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Privacy, Data Protection and Cyber Security in India

March 2023

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March 2023



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Tier 1 for Private Equity: 2020, 2019, 2018, 2017, 2014
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Summary and Chronology of Privacy Developments in India

A. Information Technology Act, 2000 Enacted

The *Information Technology Act, 2000* (“IT Act”) was the first law enacted in India which contained provisions on confidentiality, privacy and security for information stored in a computer resource. In 2011, the *Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011* (“Data Protection Rules”) were enacted under the IT Act to protect sensitive personal data and information collected from individuals by body corporates.¹ These rules make up the existing general data protection framework in India. In addition to the Data Protection Rules, the *Information Technology (The Indian Computer Emergency Response Team and Manner of Performing Functions and Duties) Rules, 2013* which is administered by the Indian Computer Emergency Response Team (CERT-In) forms the cyber security framework in India.

B. High Courts divided on the Right to be forgotten in India

The first case in India to deal with the concept of the right to be forgotten was heard in the Gujarat High Court, where the petitioner prayed for the removal of a published judgment in which he had been acquitted. The Court didn’t per se recognize the ‘right to be forgotten’ and disposed of the case as the petitioner had not been able to point out specific provisions of law that had been violated.²

The Karnataka High Court has also made references to the “trend in the Western countries” where they follow the “right to be forgotten” in sensitive cases.³

The Odisha High Court in the case of *Subhranshu Rout @ Gugul v. State of Odisha*⁴ observed in its order on November 23, 2020 the importance of the right to be forgotten of an individual and how it remains unaddressed in legislation. The case involved objectionable content regarding a woman that was posted online. The court encouraged the victim to seek appropriate orders for the protection of her fundamental right to privacy even in the absence of an explicit right to be forgotten. It noted that the right to be forgotten would be recognized by the proposed draft data protection bill. Please see our detailed update on this matter.⁵

Distinguishing from the above decisions, the Madras High Court, on August 3, 2021, dismissed a petitioner seeking to have his name redacted from court orders by exercise of his right to be forgotten.⁶ The petitioner was acquitted in certain criminal proceedings by the Madras High Court and prayed for his name to be redacted from the judgment of the Madras High Court. Without a precise framework or objective criteria for redaction of the name of an accused in India’s criminal justice system, the court held that it would be more appropriate to await the enactment of India’s new data protection law to exercise such rights and thus dismissed the petition.

1 ‘Body corporates’ includes any company and includes a firm, sole proprietorship or other association of individuals engaged in commercial or professional activities, as per Section 43A of the IT Act.

2 Dharmaraj Bhanushankar Dave v. State of Gujarat, Special Civil Application No. 1854 of 2015.

3 [Name Redacted] v. The Registrar, Karnataka High Court, Writ Petition No.62038 Of 2016.

4 BLAPL No. 4592 of 2020.

5 <https://www.nishithdesai.com/generateHTML/4423/4>, last accessed February 25, 2023.

6 Karthick Theodore v. The Registrar General, Madras High Court (W.P.(MD) No.12015 of 2021 and WMP(MD).No.9466 of 2021); available at <https://www.mhc.tn.gov.in/judis/index.php/casestatus/viewpdf/783065>, last accessed February 25, 2023..

1. Summary and Chronology of Privacy Developments in India

C. Supreme Court recognizes a Fundamental Right to Privacy

The Supreme Court in the landmark decision of *Justice K. S. Puttaswamy (Retd.) and Anr. v. Union of India And Ors.*⁷ affirmed that a fundamental right to privacy exists under the Constitution that is enforceable against the State even though it was not explicitly worded. This decision overruled previous Supreme Court decisions where the court held that there was no fundamental right to privacy. Further, the Court also asked for a data protection law to be framed to protect individual's rights against privacy parties.

D. Committee to Examine Non-Personal Data Constituted

MeitY, in September 2019 had constituted a special committee ("**NPD Committee**") to explore the governance of 'non-personal data' (NPD). The NPD Committee released a report on the Non-Personal Data Governance Framework in July 2020,⁸ including a revised version in December 2020.⁹ Although, not much traction on this report observed thereafter, it was reported that non-personal data could be included in the widened ambit of the draft data protection bill itself.¹⁰

E. Bureau of Indian Standards publishes Data Privacy Standards

The Bureau of Indian Standards made available to the public its new standards for data privacy assurance i.e., the IS 17428 which was notified in the official Gazette on December 21, 2020.¹¹ The standard seeks to provide a privacy assurance framework for organizations to establish, implement, maintain and continually improve their data privacy management system. It comprises two parts - one being the prescriptive part where the requirements are to be mandatorily implemented by anyone applying the standard and the other part being the suggestive part with detailed best practices to aid in implementing the requirements of the prescriptive part.

F. Supreme Court forms Committee to review Surveillance Laws

The Supreme Court of India heard a petition on October 27, 2021 following certain reports of a spyware called 'Pegasus' (developed by an Israeli security firm i.e. the NSO Group) being deployed as a surveillance tool on Indian citizens.¹² The petitions prayed for an independent investigation to be conducted into the alleged deployment of Pegasus by certain foreign governments and Indian government agencies.

The Supreme Court noted that the impact of the alleged use of Pegasus on the right to privacy and freedom of speech need to be examined, while forming the three-member expert technical committee. The committee is directed to make recommendations on enactment or amendment to existing surveillance laws to ensure an "improved" right to privacy, improved cyber security and threat assessment measures. The committee had

⁷ Supreme Court, Writ Petition (Civil) No 494 Of 2012.

⁸ https://static.mygov.in/rest/s3fs-public/mygov_159453381955063671.pdf, last accessed February 25, 2023..

⁹ https://static.mygov.in/rest/s3fs-public/mygov_160922880751553221.pdf, last accessed February 25, 2023.

¹⁰ <https://indianexpress.com/article/business/looking-at-bigger-umbrella-pdp-bill-likely-to-include-non-personal-data-7552240> (last accessed February 25, 2023).

¹¹ See <https://egazette.nic.in/WriteReadData/2020/223869.pdf>, last accessed February 25, 2023..

¹² *Manohar Lal Sharma v. UOI* (WP (CrI) 314 of 2021); available at https://main.sci.gov.in/supremecourt/2021/16884/16884_2021_1_1501_30827_Judge-ment_27-Oct-2021.pdf, last accessed February 25, 2023.

1. Summary and Chronology of Privacy Developments in India

submitted an interim report in February 2022¹³ and had sought public responses on the issues referred to it by the Supreme Court. The case is pending before the Supreme Court.

G. MeitY publishes a Policy for use of Public Sector Data

MeitY also published an India Data Accessibility and Use Policy on February 21, 2022.¹⁴ This policy seeks to establish a public access and data sharing framework of all public sector data i.e. data created, generated, collected or archived by the Indian Government or its agencies. In March 2022, the State of Tamil Nadu also published a 'Tamil Nadu Data Policy' along similar lines to leverage public sector data.¹⁵

H. CERT-In issues Directions for Cyber Security Incident Response

The CERT-in which is the agency appointed under the Information Technology Act, 2000 for dealing with cyber security incidents has issued certain directions on April 28, 2022.¹⁶ The directions provide a list of cyber security incidents that must be mandatorily reported by service provider, intermediary, data centre, body corporate and Government organisation within 6 hours of noticing such incidents or being brought to notice about such incidents. When CERT-In issues any order/directions to a service provider/intermediary/data centre/body corporate, such entities must mandatorily take action or provide information or any such assistance to CERT-In. Service providers, intermediaries, data centres, body corporate and Government organisations are required to undertake synchronisation of all their ICT systems clocks, designate a point of contact, enable logs of all ICT systems for a rolling period of 180 days within India. Data Centres, Virtual Private Server (VPS) providers, Cloud Service providers and Virtual Private Network Service (VPN Service) providers are required to maintain certain prescribed information for a period of 5 years or longer duration as mandated by the law after any cancellation or withdrawal of the registration. Virtual asset service providers, virtual asset exchange providers and custodian wallet providers (to be defined by Ministry of Finance) are required to maintain KYC information for 5 years.

I. Draft Digital Personal Data Protection Bill, 2023

In pursuance of the developments in Court towards recognizing privacy as fundamental right, the Indian Government has been in the process of introducing an extensive data protection law since 2018.

Four drafts of a proposed standalone data privacy legislation has been released by the Government. The current and the latest draft of the proposed framework- draft Digital Personal Data Protection Bill, 2022¹⁷ (accessible here) was released on November 18, 2022 for public consultation inviting comments for stakeholder and general public until January 2023.

¹³ <https://indianexpress.com/article/india/pegasus-panel-to-probe-spying-charges-submits-its-report-to-sc-7784559>, last accessed February 25, 2023.

¹⁴ <https://www.meity.gov.in/content/draft-india-data-accessibility-use-policy-2022>, last accessed February 25, 2023.

¹⁵ http://cms.tn.gov.in/sites/default/files/go/it_e_16_2022_Ms.pdf, last accessed February 25, 2023.

¹⁶ <https://www.cert-in.org.in/Directions70B.jsp>, last accessed February 25, 2023.

¹⁷ <https://www.meity.gov.in/writereaddata/files/The%20Digital%20Personal%20Data%20Protection%20Bill,%202022.pdf>, last accessed February 25, 2023.

1. Summary and Chronology of Privacy Developments in India

The Proposed Law prescribes compliances for collection, storage, handling and transfers of personal data. It applies to the processing of digital personal data in India, where the personal data is (i) collected from the data principal online; and (ii) collected offline and subsequently digitized. It also imposes a soft data localization requirement for all persona data.

Right to Privacy — Now A Fundamental Right of Citizens

A. Judicial Precedents: Right to Privacy

- **First Supreme Court decision to deal with the fundamental right to privacy – March 1953**

In a case where search warrants issued by judicial authorities were challenged on a fundamental rights violation, the Supreme Court held that no fundamental right to privacy existed under the *Constitution of India* (“**Constitution**”).¹

- **The Supreme Court recognized the right to privacy albeit in a minority opinion – December 1962**

In a case where regulations that allowed surveillance by the police were challenged; the Supreme Court, in its majority opinion rejected the idea of a fundamental right to privacy and permitted such surveillance, but the minority opinion held that privacy was protected as a fundamental right under the Constitution.² Given that this was a minority opinion, it was not binding.

- **Supreme Court recognizes privacy as a common-law right – March 1975**

The Supreme Court for the first time recognized a common law right³ to privacy, i.e. even though it was not guaranteed by the constitution and thus not a fundamental right, the Court recognized the existence of this right. This was a similar case filed to challenge the validity of police regulations which allowed police surveillance.⁴

- **Supreme Court links the right to privacy with Right to Life guaranteed under the Constitution – October 1994**

In a case where a famous criminal opposed the publication of his autobiography by a news magazine on the ground that it violated his right to privacy, the Supreme Court for the first time linked the right to privacy to the right to life and personal liberty guaranteed under Article 21 of the Constitution, but also noted in the same breath that it was not an absolute right.⁵

B. Nine-Judge Bench Judgment of the Supreme Court in the Puttaswamy Case

The Supreme Court on August 24, 2017 passed the landmark judgment of *Justice K.S Puttaswamy (Retd.) v. Union of India and Ors.*⁶ (“**Puttaswamy Case**”) wherein Article 21 of the Constitution was expanded by judicial reading to recognize privacy as a fundamental right, which can be claimed by individuals in India.⁷ The question of the

1 MP Sharma & Ors. v. Satish Chandra, District Magistrate, Delhi & Ors., 1954 AIR 300, 1954 SCR 1077.

2 Kharak Singh v. State of Uttar Pradesh, 1963 AIR 1295, 1964 SCR (1) 332.

3 A common-law right is one that has been created by judicial precedent, as opposed to a statutory/constitutional right that has been provided for in a statute.

4 Govind Singh v. State of M.P. 1975 AIR 1378, 1975 SCR (3) 946.

5 R. Rajagopal v. State of Tamil Nadu, 1995 AIR 264, 1994 SCC (6) 632.

6 WP (C) 494 of 2012.

7 This is as Article 21 is available to ‘persons’ and not only citizens.

2. Right to Privacy — Now A Fundamental Right of Citizens

right to privacy as a fundamental right has come up before the judiciary multiple times, but was never declared as a fundamental right available to citizens against the State before the Puttaswamy Case.

C. Impact of the Judgment

The impact of recognizing privacy as a fundamental right, as opposed to a statutory or a common-law right, is that it is an inviolable right - these fundamental rights cannot be given or taken away by law, all laws and executive actions must abide by them, and an individual cannot part with these rights. The judgment recognized that the right to privacy was now a fundamental right under Articles 19⁸ and 21⁹ of the Constitution. To clarify, these fundamental rights are enforceable only against the State or instrumentalities of the State and not against non-State parties. The Court, however, highlighted the need for a data protection law to confer rights on individuals and enforce such rights against non-State parties as well.

D. Reasonable Restrictions

The Supreme Court has, clarified that like most other fundamental rights, the right to privacy is not an “absolute right”, and is subject to the satisfaction of certain tests and reasonable restrictions. Therefore, a person’s right to privacy could be overridden by competing state and individual interests. In the Supreme Court’s view, the fundamental right to privacy cannot be read in isolation and that the infringement of any of the fundamental rights will have to pass the basic tests under Articles 14¹⁰ and 21 of the Constitution as mentioned below:

- existence of law to justify an encroachment on privacy;
- the requirement of a need, in terms of a legitimate state aim, ensures that the nature and content of the law which imposes the restriction falls within the zone of reasonableness mandated by Article 14, which is a guarantee against arbitrary state action;

The judgment itself lays down some examples of what the legitimate aim of the state would be, i.e. protecting national security, preventing and investigating crime, encouraging innovation and the spread of knowledge, and preventing the dissipation of social welfare benefits); the means which are adopted by the legislature are proportional to the object and needs sought to be fulfilled by the law. Proportionality is an essential facet of the guarantee against arbitrary state action because it ensures that the nature and quality of the encroachment on the right is not disproportionate to the purpose of the law.

Further, the Court acknowledged that the principles set out in this judgment should be followed in the drafting of the new data protection law.

8 Article 19(1) states that: “All citizens shall have the right— (a) to freedom of speech and expression; (b) to assemble peaceably and without arms; (c) to form associations or unions; (d) to move freely throughout the territory of India; (e) to reside and settle in any part of the territory of India; (g) to practice any profession, or to carry on any occupation, trade or business”. These rights are subject to reasonable restrictions.

9 Article 21 states that: “No person shall be deprived of his life or personal liberty except according to procedure established by law”.

10 Article 14 states that “the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India”.

2. Right to Privacy — Now A Fundamental Right of Citizens

Post August 2017, the Puttaswamy Case has been upheld by the Delhi High Court in the case of *Sangamitra Acharya and Ors. v State (NCT of Delhi) and Ors.*¹¹ and in the Kerala High Court case of *Oommen Chandy v. State of Kerala*,¹² and both cases observed that the right to privacy lay against both State and non-State actors. Further, the Kerala High Court has applied the Puttaswamy Case where the determination of the privacy of an individual's bank account information was in question,¹³ and where the right to access the internet was determined to constitute the right to privacy and education under the Constitution of India.¹⁴

11 250(2018)DLT36; In this case, the petitioner was an adult female who was forcibly taken away from the residence of her music teacher with whom she had been residing since the age of 18 by her parents, brother and police. The Court observed that the fundamental right to privacy applies against both State and non-State actors.

12 2018(2)KLT748; In this case, a committee consisting of a retired Judge relied on and published a letter containing sexual allegations against the Petitioner. The Court held that the right to privacy lies both against State action as well as private citizens like the press or media

13 Raju Sebastian v. Union of India; Kerala High Court, WA. No.2112 OF 2018.

14 Faheema Shirin v. State of Kerala; Kerala High Court; WP(C). No.19716 OF 2019(L).

Existing Legal Framework on Data Protection

A. General Data Protection Law

In India, data protection viz. private parties is currently governed by the *Information Technology Act, 2000* (as amended) (“**IT Act**”) and more specifically, the rules issued under Section 43A of the IT Act: *Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011* (“**Data Protection Rules**”). There are two categories of information covered under the IT Act, which need to be considered with respect to data protection:

- a. **Personal information (“PI”)** which is defined as any information that relates to a natural person, which, either directly or indirectly, in combination with other information available or likely to be available with a body corporate, is capable of identifying such person; and
- b. **Sensitive personal data or information (“SPDI”)** which is defined to mean such personal information which consists of information relating to:
 - i. passwords;
 - ii. financial information such as bank account or credit card or debit card or other payment instrument details;
 - iii. physical, physiological and mental health condition;
 - iv. sexual orientation;
 - v. medical records and history;
 - vi. biometric information.¹

I. Applicability

The Data Protection Rules are applicable to a body corporate that is engaged in the collection, receiving, possessing, storing, dealing or handling of SPDI using an electronic medium and sets out compliances for protection of SPDI by such body corporate. Thus, the Data Protection Rules do not apply to (i) natural persons who collect SPDI, or (ii) to standalone PI, or (iii) to information purely in the physical domain.

Further, the Data Protection Rules are applicable only to body corporates located within India. Therefore, if SPDI of any individual is collected, received, processed, stored, dealt with and handled outside India, the Data Protection Rules may not be applicable. The IT Act however, is applicable to an offence committed outside India if the act involves a computer, computer system or computer network located in India. However, the local data protection laws of the relevant countries may apply in relation to such data.

¹ Further, as per Rule 3 of the Data Protection Rules, any information that is freely available or accessible in public domain or furnished under the Right to Information Act, 2005 or any other law for the time being in force will not be regarded as sensitive personal data or information for the purposes of the Data Protection Rules.

3. Existing Legal Framework on Data Protection

Processing Data under a Contractual Obligation As we have discussed below, the draft Personal Data Protection Bill, 2018 introduces the concept of a ‘Data Fiduciary’ and a ‘Data Processor’ – wherein the Data Processor processes data on behalf of the Data Fiduciary and is subject to fewer compliance requirements as compared to the Data Fiduciary who remains primarily responsible. However, no such distinction existed in the Data Protection Rules.

However, the Department of Information Technology issued a Clarification on the Data Protection Rules in 2011 (“**2011 Clarification**”). It was clarified that:

The rules governing the collection and disclosure of SPDI,² will not apply to any body corporate providing services relating to collection, storage, dealing or handling of SPDI under a contractual obligation with any legal entity located within or outside India. The rules will, however apply to a body corporate, providing services to the provider of information under a contractual obligation directly with them. This clarification thus brought in a lower compliance requirement for ‘Data Processors’, as have come to be known under the DPB. This clarification was essentially introduced for the IT/Business Process Outsourcing (BPO) industry – where data is usually processed on the basis of contracts between the outsourcing entity and the entity who does the actual processing.

II. Compliance Requirements

The existing compliance requirements for the body corporates (company, firm, sole proprietorship, or other association of individuals) who possess, or handle SPDI under the Data Protection Rules are as follows:

- a. Provide the individual with the option to either not provide the SPDI to the body corporate or to withdraw his/her consent (withdrawal of consent must be given in writing) given previously for the collection of SPDI.
- b. Ensure that the SPDI is collected for a lawful purpose connected with the activity of the body corporate, and that the collection of the SPDI is considered necessary for the purpose.
- c. Obtain specific consent of the individual, in writing (or any mode of electronic communication) regarding the purpose of use of the SPDI.
- d. Provide a privacy policy for the handling of or dealing in SPDI, and ensure that such privacy policy is available on its websites and for view by individual.
- e. Ensure that SPDI is not retained for longer than is required for the purpose for which the SPDI is collected.
- f. Ensure that the SPDI is used for the purpose for which it has been collected.
- g. Permit the individual to review the SPDI provided and have any inaccurate or deficient SPDI corrected or amended as feasible.
- h. Ensure that a grievance officer is appointed, whose name and contact details are published on the website of the body corporate.

² Rules 5 and 6 in particular.

3. Existing Legal Framework on Data Protection

- i. Ensure that to the extent any SPDI is transferred to any third party (within or outside of India), specific permission has been obtained for such transfer, and that the transferee provides the same level of data protection as adhered to by the transferor as required under the Indian data protection laws.
- j. Implement reasonable security practices and procedures such as the International Standard IS / ISO / IEC 27001, or any security practices and procedures that may be agreed to between the individual and the body corporate.
- k. Maintain comprehensive documented security policies.

III. Penalties

i. Personal Information

Whilst there is no specific compliance set out in the IT Act or the Data Protection Rules with respect to PI, the IT Act provides for a penalty for offenders who, while providing services under a contract, have accessed PI, and with wrongful intent, discloses the PI, knowing that such disclosure would cause harm without authorization.³

This section prescribes a penalty of

imprisonment up to three years and/ or a fine up to INR 5,00,000 (approx. USD 6,530).

ii. SDPI

As per the IT Act, where a body corporate, possessing, dealing or handling any SPDI is negligent in implementing security measures, and thereby causes wrongful loss or wrongful gain to any person, such body corporate shall be liable to pay damages by way of compensation to the affected person.⁴ There is no cap prescribed under the IT Act on the compensation payable to the person so affected.

Since the IT Act has extra-territorial jurisdiction, the above penalties may be applicable to parties outside India, subject to meeting certain nexus requirements to India.⁵

B. Industry Specific Regulations

I. Telecommunications Law

The *Indian Telegraph Act, 1885*⁶ and the *Indian Telegraph Rules, 1951*⁷ provide for certain directions issued by the Central/State Government for the interception of messages in situations of public emergencies, or in the interest of public safety. The Central/State Government may in specified instances, issue directions for such interception.

³ Section 72A, IT Act.

⁴ Section 43A, IT Act.

⁵ Section 75, IT Act.

⁶ Section 5 of the Indian Telegraph Act, 1885.

⁷ Rule 419A of the Indian Telegraph Rules, 1951.

3. Existing Legal Framework on Data Protection

From a regulatory perspective, it would be pertinent to note certain obligations of telecom service providers (“TSP”) under the Unified License (“UL”)⁸ issued to the TSP by the Department of Telecom (“DoT”). We have listed below some privacy specific requirements to be complied with under the UL:

- TSPs have to permit the government agencies to inspect ‘wired or wireless equipment, hardware/ software, memories in semiconductor, magnetic or optical varieties’ etc.
- TSPs cannot employ ‘bulk encryption’ equipment in its network. However, it has to ensure the privacy of any message transmitted over the network and prevent unauthorized authorization of any message’. This condition extends to those third parties who render services to the TSP.
- TSPs are required to maintain Call Detail Record (CDR)/ IP Detail Record (IPDR) and Exchange Detail Record (EDR) with regard to communications exchanged over the TSP network. This data needs to be maintained for a period of one year.
- The TSP is not permitted to export out of India, accounting information of Indian telecom users (with the exception of international roaming subscribers) or user information of Indian telecom users (with the exception of international roaming subscribers using Indian TSP’s network while roaming and International Private Leased Circuit customers).
- TSPs have to maintain Call Detail Records/IP Detail Record for internet services rendered for a minimum period of one year. Parameters of IP Detail Records that need to be maintained as per the directions/instructions issued by the government to the telecom operators.
- TSPs have to maintain log-in/log-out details of all subscribers for services provided such as internet access, e-mail, Internet Telephony, IPTV etc. These logs are required to be maintained for a minimum period of one year.
- A penalty of up to INR 500,000,000 (approx. USD 6,531,000) may be imposed by the government in the event of any security breaches on the TSPs networks which are caused due to inadequate precautions at the end of the TSP.

II. Banking Laws

Apart from the IT Act and Data Protection Rules, banks and financial institutions in India are governed and regulated by various regulations and guidelines (“**Banking Laws**”) issued by the RBI, the apex bank in India. There is no specific definition of ‘sensitive data’ or its equivalent under the banking laws. However, different Banking Laws, based on their subject matter seek to protect such kind of information. Further, certain Banking Laws impose obligations on banks, which include that when engaging third party vendors / service providers / consultants / sub-contractors, to contractually impose certain obligations on such third parties.

Some of the major laws in the BFSI sector which have privacy and security related provisions include the *Payment and Settlement Systems Act, 2007*, *RBI Circular on a Cyber Security Framework for Banks*,⁹ *RBI Directions on Information Technology Framework for the NBFC Sector*,¹⁰ *RBI Guidelines on Information Security, Electronic Banking, Technology Risk*

8 <https://dot.gov.in/sites/default/files/UL%20AGREEMENT%20with%20Audiotex%20M2M%20without%20INSAT%20MSSR%2017012022.pdf?download=1>, last accessed February 25, 2023.

9 <https://rbidocs.rbi.org.in/rdocs/notification/PDFs/NT41893F697BC1D57443BB76AFC7AB56272EB.PDF>, last accessed February 25, 2023.

10 <https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=10999&Mode=0>, last accessed February 25, 2023.

3. Existing Legal Framework on Data Protection

Management and Cyber Frauds,¹¹ *RBI Report on Information Systems Security Guidelines for the Banking and Financial Sector*,¹² *RBI Guidelines on Managing Risks and Code of Conduct in Outsourcing of Financial Services by Banks*,¹³ *RBI Master Circular – Know Your Customer (KYC) norms / Anti-Money Laundering (AML) standards/Combating Financing of Terrorism (CFT)/Obligation of banks and financial institutions under PMLA, 2002*,¹⁴ *RBI's Master Circular on Customer Service in Banks, 2014*,¹⁵ *RBI's Master Direction on Credit Card and Debit Card – Issuance and Conduct Directions, 2022*,¹⁶ and *RBI Guidelines on Regulation of Payment Aggregators and Payment Gateways*.¹⁷

Importantly, RBI released the *Storage of Payment System Data Directive, 2018*¹⁸ in April 2018 which mandated the entire data relating to payment systems operated by system providers to be stored in a system only in India. This data should include the full end-to-end transaction details / information collected / carried / processed as part of the message / payment instruction. This Circular exempts data corresponding to the foreign leg of a transaction from this requirement. The deadline to comply with this mandate was on October 15, 2018. The RBI then released clarifications in the form of FAQs on the circular in June 2019.¹⁹ The FAQs clarified that the directive is applicable to all Payment System providers authorised / approved by the Reserve Bank of India (RBI) to set up and operate a payment system in India. It was also clarified that the end to end payments data is to be stored in India. The FAQs also addressed cross border data flows, where it clarified that for processing of payment transaction is done abroad, the data should be deleted from the systems abroad and brought back to India not later than the one business day or 24 hours from payment processing, whichever is earlier.

III. Capital Market and Financial Services

The Capital Markets and Financial Services industry is primarily regulated in India by the Securities and Exchange Board of India (“SEBI”). SEBI came out with a framework for *cyber security for some regulated entities called the Cyber Security and Cyber Resilience framework of Stock Exchanges, Clearing Corporation and Depositories* (“SEBI Circular”).²⁰ The SEBI Circular is only applicable to Clearing Corporations, Depositories and Stock Exchanges (“MIIs”).

The SEBI Circular extensively covers the obligations of the MIIs as far as maintaining their IT infrastructure is concerned, such as the need to establish a Cyber Security and Cyber Resilience Policy, along with confidentiality and privacy requirements to be followed by MIIs.

In 2020, SEBI issued the *Advisory for Financial Sector Organizations regarding Software as a Service (SaaS) based solution, 2020* (“Data Advisory”)²¹ (accessible [here](https://www.sebi.gov.in/legal/circulars/nov-2020/advisory-for-financial-sector-organizations-regarding-software-as-a-service-saas-based-solutions_48081.html)) which is applicable to (i) stock brokers through exchanges; (ii) all depository participants through depositories; (iii) all merchant bankers (iv) all registrar to an issue and share

11 <https://rbidocs.rbi.org.in/rdocs/content/PDFs/GBS300411F.pdf>, last accessed February 25, 2023.

12 <https://www.rbi.org.in/Scripts/PublicationReportDetails.aspx?ID=275>, last accessed February 25, 2023.

13 <https://rbi.org.in/Scripts/NotificationUser.aspx?Id=3148&Mode=0>, last accessed February 25, 2023.

14 https://www.rbi.org.in/Scripts/BS_ViewMasDirections.aspx?id=11566.aspx?id=9848, last accessed February 25, 2023.

15 https://www.rbi.org.in/Scripts/bs_viewmascirculardetails.aspx?id=9008, last accessed February 25, 2023.

16 <https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=12300&Mode=0.aspx?id=7338>, last accessed February 25, 2023.

17 <https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=11822&Mode=0>, last accessed February 25, 2023.

18 <https://www.rbi.org.in/scripts/NotificationUser.aspx?Id=11244&Mode=0>, last accessed February 25, 2023.

19 <https://www.rbi.org.in/Scripts/FAQView.aspx?Id=130>, last accessed February 25, 2023.

20 http://www.sebi.gov.in/sebi_data/attachdocs/1436179654531.pdf, last accessed February 25, 2023.

21 https://www.sebi.gov.in/legal/circulars/nov-2020/advisory-for-financial-sector-organizations-regarding-software-as-a-service-saas-based-solutions_48081.html, last accessed February 25, 2023.

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transfer agent; (v) all debenture trustee (vi) all credit rating agencies (vii) all bankers to an issue (viii) all STP service providers and (ix) all approved intermediaries.

Among other compliances, the Data Advisory requires ‘critical data’ to be stored in systems in India. The items of critical data is elaborated in Annexure to the Data Advisory. For background, this Annexure is the CERT-In Advisory for Financial Sector Organizations- SEBI and RBI issued by the Indian Computer Emergency Response Team (CERT-In) - the nodal agency for cybersecurity in India. Accordingly, critical data may include- *credit risk data, liquidity risk data, market risk data, system and sub-system information, internal and partner IP schema, network topography and design, audit/internal audit data, system configuration data, system vulnerability information, risk exception information, supplier information and its dependencies information*. Each of these items of critical data are not specifically defined.

IV. Insurance

The insurance regulator, the Insurance Regulatory and Development Authority of India (“**IRDAI**”) has in place a number of regulations and guidelines which contain provisions on data security. Examples are the ‘*Guidelines on Information and Cyber Security for Insurers*’ (“**Insurer Guidelines**”),²² IRDAI (*Outsourcing of Activities by Indian Insurers*) Regulations, 2017,²³ IRDAI (*Maintenance of Insurance Records*) Regulations, 2015,²⁴ and the IRDAI (*Protection of Policyholders’ Interests*) Regulations, 2017.²⁵ The above guidelines and regulations broadly provide for the following:

- Policies to be framed by the Insurer for information security
- Requirement to establish an Information Security Committee and its duties
- Requirement to appoint a Chief Information Security Officer and his duties
- Information Security Risk Management
- Data Security
- Platform, Application and Infrastructure Security
- Cyber Security

Via the Insurer Guidelines, the IRDAI has recognized the immense growth in the information technology space, the varied applications of these developments on the insurance sector and the critical need to protect sensitive customer data, especially health data. Further, the IRDAI (Maintenance of Insurance Records) Regulations, 2015 contain a data localization requirement – where records pertaining to all the policies issued and all claims made in India, are to be stored in data centers located and maintained only in India.²⁶

22 https://www.aicofindia.com/AICEng/General_Documents/Notices%20And%20Tenders/IRDAI-GUIDELINES.pdf, last accessed February 25, 2023.

23 <https://irdai.gov.in/document-detail?documentId=384141>, last accessed February 25, 2023.

24 [https://thc.nic.in/Central%20Governmental%20Regulations/Insurance%20Regulatory%20and%20Development%20Authority%20of%20India%20\(Maintenance%20of%20Insurance%20Records\)%20Regulations,2015..pdf](https://thc.nic.in/Central%20Governmental%20Regulations/Insurance%20Regulatory%20and%20Development%20Authority%20of%20India%20(Maintenance%20of%20Insurance%20Records)%20Regulations,2015..pdf), last accessed February 25, 2023.

25 [https://thc.nic.in/Central%20Governmental%20Regulations/Insurance%20Regulatory%20and%20Development%20Authority%20of%20India%20\(Protection%20of%20PolicyHolders'%20Interests\)%20Regulations,%202017..pdf](https://thc.nic.in/Central%20Governmental%20Regulations/Insurance%20Regulatory%20and%20Development%20Authority%20of%20India%20(Protection%20of%20PolicyHolders'%20Interests)%20Regulations,%202017..pdf), last accessed February 25, 2023.

26 [https://thc.nic.in/Central%20Governmental%20Regulations/Insurance%20Regulatory%20and%20Development%20Authority%20of%20India%20\(Maintenance%20of%20Insurance%20Records\)%20Regulations,2015..pdf](https://thc.nic.in/Central%20Governmental%20Regulations/Insurance%20Regulatory%20and%20Development%20Authority%20of%20India%20(Maintenance%20of%20Insurance%20Records)%20Regulations,2015..pdf), last accessed February 25, 2023.

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V. Healthcare

Under the Ayushman Bharat Digital Mission, the Ministry of Health and Family Welfare had announced the National Digital Health Mission. As part of this mission, a draft Health Data Management Policy (“**draft HDM Policy**”) has been released²⁷ to govern health data under in the proposed National Digital Health Ecosystem,²⁸ The draft HDM Policy recognises entities in the data processing space, i.e. data fiduciaries (similar to data controllers under GDPR) and data processors similar to the draft Indian data protection bill, and establishes a consent framework for processing personal data. It also provides for rights to individuals, establishes an identification framework for stakeholders and mandates certain compliance requirements on data fiduciaries.

VI. Geospatial Data Regulation

The Department of Science and Technology of the Government of India issued “*Guidelines for acquiring and producing geospatial data and geospatial data services including Maps*”²⁹ on February 15, 2021. Under these guidelines and as opposed to the previous legal regime, there is no restriction, nor requirement of any approval, clearance, license, etc. on the collection, generation, preparation, dissemination, storage, publication, updating and/or digitisation of geospatial data and maps within the territory of India, subject to a negative list of attributes for which there are restrictions. The guidelines also restrict foreign entities from creating and/or owning, or hosting geospatial data finer than certain prescribed threshold values. They are also restricted from conducting terrestrial mobile mapping surveys, street view surveys and surveying in Indian territorial waters. Our analysis of the new geospatial data and maps guidelines are available [here](#).

27 Available at https://abdm.gov.in/assets/uploads/consultation_papersDocs/Draft_HDM_Policy_April2022.pdf, last accessed February 25, 2023.

28 <https://economictimes.indiatimes.com/tech/technology/budget-2022-23-fm-announces-open-platform-for-national-digital-health-ecosystem-under-abdm/articleshow/89272174.cms>, last accessed February 25, 2023.

29 Available at <https://dst.gov.in/sites/default/files/Final%20Approved%20Guidelines%20on%20Geospatial%20Data.pdf>, last accessed February 25, 2023.

India: The draft Digital Personal Data Protection Bill – Closer to a Reality in 2023

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The Ministry of Electronics and Information Technology of the Government of India ('MeitY') published the draft Digital Personal Data Protection Bill, 2022 ('the Draft Bill') on 18 November 2022 for public consultation, which was open until 2 January 2023. Aaron Kamath and Varsha Rajesh, from Nishith Desai Associates, discuss the content of the draft Bill and its potential impact on businesses.

The Indian Government has been working towards introducing a comprehensive standalone data protection legislation since 2018, and this is the fourth bill to be floated on the subject. The draft Bill is a much simpler version compared to the previous drafts and relaxes multiple compliance requirements previously proposed.

Once the draft Bill is deliberated and enacted by the Parliament; it will overhaul the current law, i.e. the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 issued under the Information Technology Act, 2000. The draft Bill also provides for different dates that may be appointed for different provisions, and hence there may be a transitional period for implementation.

Applicability of the Proposed Law

'Personal data' has been broadly defined as 'any data about an individual who is identifiable by or in relation to such data'. The draft Bill is proposed to apply to: (i) processing of digital personal data within the territory of India where the personal data which is collected from the data principal online and also to data which is collected offline and subsequently digitised; and (ii) processing of personal data outside India if in connection with any profiling, or activity of offering goods or services to data principals located within India.

The draft Bill does not apply to personal data processed by an individual for any personal or domestic purpose and, interestingly, data sets which have been in existence for at least 100 years.

The Data Protection Board of India

The Data Protection Board of India ('the Board') is proposed to be established under the draft Bill. The Board will function as an independent body and will function digitally, however, the exact composition and other aspects of the Board are to be further elaborated and prescribed by the Central Government. The functions of the Board would include determination of non-compliance; imposition of penalties; and directing adoption of urgent remedial measures in cases of personal data breaches. Orders from the Board will be deemed to be decrees made by a civil court and may be appealed to the High Courts.

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In a first, the draft Bill proposes an alternate dispute resolution mechanism. If the Board is of the opinion that any complaint may more be appropriately resolved by mediation or other process of dispute resolution, the Board may direct the concerned parties to attempt resolution of the dispute through mediation.

In the event the Board determines on conclusion of an inquiry that a non-compliance by a person is significant, it may, after giving the person a reasonable opportunity of being heard, impose a financial penalty of up to INR 5 billion (approx. ₹56.7 million).

Types of Regulated Entities

In increasing order of compliance obligations, there are three broad categories of regulated entities:

- data processors i.e. which process data on behalf of a data fiduciary;
- data fiduciaries akin to ‘data controllers’ which determine the purpose and means for processing of personal data; and
- significant data fiduciaries (‘SDFs’) which are a subset of data fiduciaries which are notified by the Central Government based on the volume and sensitivity of the data processed by them.

Notice and Consent

The draft Bill permits processing of personal data for a lawful purpose, with consent from the data principal. The data fiduciary is required to provide an itemised notice to the data principal, prior to or upon collection of personal data, in clear and plain language containing a description of personal data sought to be collected and the purpose of processing of such personal data. For consent given prior to enactment of the new law, such notice should be given to the data principal, as soon as reasonably practicable. Additionally, free, specific, informed, and unambiguous consent by clear affirmative action must be sought from the data principal for the collection and processing of their personal data. The consent may subsequently be withdrawn at the discretion of the data principal.

The draft Bill also specifies the role of ‘consent manager’, which are data fiduciaries that enables a data principal to give, manage, review, and withdraw their consent through an accessible, transparent, and interoperable platform.

Given that the current law prescribes notice and consent requirements only for the collection of sensitive personal data or information, businesses will now have to gear up to implement the notice and consent requirements for all personal data.

Deemed Consent

The draft Bill introduces the concept of ‘deemed consent’ as well as sets out scenarios and illustrations wherein consent is required. Essentially, a data fiduciary should not be required to provide consent for the collection and processing of data for the following purposes:

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- where the data principal voluntarily provides personal data to the data fiduciary and it is reasonably expected that such personal data may be provided;
- for the performance of any function under any law, or the provision of any service or benefit to the data principal, or the issuance of any certificate, license, or permit for any action or activity of the data principal, by the State or any instrumentality of the State;
- for compliance with any judgment or order issued under any law;
- for responding to a medical emergency involving a threat to the life or immediate threat to the health of the data principal or any other individual;
- in case of taking measures to provide medical treatment or health services to any individual during an epidemic or outbreak of diseases etc.;
- for taking measures to ensure safety of, or provide assistance or services to, any individual during any disaster or any breakdown of public order;
- for purposes related to employment including prevention of corporate espionage, maintenance of confidentiality of trade secrets, intellectual property, classified information, recruitment, termination of employment, provision of any service or benefit sought by a data principal who is an employee, and verification of attendance and assessment of performance;
- in public interest, which includes purposes such as prevention and detection of fraud, credit scoring, recovery of debt, mergers and acquisitions, network and information security, processing of publicly available personal data, operation of search engines, processing of publicly available personal data, and recovery of debt; and
- for fair and reasonable purpose as may be prescribed by the Central Government, including based on legitimate interests of the data fiduciary, and reasonable expectation of processing of personal data.

Deemed consent is similar to ‘alternate grounds of processing of data’ which is seen in privacy legislation in other jurisdictions. However, unlike the concept of alternate grounds of processing, deemed consent is not an alternate to consent based processing, instead, the data principal may be deemed to have given their consent for processing only under the above-mentioned grounds. Hence, all rights applicable to consent-based processing (including withdrawal of consent) should apply here.

Data Principal Rights and Duties

The data principals may exercise certain rights with respect to their personal data:

- right to information about personal data including information regarding status of processing, summary of processing activities, and identities of all the data fiduciaries with whom the personal data has been shared along with the categories of personal data so shared;
- correction and erasure of personal data;
- right to grievance redressal; and
- right to nominate any other individual to exercise the above-mentioned rights under the draft Bill in the event of data principal’s death or incapacity.

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To protect businesses, the draft Bill imposes certain duties upon data principals, including prohibiting them from registering a false or frivolous grievance or complaint with a data fiduciary and from providing false information or suppressing material information. A penalty of up to INR 10,000 (approx. ₹110) may be levied on data principals for the failure to comply with their duties.

Compliances

Broadly, the compliances to be undertaken by data fiduciaries are as follows:

- comply with the draft Bill (irrespective of whether processing is undertaken by a processor/data fiduciary on its behalf or if the data principal is non-compliant with their duties;
- undertake reasonable efforts to ensure that personal data processed by or on behalf of the Data Fiduciary is accurate and complete if the personal data is likely to be used by the data fiduciary to make a decision that affects the data principal or if the personal data is likely to be disclosed another data fiduciary;
- implement appropriate technical and organisational measures;
- protect personal data in its possession or under its control by taking reasonable security safeguards to prevent personal data breach;
- notify the Board and each affected data principal in the event of a personal data breach;
- publish, in such manner as may be prescribed, the business contact information of a data protection officer ('DPO'), if applicable, or a person who is able to answer on behalf of the data fiduciary, the data principal's questions about the processing of their personal data; and
- share, transfer, or transmit the personal data to any data fiduciary or data processor with consent of the data principal.

Additionally, SDFs are required, among other obligations, to implement independent data audits, appoint a DPO, and carry out Data Protection Impact Assessments ('DPIAs'). Non-compliance with these additional obligations may attract a penalty of up to INR 1.5 billion (approx. ₹17 million).

Retention Period

While there are no specific retention periods prescribed, personal data is only permitted to be retained for as long as necessary for legal or business purposes. Further, personal data is not permitted to be retained if the purpose for which such personal data was collected is no longer being served by its retention.

Cross-Border Transfers of Data

Personal data can be transferred to only those countries which are notified by the Central Government in accordance with terms and conditions as may be prescribed. At present, there is no foreseeability on the factors basis which countries may be notified.

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For personal data, while the draft Bill does not expressly allow transfer of personal data outside India, it provides that the Central Government may whitelist certain countries or territories outside India. The draft Bill itself does not throw light on the factors based on which countries or territories will be whitelisted, nor the types of personal data that may be allowed/restricted to be transferred. The MeitY has also remarked that data localisation is intended to be the norm and cross-border transfer of personal data may only be allowed as an exception through 'corridors of trust' where established with such countries or territories.

Children's Data

The draft Bill mandates 'verifiable' parental/guardian consent for processing of children's data (those below age of eighteen). There is no exemption carved out for children who are between the ages 13 and 18 years old. Profiling, tracking, behavioural monitoring, and targeted advertising aimed at children and any other processing of personal data that can lead to harm to the child is also prohibited.

The primary issue with the requirement of 'verifiable parental consent' is that businesses will need to obtain consent of parents if children are accessing their services. This is applicable in instances of minor users availing services on the internet such as browsing videos, shopping online, and educational services which may involve the collection of personal data of children. This form of compliance could disincentivise businesses from offering services to children, including those which are useful. Further, there is a blanket ban on tracking and behavioural monitoring of children. There is no exemption carved out for activities which may be carried out to benefit children, such as preventing harm and ensuring the safety of children online.

The prohibition on targeted advertising directed at children overlaps with the prohibition on children targeted advertisements provided in the Guidelines for Prevention of Misleading Advertisements and Endorsements for Misleading Advertisements, 2022 issued under the Consumer Protection Act, 2019. Currently there is no sight on how the two laws may interplay once the draft Bill is in force. The draft Bill proposes a high penalty which may extend up to INR 2 billion (approx. ₹22.6 million) for non-compliance with this children-data related obligations.

Data Breach Reporting

The draft Bill defines 'personal data breach' as 'any unauthorized processing of personal data or accidental disclosure, acquisition, sharing, use, alteration, destruction of or loss of access to personal data, that compromises the confidentiality, integrity or availability of personal data'.

The draft Bill obligates the data fiduciary or the data processor to notify the Board and the affected data principals in the event of a personal data breach. The obligation to notify data principals does not exist under Indian law currently. The data fiduciary and the processor may contractually determine who is responsible for undertaking the reporting obligation. Further, the draft Bill proposes a penalty which may extend up to INR 2 billion for non-compliance with this requirement.

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Exemptions

By way of notification, the applicability of provisions in the draft Bill may be exempted for any instrumentality of the state in the interests of sovereignty and integrity of India, security of the state, friendly relations with foreign states, and maintenance of public order. No specific exemptions have been specified for private bodies.

Conclusion

A revamp of the general data protection law has been in the works since 2017 when the Supreme Court of India delivered the landmark judgement in *Justice K S Puttaswamy and Anr v. Union of India and Ors* [Writ Petition (Civil) No. 494 of 2012] recognising the right to privacy as a 'fundamental right'. The draft Bill is a fresh and minimalistic take on reinventing the general data protection in law in India. Though covering a variety of aspects at a conceptual level, the draft Bill delegates to the Central Government a host of important matters, including the data breach notification requirements, compliances of a data fiduciary, classes of regulated entities, the exercise of a data principal's rights, and cross-border transfer of personal data.

Further, an interesting feature of the draft Bill is that it is not intended to overhaul the entire gamut of data protection regulations in India. Data privacy and security related obligations under sectoral laws currently, such as the banking regulations, insurance and health regulations, and securities regulations, will continue to apply in parallel. Therefore, businesses will continue to have to evaluate the applicability of sectoral laws to them or their products even after the draft Bill becomes law.

As with every new law, the draft Bill brings with it its own unique set of challenges and implementation hurdles. The draft Bill raises questions regarding: the regulation of personal data in the absence of sensitivity-based classification; the lack of foresight on how comprehensive the rules and regulations subsequently introduced will look like; the lack of clarity with respect to exemptions listed under deemed consent; and the broad powers vested with the Board. The draft Bill also misses out in clarifying several provisions and has left much to the discretion of the Central Government to frame rules and regulations. Aspects such as: the manner of personal data breach notifications; registration and functions of consent manager; parental consent for processing of personal data of children; the composition of the Board; conducting DPIAs; and audits, will be further elaborated by way of rules and regulations introduced by the Central Government. The indirect data localisation in the form of introducing requirement of approving only specific jurisdictions is also a cause of concern in the absence of clarity of how countries or territories may be whitelisted.

Post the Government's receipt of public comments and feedback, it is expected that the draft Bill will be tabled before Parliament in 2023 and is expected to become law in 2023, as orally remarked by the Minister of Electronics and Information Technology of India.

India: Stricter Cybersecurity Norms and Reporting Requirements

Why MNCs and Start-ups alike are gearing up for Rippling Change

Authored by Aaron Kamath, Aniruddha Majumdar and Varsha Rajesh

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REGULATORY RESEARCH SOFTWARE

The Indian Computer Emergency Response Team ('CERT-In'), the Government nodal agency that deals with cybersecurity threats in India, issued a direction relating to 'Information security practices, procedures, prevention, response, and reporting of cyber incidents for safe & trusted internet'¹ (the Direction) to impose stringent requirements for cybersecurity reporting and introduce broader compliance requirements. Subsequently, CERT-In released frequently asked questions² (the FAQs) to clarify certain aspects of the Direction. The Ministry for Electronics and Information Technology (MeitY) has since held a meeting on 10 June 2022 with stakeholders to provide informal clarifications on certain aspects of the Direction and the FAQs. Aaron Kamath, Varsha Rajesh, and Aniruddha Majumdar, from Nishith Desai Associates, discuss the contents of the Direction, as well as its impact on the industry.

The Direction came into force on 27 June 2022, two months after it was issued. The timeline for compliance with the Direction was extended for certain specific entities, including for 'Micro, Small and Medium Enterprises' ('MSMEs') to 25 September 2022³.

Existing Cybersecurity Framework

Prior to the Direction, the Information Technology (The Indian Computer Emergency Response Team and Manner of Performing Functions and Duties) Rules, 2013 ('the CERT Rules') issued under the Information Technology Act, 2000 ('the IT Act') provided for certain compliance obligations for entities with respect to cybersecurity in India. The CERT Rules require affected service providers, intermediaries, data centres, and bodies corporate to mandatorily report certain cybersecurity incidents to CERT-In as soon as possible to leave scope for timely action. Other cybersecurity incidents which were not specifically identified in the CERT Rules could be reported voluntarily.

1 Available at: https://www.cert-in.org.in/PDF/CERT-In_Directions_70B_28.04.2022.pdf, last accessed February 25, 2023.

2 Available at: https://www.cert-in.org.in/PDF/FAQs_on_CyberSecurityDirections_May2022.pdf, last accessed February 25, 2023.

3 See: https://www.cert-in.org.in/PDF/CERT-In_directions_extension_MSMEs_and_validation_27.06.2022.pdf, last accessed February 25, 2023.

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The CERT Rules are not specifically repealed or replaced with the Direction. The Direction supplements the existing CERT Rules, augments the powers of CERT-In, and introduces further obligations for reporting and compliance.

Applicability of the Direction

The obligations relating to the reporting of incidents under the Direction⁴ apply to both Indian and foreign entities which have computer infrastructure (i.e., a ‘computer’, ‘computer system’, or ‘computer network’) located in India. The Direction may also apply with respect to incidents affecting any computer infrastructure located outside India under limited circumstances such as if the cybersecurity incident originated from an attacker in India or if any computer infrastructure in India is adversely impacted.

However, the Direction also contains obligations in the nature of ‘Know Your Customer’ (‘KYC’) procedures for specific entities such as data centres and cloud service providers.⁵ These obligations may apply even if such entities provide services to customers in India, regardless of the location of their computer infrastructure, or the origin or impact of any incident which affects such computer infrastructure.

Compliances under the Direction

Below are key compliances under the Direction applicable to service providers, intermediaries, data centres, bodies corporate, and Government organisations (collectively known as ‘the Entities’).

Ongoing compliance

Point of contact

Entities offering services to the users in the country are required to designate a Point of Contact (‘PoC’) to liaise with CERT-In and update CERT-In of any changes in the PoC.⁶

Synchronisation of system clocks

The Direction requires all the Entities to synchronise ICT systems’ clocks to the Network Time Protocol (‘NTP’) of the National Informatics Centre (‘NIC’) or National Physical Laboratory (‘NPL’). Alternatively, the ICT systems’ clocks may be synced with NTP servers traceable to those maintained by the NIC or the NPL. Global entities are permitted to use a different time source which is accurate and standard, but they need to ensure that their time source does not deviate from the NPL and the NIC. In case there is a deviation, the entity must make note of the deviation and report it to CERT-In at the time of reporting the incident.

Maintenance of logs and data localisation

All the Entities covered under the Direction should maintain logs such as Firewall logs, Intrusion Prevention Systems logs, SIEM logs, web/database/mail/FTP/proxy server logs, event logs of critical systems, application

⁴ As contained in paragraphs (i) to (iv) of the Direction.

⁵ As contained in paragraphs (v) to (vi) of the Directions.

⁶ Question no. 29 of the FAQs.

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logs, ATM switch logs, SSH logs, and virtual private network ('VPN') logs etc, for all their ICT systems for 180 days in India. These logs are also required to be provided to CERT-In while reporting a cyber incident, or when sought by CERT-In pursuant to a direction. The logs may be stored outside India provided they can be produced to CERT-In upon request within a reasonable time.⁷

Additionally, data centres, virtual private server ('VPS') providers, cloud service providers ('CSP'), and VPN providers are required to record information in relation to subscribers⁸ and maintain records of such information for at least five years after the cancellation of the user registration, or a longer period when mandated by law. The requirement of maintenance of <validated names of subscribers/customers hiring the services> and <validated address and contact numbers> will be enforced post 25 September 2022.⁹

Similarly, virtual asset service providers, virtual asset exchange providers, and custodian wallet providers shall mandatorily maintain all information obtained as part of KYC and records of financial transactions for a period of five years. With respect to transaction records, accurate information should be maintained in a manner so that individual transactions can be reconstructed along with the relevant elements like information relating to the identification of the relevant parties including IP addresses along with timestamps and time zones, transaction ID, the public keys (or equivalent identifiers), addresses or accounts involved (or equivalent identifiers), the nature and date of the transaction, and the amount transferred.

Reporting Obligations

The Direction identifies certain kinds of cybersecurity incidents which are required to be reported by the Entities which are further explained in the FAQs.

The Direction introduces a six-hour timeframe for reporting the specified incidents which meet the following criteria:

- cyber incidents and cybersecurity incidents of severe nature (such as Denial of Service ('DoS'), Distributed Denial of Service ('DDoS'), intrusion, and the spread of computer contaminants including ransomware) on any part of the public information infrastructure including backbone network infrastructure;
- data breaches or data leaks,
- large-scale or most frequent incidents such as intrusion into computer resources and websites, etc.; and
- cyber incidents impacting safety of human beings.

Information to the extent available regarding incidents can be provided to CERT-In within the six-hour timeline. The detailed reporting for such incidents should be made as per the prescribed incident reporting form¹⁰ within a reasonable time. For all other mandatorily reportable cybersecurity incidents, information is required to be provided to CERT-In within a reasonable time.

⁷ Question no. 35 of the FAQs.

⁸ Specifically, the Directions requires the: (i) validated names of subscribers/customers hiring the services; (ii) period of hire including dates; (iii) IPs allotted to/being used by the members; (iv) email address and IP address and time stamp used at the time of registration/on-boarding; (v) purpose for hiring services; (vi) validated address and contact numbers; and (vii) ownership pattern of the subscribers/customers hiring services.

⁹ See: https://www.cert-in.org.in/PDF/CERT-In_directions_extension_MSMEs_and_validation_27.06.2022.pdf, last accessed February 25, 2023.

¹⁰ Available at: <https://www.cert-in.org.in/PDF/certinirform.pdf>, last accessed February 25, 2023.

5. Existing Legal Framework on Data Protection

The FAQs further clarify that in the event multiple parties are affected by the same cybersecurity incident, any entity which *notifies* the cybersecurity incident, shall report to CERT-In. There was a subsequent informal clarification that the entity to report the cybersecurity incident to CERT-In should be the entity in-charge of the affected computer infrastructure. The obligation to report a cyber incident is neither transferrable nor can it be indemnified against or dispensed with.

Post-reporting Obligations

Subsequent to reporting a cybersecurity incident, necessary action should be taken by the entity and/or information or assistance should be provided if directed by CERT-In.

Penalties

The CERT Rules do not prescribe any specific penalties for non-compliance with directions issued by CERT-In or reporting requirements. However, the Direction provides that the penalty for non-compliance with the Direction shall be as per the IT Act. Accordingly, entities who fail to comply with the Direction, or otherwise fail to provide the information or assistance as directed by CERT-In will be liable to imprisonment which may extend up to one year and/or fine which may extend up to INR 100,000 (approx. ₹1,240).¹¹

Concerns regarding the Direction

In the wake of the Direction, industry players and experts have raised several concerns regarding the Direction. Primarily the stringency in the reporting requirements, i.e. the six-hour timeframe and the enlarged ambit of mandatory reporting, were met with objections from the industry due to the lack of capacity and infrastructure to identify and report cybersecurity incidents within the prescribed timeline. Furthermore, it appears that the internal escalation and administrative processes within the organisations may not have been accounted for by CERT-In while arriving at this timeframe.

The Direction also raises several privacy concerns. It appears to provide CERT-In with unbridled powers to demand disclosure of information (even without the occurrence of a cybersecurity incident). Such information may include personal information of individuals and, therefore, the Direction may need to be assessed in light of the three-fold test of legality, legitimacy of aims, and proportionality prescribed in *K.S. Puttaswamy v. Union of India*. Further, the Direction also requires VPN providers to maintain the data of subscribers for a period of five years and furnish it on request. Maintenance of such logs would contradict the purpose of the VPN which is primarily designed to protect user privacy.

On the contrary, the FAQs justify that the right of citizens is not affected since the Direction does not envisage the seeking of information by CERT-In from the service providers on a continuous basis as a standing arrangement. The FAQs further clarify that the reporting requirements placed on bodies corporate take precedence over any contractual obligations towards users to ensure confidentiality of their information.

¹¹ Section 70B(7) of the IT Act.

5. Existing Legal Framework on Data Protection

Additionally, from a legal standpoint, the validity of the Direction may be controversial. CERT-In is vested with wide powers with respect to cybersecurity incidents under the IT Act, as specified above. While directions may be issued by CERT-In, it may be argued that the present Direction is beyond the scope of the powers of CERT-In, since it contains provisions which effectively amend the current provisions of the CERT Rules, and also contain KYC obligations which are beyond the scope of CERT-In's functions.

In light of these issues, there have been representations made to the Government to re-consider and delay the implementation of the Direction. The Government has issued some oral clarifications with respect to certain aspects of the Direction and has also extended the timeline for compliance for MSMEs, and certain KYC requirements. The Government has indicated that the implementation of the Direction will be reviewed and there may be further reconsiderations of the provisions.

Conclusion

Cybersecurity in India has been a concern of national security and interest. Despite the CERT Rules, 1,402,809 cybersecurity incidents were reported in 2021.¹² The Direction serves as a facelift to the existing law and seeks to remedy the impassive outlook of the industry towards cybersecurity reporting and compliance.

The Direction also supplements the recent approach of the Government towards the protection of consumer data, governmental access to data for enforcement, and combatting security threats as seen in the proposed data protection law and sectoral data laws in the telecom, banking, and insurance industry.

Overall, while the Direction is important to ensure an open, safe, and accountable internet for citizens, some of the requirements require further clarity whilst enforcement action is also left to be observed.

¹² See: <https://www.cert-in.org.in/s2cMainServlet?pageid=PUBANULREPT>, last accessed February 25, 2023.

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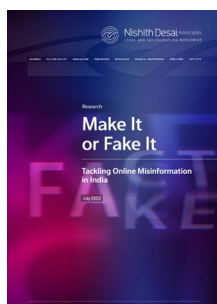
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