

Newsflash

The Digital Personal Data Protection Bill, 2022

Introduction

The Ministry of Electronics and IT (“MeitY”) has introduced a draft of the Digital Personal Data Protection Bill, 2022 (‘**DPDP Bill**’) and has invited the public to submit feedback on the DPDP Bill by 17th December 2022. This move comes a few months after MeitY withdrew the DPDP Bill’s predecessor, the Personal Data Protection Bill, 2019 (‘**PDP Bill**’) in August 2022.

The DPDP Bill seeks to regulate personal data alone and leaves out non-personal data from its ambit. For the first time in India, the DPDP Bill has introduced pronouns ‘*she/her*’ to refer to individuals, irrespective of gender.

The DPDP Bill has, amongst other definitions, introduced new terms such as Data Principal (i.e. individual to whom the personal data relates and where such individual is a child includes the parents or lawful guardian of such a child) (“**DP**”) and Data Fiduciary (i.e. person who alone or in conjunction with other persons determines the purpose and means of processing of personal data) (“**DF**”). DF now includes HUFs, artificial judicial persons, individuals, State as compared to the existing Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011 (‘IT Rules 2011’) which are only applicable to body corporates.

While the DPDP Bill proposes the protection of (a) personal data collected from the Data Principal online and (b) personal data collected offline and then digitized; the DPDP Bill excludes (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.

The DPDP Bill proposes three grounds according to which personal data can be processed by a DF. Firstly, the processing of the digital personal data must comply with the provisions of the DPDP Bill. Secondly, as long as the processing is not expressly forbidden by law, such processing is allowed. Thirdly, the DP should have given consent (express or deemed) before such personal data is processed.

Some of the key features of the DPDP Bill are set out below:

1. Territorial Applicability

The DPDP Bill proposes that the Bill shall be applicable to personal digital data that is processed in India and to such personal data which though processed by the DF outside India but processed in connection with any profiling of, or activity of offering goods or services to the DP within India.

2. Notice and Consent

On or prior to seeking consent of the DP; the DF must send a notice to the DP setting out the description of personal data sought to be collected and the purpose of its collection. The DPDP Bill states the consent may be express or deemed. This consent is not permanent; the DP may withdraw consent at any time. If the DP withdraws consent, it is the DF’s responsibility to cease the processing of the DP’s personal data within a reasonable time unless such processing without the DP’s consent is required or authorised under the provisions of law. The latter form of consent, referred to as ‘*deemed consent*’ can be inferred by DFs during medical emergencies, compliance with a judgment or order or when the DP voluntarily provides personal data to the DF etc.

3. Duties and Obligations of DFs

The DFs have to *inter alia*:

- (a) ensure accuracy and completeness of the personal data when the same is used to make a decision that affects the DP to whom the personal data relates and in case of transfer of personal data from one DF to another;
- (b) take reasonable security safeguards to prevent personal data breach and notify the affected DPs in case of data breach; and
- (c) cease to retain the personal data upon fulfilment of purpose for which it is collected.

Further, vis-à-vis personal data of a child, DFs shall neither undertake processing of personal data that is likely to cause harm to a child nor undertake tracking or behavioural monitoring of children or targeted advertising directed at children.

4. Rights and Duties of the DPs

The DPDP Bill prescribes certain rights and duties for the DPs such as obtaining (a) a summary from the DFs of the personal data being processed, (b) the right to correct and erase her personal data, (c) nominate a person who may take decisions *vis-à-vis* the data of the DP upon her death or incapacity. The DP also has certain obligations under the DPDP Bill such as compliance with the provisions of the DPDP Bill, not furnishing false information, not registering a false or frivolous grievance or complaint etc.

5. Exemptions

The DPDP Bill *inter alia* vests the State with power to exempt, certain businesses from adhering to provisions of the bill on the basis of the number of users and the volume of personal data processed by the concerned business. This seems to have been done keeping in mind the complaints received from start-ups regarding the compliance burden under the PDP Bill.

The State has also been empowered to exempt its instrumentalities from the application of the DPDP Bill in the interest of sovereignty and integrity of India, security of the state, friendly relations with foreign states, maintenance of public order or preventing incitement to any cognizable offence. Further, while the DFs are required to cease retention of personal data upon fulfilment of the purpose for which personal data is collected, the DPDP Bill exempts the State from this requirement.

6. Appointment of Significant Data Fiduciary

The DPDP Bill proposes provisions for the appointment of a Significant Data Fiduciary (“SDF”). The Central Government may notify any DF or class of DF as SDF on the basis of an assessment of factors such as volume of personal data to be processed, risk of harm to DPs, potential impact on the sovereignty of the country, risk to electoral democracy, security of the State, public order; and such other factors as it may consider necessary. The DPDP Bill further proposes certain obligations for the SDF such as appointment of a Data Protection Officer (“DPO”) to represent the SDF and Independent Data Auditor (“IDA”) to evaluate compliance of the SDF under the DPDP Bill.

7. Data Protection Board of India

The DPDP Bill provides for the establishment of a Data Protection Board of India (“Board”) by the Central Government. The Board shall receive and hear complaints, pronounce decisions, and perform

other functions in a digital mode to determine non-compliance and impose penalties for non-compliance in accordance with the provisions of the DPDP Bill. Appeals from the decision of the Board shall lie to the High Court.

8. Penalties

Unlike the PDP Bill which had a penalty of INR 15 crores or 4% of the total worldwide turnover of any data collection or processing entity, the DPDP Bill prescribes hefty penalties of up to INR 500 crores on DFs. The DPDP Bill also provides for penalties of up to INR 10,000 on DPs for non-compliances. The DPDP Bill also provides for a voluntary undertaking that individuals may give to the Board which may include, an undertaking to take specified action within a specified time, an undertaking to refrain from taking specified action, and an undertaking to publicize the voluntary undertaking. This undertaking can be given at any stage of the proceedings and if accepted by the Board shall constitute a bar on ongoing proceedings in as much as the same relate to the proceedings.

9. Transfer of Personal Data

The PDP Bill restricted transfer of personal data outside India. On the contrary, the DPDP Bill has provided concessions on cross-border data flow by allowing transfer of personal data to countries outside India which will be notified by the Government.

Conclusion

The DPDP Bill has been drafted by the MeitY in a simple and plain language to facilitate easy understanding. But the plain language also leaves ample room for interpretations, and which may negate the intent of legislature. In majority of clauses, the term '*as may be prescribed*' has been used in the DPDP Bill thus leaving the detailing of the statute through rules and notifications. Further though the concept of voluntary undertakings may go a long way in establishing clear focus on facilitating and enabling compliance rather than penalising non-compliance, but it may also result in being frequently used as a bail-out card for getting away with non-compliances.

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