Data Protection Authority

Background

The Personal Data Protection Bill 2019 (bill)[1] provides for setting up a Data Protection Authority (DPA), while prescribing its composition, functions, powers etc.[2] However, these are plagued with various gaps and unfavourable changes made from its previous draft, as prepared by the BN Srikrishna committee in 2018[3].

Shortcomings in the Provisions

Lack of independence of the DPA: While the DPA will consist of a Chairperson, and upto six whole time members,[4] these shall be appointed exclusively by the central government, while taking recommendations from a selection committee, which shall again comprise of government officials (i.e. a cabinet secretary, and secretaries from the Ministry/Department of Legal Affairs, and Electronics & Information Technology)[5]. With the central government itself being a data fiduciary, there is a clear conflict of interest of the (central government appointed) members of the DPA and the government itself, since it effectively makes the government a judge of its own case, in a situation where the central government is accused of violating any provision of the bill. Furthermore, given the wide discretionary powers of the DPA, excessive central government control over the DPA would effectively enable the central government to hold immense decision-making powers under the bill, which would further weaken the independence and sovereignty of the DPA.

Funds made available through penalties not being used by the DPA: All funds raised from penalties under the bill, are required to be credited in the consolidated fund of India[6], and not in the DPA fund. This results in the removal of the provision of setting up a Data Protection Awareness Fund, as provided for by the previous version of the bill, which was to be maintained through sums realised from penalties.[7] Also, being completely dependent on the central government for its funds,[8] would weaken the independence of the DPA.

Power to make regulations, now shared with the central government: Many powers of the DPA (as granted by the previous draft bill) have been shifted to the central government. For instance, power to notify additional categories of sensitive personal data are now with the central government, in consultation with the DPA and sectoral regulators.[9] Similarly, there exist irregularity with powers to notify significant data fiduciaries (SDF) which continues to be with the DPA[10], with an inconsistent exception of social media intermediaries, categories of which shall be notified as SDF by the central government[11]. Another such provision is the power of the central government to issue

directions to the DPA, to which the DPA would be bound.[12]

Such dilution of powers of the DPA in favour of the central government is not advisable, since the DPA as a regulator would be better equipped with knowledge, experience and information pertaining to data practices, as compared to the central government.

Lack of requirement of transparency in use of discretion: It is to be noted, that despite such sharing of powers with the central government, the DPA still has vast powers to make regulations and the rules to carry out provisions of this bill.[13] However, the DPA has not been mandated to ensure adequate transparency, and not required to undertake cost-benefit analysis (CBA) while framing them.

Recommendations

Adopt an unbiased and neutral selection committee: The selection committee proposed by the previous draft comprised of the Chief Justice of India or a Supreme Court Judge; a Cabinet Secretary; and an expert[14].[15] Such a selection committee appears to be competent, neutral and unbiased, and should be reinstated in the bill. Furthermore, CUTS work on the Draft Regulatory Reform Bill[16] recommends to have one member in the selection committee from a Civil Society Organisation, with experience in consumer affairs or economic regulatory issues.

Also, in order to ensure transparency, a public hearing/consultation on the proposed selection committee must be undertaken before being finalised. Pubic consultations must also provide for inviting candidates it deems qualified to provide their CV's for its consideration, i.e. an open selection process must be adopted, to enable anybody possessing the requisite qualification to apply. Persons working as members or chairpersons in other regulatory commissions may also be invited to apply.

DPA to be a financially independent regulator: In order to ensure the financial independence of the regulator, any revenue generated by the DPA (including from levying fines on service providers for violating any provision of the bill) should be deposited under the DPA Fund[17]. Such independent raising of funds could be utilised to meet their expenses as mentioned under S. 79(2), before taking recourse to the Consolidated Fund of India.

Considering that consumer organisations are in a good position to take up the cause of aggrieved consumers and present their case, these funds may also be used to equip them with sufficient and sustained financial resources, in order to ensure that they perform this task of research and advocacy while meeting the appropriate standards. This cause may also be furthered by reinstating the Data Protection Awareness Fund, which may be used to raise awareness and build capacity of users and other stakeholders on issues of/incidental to privacy and data protection.

Shift powers back from the central government to the DPA: CUTS' recommends the shifting of powers (such as the ones mentioned above), from the central government back to the DPA. Decision

making by the central government, despite having an expert dedicated regulator would potentially delay decision making, while also fuelling risks of political biasness and conflict of interests.

DPA to adopt scientific regulation making processes: Considering the wide powers given to the DPA (such as those pertaining to issuing codes of practice, classifying data fiduciaries, prescribing standards of data protection etc.), the bill must mandate adopting scientific regulatory decision-making processes, in order to frame optimal regulations, wherein the costs of the regulations do not outweigh its intended benefits. Provisions for undertaking CBA through tools such as Regulatory Impact Assessment[18] must be encouraged in this regard. Conducting competition assessments and/or consulting with the Competition Commission of India, may also be mandated while deliberating on regulations which may impact the market.

1 Available at: http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/373_2019_LS_Eng.pdf

2 Chapter IX, Sections 41 to 50 of the bill.

3 Available at: https://meity.gov.in/writereaddata/files/Personal_Data_Protection_Bill,2018.pdf

4 S. 42(1) of the bill.

5 S. 42(2) of the bill.

6 S. 66(2) of the bill.

7 S. 77(2) of the previous bill.

8 S. 79(1) of the bill.

9 S. 15 of the bill.

10 S. 26(1) of the bill.

11 S. 26(4) of the bill.

12 S. 86 of the bill.

13 S. 94 of the bill.

14 Expert having specialised knowledge of, and professional experience in the field of data protection, information technology, data management, data science, cyber and internet laws, and related subjects. Refer S. 50(6) of the previous bill.

15 S. 50(2) of the previous bill.

16 Available at: https://cuts-ccier.org/pdf/CUTS_Comments_on_Regulatory_Reform_Bill-2013.pdf

17 As provided under S. 79(1) of the bill.

18 Details available at: https://cuts-ccier.org/regulatory-impact-assessment/