

DATA GOVERNANCE POLICIES AND THEIR IMPACT ON STARTUPS

Stakeholder Consultation by The Dialogue

On August 28, 2020, The Dialogue held a stakeholder consultation to discuss '*Data Governance Policies and their Impact on Startups*'. The consultation was held on Microsoft Teams from 5 PM - 6:30 PM. A range of participants from organizations such as, **KartaKconnect**, **Mapmygenome**, **Factumlegal**, **Bluesky Analytics**, **Swiggy** and **The Datavist** were present at the event. Speakers included esteemed members of the startup space and tech policy leaders.

The highlight of the discussion was the impact of the Non-Personal Data (NPD) report released by the Kris Gopalakrishnan committee on startups and SMBs. The questions participants grappled with included which market principles allow for sharing of data, who determines at what point raw data gets converted to business insights, whether the mandatory sharing of data will be a compliance burden to startups, at what point does an entity become a dominant player, where does user data ultimately end up going and how to create a progressive system for startups.

Non Personal Data and Compliance Burden on Startups

Sreenidhi Srinivasan from Ikigai Law answered the question about the premise of the NPD report for data collection by the government and compliance burden on startups. She explained that the basic premise of the report is that there is value in NPD, and that the government will be able to use it for policy making. Therefore, there is an attempt by the government to regulate NPD. However, the NPD report proposes a completely new architecture, a new regulator, a new law (as compared to the proposed Personal Data Protection Bill 2019 [hereafter PDP 2019]). There are questions which still need answers - such as how the NPD regulation will interact with the Intellectual Property regulation regime. There is already a proposed Data Protection Authority in the PDP 2019, and it is necessary to see whether data protection can be addressed without overlapping two regulators. These requirements will disproportionately affect startups and increase their compliance costs, in an already uncertain climate of funding.

Mr. Deepak Maheshwari added to this when he addressed the audience, mentioning how from the smallest business to the largest business, getting permissions is a part of setting up operations. However, with respect to the regulation of NPD, it is important to remember that compliance burdens should be reasonable, necessary and lawful. The Founder of MyUpchar, Manuj Garg, spoke about how if the NPD regulations had been in practice when he was growing his startup, they would likely not have been able to grow the organization into the success it is today. According to him, it is possible to depersonalise the data but compliance mechanisms are burdensome. In terms of effort, money and systems - practically everything is invested in collecting NPD. If a data trustee - be it the government or any other party is going to collect this data, it will halter innovation. Startups will have no reason to collect the NPD for fear that it will be taken away from them. There are important questions here to ponder upon - such as who sets the price for it, how much has to be paid and who is to be paid. This could lead to a shrinkage in investments across sectors, since formulating a single data sharing rule across all sectors, all industries and individuals could easily hurt investor sentiments.

He concluded by saying that the NPD regime isn't yet a law or even a draft law. It is the responsibility of citizens to participate without being too concerned about the content of the report presently. The important idea to focus on is a data governance framework which the government comes up with and look into horizontal regulator bodies, since there will be overlaps everywhere. Having a single "north star" to gauge the direction of overlaps is crucial.

Mr. Panduranga Acharya from Swiggy revealed how there is significant conflict when it comes to identification and categorization of data. NPD might not truly be 'non-personal' as it is often thought of, and if deanonymization is used to identify individuals then it could lead to a catastrophic situation. Companies generally rely on Artificial Intelligence for the generation of certain data - and this information is crucial to the business. If it is made open to competitors, then the incumbent could launch similar products or services. Therefore, bridging competition should be the role of the Competition Commission of India (CCI).

On the conflict between the data protection authorities envisaged in the NPD report and the PDP 2019, Mr. Acharya mentioned that they will have conflicts and overlaps. Especially around categorizing particular data sets, leading to more complications in terms of things for the companies to comply with. Thus, it doesn't make sense to have two regulators in the same space, asking for companies to comply with them. The market should be opened up and the current policy is not incentive enough for companies to comply with it - it is more about coercion than protecting data.

Uncharted Access of Data and Data Ownership

On the count of uncharted access of the government to NPD, Aditi Chaturvedi from Koan

Advisory answered that the main approach would be to assess the basic principles that are in existence and are being followed. There exists no settled law on the same. With respect to the NPD framework, we must assess whether or not the object of data sharing is met, which is to create a level playing field. At present, there is no clarity on thresholds with respect to who the requesting entities are. Whether they can be domestic or foreign; or whether they are big or small entities. There is little clarity on who is getting access to such data. Therefore, it is necessary to look at the taxonomy of such data where there exist rival communities.

Secondly, she discussed the problem of data ownership. There exists a requirement to settle this concept. Government circles are not clear on this and there has been pressure on the government by various countries like Japan, US, and other European countries on the same, as there are copyright issues of the database, trade secret clauses.

Thirdly, there needs to be discussion to assess the market principles on which India will allow the sharing of data. There are regulatory overlaps, where the NPD authority will be responsible for NPD but the CCI is the main watchdog on issues related to competition. There will be cases of forum shopping where companies will prefer one regulatory authority over the other.

Lastly, we must focus on indices such as the Digital fitness index, which comprises physical infrastructure, access to creativity and data transfer issues. This will impact India and there is not enough discussion around this yet.

Intellectual Property, NPD and Startups

With regards to the question of the challenges to Intellectual Property and the direction that the new NPD Bill is planning on giving the same, the panel had a unanimous opinion regarding the NPD bill in its current form will limit the incentive and thus the development of proprietary intellectual property as they will be mandated to share the same with everyone else. They drew our attention to how the European Union has allowed the data to freely flow and has not enforced a coercive data sharing mandate in any situation besides legal enforcement and that this action is why their data sharing economy is democratic and functions on market forces of competition.

They further agreed upon the **FRAND** model of licencing while emphasizing on the need for these types of policies to come from industry consultations rather than legislative enforcement through the bill. The **FRAND** model stands for 'Fair, Reasonable and Non Discriminatory Licensing' of Intellectual property that allows for innovation to prosper through voluntary IP sharing and has already been proven as a step in the right direction in the case of Standard Essential Patent (SEP).

Furthermore, the panelists we're also on the same page when it came to the level of clarity that the NPD Bill had in relation to the architecture of its Regulatory Authority and the ambit of its

scrutiny as there are currently two regulators in the same space, overlapping each other's powers. The panelists called for a broader data governance framework firstly, before talking of vertical or horizontal integration as they felt that overlaps of regulatory powers are inevitable but an analysis of the same will allow for minimization of such overlaps over time.

NPD Regime's Effect on Investment Opportunities for Startups

With regards to the NPD's impact on the investment opportunities in Startups, Mr. Acharya lead the panel in identifying the compliance issues that they might have to face as startups do not initially have the capital to comply with a host of requirements all at once and also turn a profit. Mr. Acharya drew the panel's attention to firstly, how resource heavy and burdensome compliance under the NPD can be for startups and then secondly, tried to visualize the impact of overlapping compliances between the Personal Data Protection Authority and the Non Personal Data Protection Authority and the confusion that their dual presence sows, can be very overwhelming on startups. Mr. Acharya also mentioned that the Data sharing mandate is unfair for companies that have invested time and resources in making their intellectual property, only to share the same with the government without any consideration.

Mr. Acharya then followed up on this with his suggestion of allowing the market to resolve itself and not to mandate coercive data sharing through the bill as companies might voluntarily create a data sharing ecosystem over time. Mr. Garg agreed to this characterisation of a 'marketplace of data' and called for a more nuanced framework and not a blanket application as the industry is very nuanced and thus, requires nuanced laws to ensure that companies aren't over or even in some cases, under regulated. Ms. Anu then furthered this discussion calling on the government to firstly, make the public data of all individuals or data collected by publicly funded projects, which as a matter of fact is legally mandated to be in the public domain by the RTI Act, available digitally to the public, and only when they fulfill this obligation, should they consider expanding by mandating data sharing on the corporate sector.

While panelists has their own qualms with the NPD Bill, all of them agreed that the intention of the bill was to bolster growth in India's domestic data market, just that the way in which it is being actualized, needs a fundamental rethink in relation to the necessity of a more nuanced compliance regime with a clear mandate and unified regulation under the same.