

STAKEHOLDER CONSULTATION ON THE BUILDING BLOCKS OF A DATA PROTECTION AUTHORITY

1. BACKGROUND

The Dialogue, in collaboration with Centre for Communication Governance at National Law University Delhi¹ organised a technology policy roundtable titled “DPA and its Independence: Global Bridge to High Standards of Data Protection” on the 18th of February 2020 at The Senate, The Claridge’s Hotel, New Delhi.

In a country like India, at present the challenge is to move rapidly from a near absence of a data protection law, and consequently an abysmal state of data privacy practices, to a strong data protection regime. This requires a system of supportive mechanisms to the stakeholders in the data ecosystem, as well as systemic measures which enable the proactive detection of breaches. Further, keeping in mind the limited regulatory capacity in India, there is a need for the Authority to make use of different kinds of inexpensive and innovative strategies.

Mr. Ritesh Pandey, Hon’ble Member of Parliament and Member of the Joint Parliamentary Committee on Data Protection Bill, chaired the event. The discussion was moderated by Mr. Kazim Rizvi, The Dialogue.

The discussion was attended by a range of stakeholders who work on tech policy. These included representative from technology companies, industry associations, academics and civil society organisations. The event also saw active participation from eight offices of Members of Parliament who are on the Joint Parliamentary Committee and others. The total strength of the attendees stood at 85 participants.

¹ The report is a summary of the discussion held at the event, and do not represent the view of the Centre for Communication Governance or The Dialogue.

A nuanced discussion on the regulatory system around data protection in India was held at the event. Comparisons to the Data Protection Authorities under the GDPR regime were drawn to understand the best practices that could be adopted in India. The challenges and opportunities that exist in designing an independent and effective regulator were discussed. Key points that came up were regarding the composition of the selection committee, the inclusion of experts in the DPA, functions and capacity of the authority, and the powers of the DPA. Another topic that was brought up was data localisation and its downfalls.

2. RECOMMENDATIONS

- PDP Bill must include a clause on transparency in the main legislation to give it a statutory backing. Additionally, the criteria for selection of the members of the DPA must be made public.
- Inclusion of an independent member in the body of the selection committee from Chairperson and Members of the DPA. To balance conflicts of interest in the committee, a diverse group with multiple stakeholders' representation should be there. Judicial members are need in the committee.
- Non-executive members could be added to the structure of the DPA. They serve as independent observers in the functioning of the DPA and alert the Government of any non-compliance of law by it.
- An empowered DPA which is financially not restrained in hiring expertise, as required, would help in solving the complex issues that it might have to face. This could include members from the industry, academics, or civil society.
- In order to avoid overburdening of the DPA, it is suggested that a tiered structure of the DPA is envisioned, with a Central body and State authorities existing simultaneously.

- Separation into ombudsman for complaints and then rule making process with a regulatory body, thereby dividing the powers.
- Prioritize data sharing agreements for law enforcement and its security. India could be signatory to the Budapest Convention or similar provisions.

3. KEY HIGHLIGHTS

3.1 Composition of the Selection Committee

It was pointed out that there were substantial changes in the selection process of the members of the DPA. The composition of the Committee has been altered to include the Cabinet Secretary, Secretary of the Government in the Department of Legal Affairs and the Secretary of the Government in the Ministry of Information Technology (MeitY).

With greater representation from the executive, the independence of the Data Protection Authority from government influence is harder to achieve. It was suggested that to increase transparency and independence, stakeholders outside of the executive must be brought into the selection committee. The idea is not to do away with the government's involvement in the committee, but to ensure that there are sufficient stakeholders involved in the decision-making process. It was also important to address the conflict of interests arising between the executive and the DPA. The proposed bill is to apply to the government and the private alike. Since the Government also comes under the scanner of the DPA, to have a body that is appointed solely by the executive is counter intuitive.

Regulators, in the past, have dealt with similar issues. It was important to draw lessons from the past while coming up with a new model. It was agreed upon that merely having a judicial member on the selection committee of the DPA would not ensure independence. It was suggested that if the DPA was to be more diverse, more stakeholders should be involved.

3.2 Inclusion of Experts

Non-executive members could be added to the structure of the DPA. They serve as neutral observers in the functioning of the DPA and alert the Government of any non-compliance of law by it. They could also provide data protection expertise from the industry that could be valuable for the DPA deal with complex issues before it. It was suggested that we must strive to build capacity to independent members from external environments in an attempt to increase the independence of the body.

Moreover, it was also opined that the focus on choosing leadership of the authority must not rest on possessing technical knowledge, which can be outsourced. The leadership of the authority must be involved in larger questions of strategy and policy. The DPA must be empowered enough to have appropriate freedoms to get the expertise at prevailing market prices, when in need for technical expertise.

3.3 Functions and Capacity of the DPA

DPA, as envisaged, is to perform adjudicatory, judicial, regulatory and rulemaking functions. Decentralization of power from the DPA is crucial to ensure that it is not overburdened and to ensure effective functioning. It was pointed out that from previous regulatory experience, where the division is not done properly, it can lead to legal issues and can hamper the functioning of the authority. DPA is a regulator that cuts across sectors and has wide application. The risk with respect to this body is the scale of issues it will have to deal with. It would be impossible for the DPA to serve all its functions effectively in case of overburdening on account of multiple cases. This will thereafter change the course of how authorities will function. It was noted that it is important to preempt this.

It would also be useful to look at a tiered system of DPA, rather than one central body. Keeping in view with the quasi federal nature of the Indian State, a Federal authority along with state bodies to support the wide range of cases that will start pouring in.

3.4 Powers of the DPA

The powers and functions that were originally intended to be performed by the Authority have now been allocated to the Central Government. Under the PDP Bill, the Central Government has been conferred the power to notify further categories of Sensitive Personal Data in consultation with the sectoral regulators. This is a departure from the earlier bill, where the Authority retained the power to do so. Similarly, the Central Government has been given the power, in consultation with the Authority to notify social media intermediaries as significant data fiduciaries. In the earlier version of the bill, the Authority had the sole power to determine and notify significant data fiduciaries. It was recommended that this excessive power vested on the government must be relooked.

3.5 Financial Independence of the DPA

Apart from the structural independence, the authority does not have financial independence as well which makes them more prone to governmental control. Per Clause 78 of the present bill, the central government will grant sums of money to the DPA. In addition to it, the authority may receive the funds from sources which will only be notified by the Central Government. This shows that the government will have control over the revenues, salaries, allowances etc. of the authority which means that the government restricts the financial autonomy of the authority.

It was suggested that to insulate the DPA from government interference, financial independence was key. Typically, regulatory bodies raise resources by providing services, approval, etc. and they can sustain themselves. One way to go about this is to look at the financial model followed by TRAI.

3.6 Pitfalls of Data Localisation

There is a belief that data localisation is a response to privacy and security issues. This assumes that data is only safe within national borders and control cannot be ensured over

data that is stored in foreign countries. Dispelling this myth, it was noted that experts recognise data localisation to be a regressive policy measure that will have significant ramifications on the Indian economy. A better model would be to enter into data sharing agreements for law enforcement and security.

The Chinese model was discussed at length, where the restriction on data flows may have proved as a fertile ground for the development of unicorns. It was noted that China pumped resources into science and tech, education, infrastructure, human resources, and healthcare to facilitate this growth. The discussion shifted to whether a similar model can be implemented in India, and if that would bring about additional advantages to the homegrown Indian companies. It was observed that there are many challenges in implementing this model in India. The eco-system to facilitate such a drastic shift is lacking at the moment and India would be better suited to follow the free-market model.