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# THE PERSONAL DATA PROTECTION BILL, 2019

DATA PROTECTION AUTHORITY

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# DATA PROTECTION AUTHORITY

## Introduction

India's first data regulatory authority ( **Data Protection Authority** ("DPA") ) forms a key part of the Personal Data Protection Bill, 2019 ("PDP Bill") that lays a cross-sectoral legal framework for data protection in India. The framework protects an individual's right to privacy ( *in turn informational privacy*) by laying down a preventive framework that upholds the basic international principles of data protection, while simultaneously putting in place an enabling framework that governs how entities (*private and public*) collect and use personal data. However, a vital aspect of the framework is to protect individuals and provide them with a recourse in the event that their right is violated and they incur harm - this is where the Data Protection Authority plays a key role.

The PDP Bill seeks to establish and incorporate a data protection authority for the territory of India. *The duty of the proposed DPA shall be to protect the interests of data principals, prevent any misuse of personal data, ensure compliance with the provisions of this Act, and promote awareness of data protection.* Thus, identifying that the DPA will undertake the following largely diverse responsibilities and functions:

- **Adjudication and grievance redressal**
- **Standard setting and policy making**
- **Regulation of data flows of sensitive and critical data**

Effectively, the DPA is required to function as an independent arbitrator or supervisory authority between citizens, industry and the State. To achieve its variety of responsibilities and role as an arbitrator the DPA thus proposed is a horizontal regulator that will overlook all usage of data across sectors. It is likely to work closely with already existing sectoral regulators, and more, depending on the creation of more regulators. Considering that India is going from a stage of rudimentary data protection regulations to a more nuanced framework, the role of the DPA in the journey will be crucial.

## Key Aspects and Recommendations

### 1. Selection of members

The Select Committee that is entrusted with the appointment of the members of DPA. The Committee includes a Cabinet Secretary (who will be the committee chairperson), a Secretary to the government in the Ministry or Department dealing with legal affairs (which will be Ministry of Law and Justice), and a Secretary to the government in the Ministry of Electronics and Information Technology. Thus, the selection committee for the chairperson of the DPA consists of **merely representation from the Executive**. Taking into consideration the role of the authority as an independent arbitrator and the Government serving as one of the largest custodians of personal data in India, it is imperative that the authority is appointed in through an impartial and transparent process. The process of appointment is a key factor in facilitating functional independence of such a regulatory authority; a heavy-handed involvement of the Government

is likely to pose a hurdle with respect to independence of such a regulatory and adjudicatory body.

### **Our Recommendations**

To improve the process of appointment of the Committee, The Dialogue recommends the inclusion of judicial oversight or a member of the opposition to the Select Committee responsible for selection of the members of the DPA. This aspect is important to ensure that a public institution such as the DPA remains open and accountable and insulated from executive interference to the greatest extent.

## **2. Composition of the DPA**

The PDP Bill requires that there shall be 'not more than' six whole-time members excluding the chairperson. These individuals must be qualified in the fields of "data protection, information technology, data management, data science, data security, cyber and internet laws, public administration, national security" but lay down no specifics for the same. Considering the nature of technical functions such as standard setting/policy making and judicial responsibilities such as adjudication being exacted by the proposed authority, there are concerns regarding the lack of technical and judicial expertise in the committee. It is imperative that the members of the DPA are duly qualified to carry out their duties.

### **Our Recommendations**

To ensure that the DPA is well-equipped to carry out its functions, The Dialogue recommends the enhancement of technical and judicial expertise of the members of the Data Protection Authority. A distinction may be made between technical members and regular members as seen in other regulatory bodies (Eg: The Telecom Regulatory Authority of India) to allow for the appointment for individuals with technical expertise in specific areas to facilitate effective functioning. It is also imperative to allow for a balance to be struck in terms of judicial, non-judicial, executive and technical members.

## **3. Absence of bar on further employment of members by entities of competing interests**

There is absence of a bar on the re-employment of members of the Authority, either by the private sector or other public institutions. Considering the nature of the DPA as an independent arbitrator, it is important to put in place safeguards and conditions on further employment of

members to ensure unbiased and effective functioning of members of the authority. It has been noted many times in India that such requirements enhance the chance of creating an unbiased regulator, as observed in the regulatory structure of authorities like the IRDAI and the TRAI.

### **Our Recommendations**

To enhance independence, The Dialogue recommends that if members seek further employment in allied fields or other public institutions, there is a procedure of a prescribed time limit and requirement of approval from authorised Government agencies required for sanctioning such employment.

## **4. Overburdening and Institutional Design**

The DPA has been entrusted with a varied set of functions to perform and responsibilities to face; thus how the body is designed or structured will be a crucial factor in deciding its effectiveness and functional independence. Presently, there lacks clarity in the PDP Bill, 2019 regarding the institutional design of the authority. As evidenced from the PDP Bill, 2019, at present, the authority has been designed as a central (single) regulator that is required to deliver the mandate of enabling better practices and enforcing provisions, however considering the size and nature of India's demographic, the said structure may prove ineffective in fulfilling the mandate.

### **Our Recommendations**

The Dialogue recommends that the institutional design and structure of the authority is laid down clearly in the parent legislation. We suggest a tiered structure for adjudication and compliance that borrows from the federal structure of India and other existing regulatory systems under the Consumer Protection Act and the Companies Act.

## **5. Accessibility of the authority**

Another concern is the accessibility of the Data Protection Authority (DPA). As India has a very diverse demographic profile, every section of society must have access to such an authority. As internet penetration in India increases, more and more citizens are finding their way online, thus exposing their personal data to collection and processing by various entities. The Data Protection Authority (DPA) must strive to be accessible to each citizen in need and ensure that awareness spreads amongst the populace regarding their data rights.

## Our Recommendations

The Dialogue recommends that authority is cognizant of enhancing accessibility in all its practices. For the same, the platform for interacting with the DPA be made multi-lingual, more graphic and less text-based and overall less dependent on literacy (and digital literacy) so that a broader section of the population can raise their concerns with the Authority.

### 6. Geopolitical Considerations

Data governance norms and frameworks of a nation today form an important part of conversations at the international level. Data privacy concerns are an important aspect of trade related negotiations across the globe, with countries demanding protection of their citizen's data as it travels across borders. For example, Article 45(2)(b) of EU GDPR requires the European Commission to consider the existence and functioning of an independent data protection authority for a country to pass the adequacy test. It is increasingly been noticed that data protection authorities play a key role in facilitating the sharing of data across borders and the manner in which it is done.

For India to negotiate on an equal footing and present India as an attractive destination for investment in technology, it is imperative that we formulate a robust data protection authority. A separate and independent regulatory body for data forms a significant part of any such framework in the absence of which India may be lacking on a global level.

The Dialogue is a public-policy think-tank with a vision to drive a progressive narrative in India's policy discourse. Founded in 2017, we believe in facilitating well-researched policy debates at various levels to help develop a more informed citizenry, on areas around technology and development issues.

The Dialogue was ranked amongst the Top-Ten think-tanks in the world to watch out for by the Think-Tank Civil Societies Programme, Lauder Institute, University of Pennsylvania, in their 2020 and 2021 ranking index.

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