022 prescribes that the data principals will have the right to seek correction and erasure of their personal data. Additionally, data principals can also nominate another individual to exercise their rights on their behalf in the event of the data principal's death or incapacity. **Interestingly, the right to data portability and the right to be forgotten which were accorded to data principles, as per the DP Bill, 2021, have not been mentioned in the Digital Data Bill, 2022.**

REPORTING OF DATA BREACHES:

As per the provisions of the Digital Data Bill, 2022, the data fiduciaries or data processors are required to notify the Board and each affected data principal of the personal data breach, in the form and manner as prescribed by the Government. Earlier, the bill provided for the particulars to be included in the notice and a mandatory specific timeframe within which the data breaches are required to be reported by the data fiduciary, namely, within 72 hours, from the time the data fiduciary becomes aware of such breach. **However, such requirements are currently not**

mentioned under the Digital Data Bill, 2022, and has been left on the Government to decide, subsequently.

PENALTIES & LIABILITY PROVISIONS:

The Digital Data Bill, 2022 introduces enhanced financial penalties for non-compliance of the provisions of the Digital Data Bill, 2022, and prescribes penalties in accordance with the subject matter of the non-compliance. The Digital Data Bill, 2022 provides for a penalty for the failure to take reasonable security safeguards to prevent personal data breach (up to ₹250 crores), the failure to notify the Board and affected data principals of a personal data breach (up to ₹200 crores), non-fulfilment of additional obligations in relation to processing data of children (up to ₹200 crores), non-fulfilment of additional obligations of significant data fiduciary (up to ₹150 crores); and for all other non-compliances under the Digital Data Bill, 2022 (up to ₹50 crores). However, the Digital Data Bill, 2022 provides ₹500 crores quantum cap on the amount of the financial penalty that can be imposed by the Board. Further, the Digital Data Bill, 2022 also details out the grounds for the determination of the financial penalty, which among others, includes the nature, gravity and duration of the non-compliance, repetitive nature of the noncompliance etc.

This newsletter is only for general informational purposes, and nothing in this edition of newsletter could possibly constitute legal advice (which can only be given after being formally engaged and familiarizing ourselves with all the relevant facts).

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