

YOU CAN'T
 INTEGRATE HIGH-TECH
 WITHOUT
 COMPROMISING DESIGN.
 WHY NOT?



#PushingBoundaries #SeamlessDesign

At Covestro, we have developed new technologies and materials, and translated them into a revolutionary design in close collaboration with our partners. This design seamlessly blends safety and sustainability – in a literal sense. Lights, displays and the entire wraparound glazing are all made from transparent, yet extremely impact-resistant and easy to mold Makrolon®. Find out more about our technologies and high-tech polymers that push the boundaries of possibility. For a more sustainable and brighter world.

covestro.in



India's Proposed Privacy Law and Its Inspiration from GDPR

Nishith Desai Associates
LEGAL AND TAX COUNSELING WORLDWIDE

India being home to over 1.3 billion people, also boasts of having one of the world's largest number of internet users. This brings with it much potential for businesses looking to expand in India, as easier access to the internet and information has allowed new business models to grow. Concerns on the largely unregulated use of personal data has resulted in clamours for a new data protection regime in the country. At least two years in the making, India finally has a prototype of what its data protection law is going to look like – *in the form of the draft Personal Data Protection Bill, 2018 (Proposed Law)*.

Data Protection Law in India – The Current Scenario

India's current data protection framework is made up of the *Information Technology Act, 2000*, and the rules framed thereunder (*Current Law*). It was only in August 2017 that the Supreme Court of India in a landmark decision recognised the right to privacy as a fundamental right enforceable against the State¹, and further recommended that a new law be framed to protect individual's rights against private parties. Following this recommendation, in July 2018, the Proposed Law was released.

Key Proposed Changes to the Law

Through this article, we give you insights on some of the key comparative features between EU's General Data Protection Regulation (GDPR) and the Proposed Law.

i. Applicability of the Proposed Law

The Proposed Law applies to entities (either 'data fiduciaries', or 'data processors') who process 'personal data' of individuals, which is essentially any data capable of identifying an individual. The Proposed Law also provides for 'sensitive personal data', a separate category of personal data, which consists of specified types of data, such as passwords, financial data, or health data, among others. Although GDPR doesn't expressly classify data into two categories, it similarly gives certain 'special' categories of data (such as genetic, or biometric data) heightened protection.



Inika Charles



Aaron Kamath



Huzefa Tavawalla

ii. Extra-Territorial Application

Being a European law didn't mean that only European businesses were impacted by the GDPR, thanks to its extraterritorial reach. Similarly, the Proposed Law will require offshore entities to comply subject to certain nexus requirements. The Proposed Law would apply to entities processing personal data outside India in so far as they have a business connection in India, carry out a systematic activity of offering goods or services to individuals located in India or carry on activities involving profiling of individuals in India.

iii. Data Localisation and Cross Border Transfers

Similar to the GDPR, consent is required from the individual for onward transfers to overseas parties (which should include group companies). In addition, the data fiduciary should ensure that (a) the transfer is as per pre-approved contractual clauses, or (b) the Government approves the location or organisation for the transfer, or (c) the data protection authority constituted under the Proposed Law specifically approves such a transfer due to a necessity. In a significant departure from the GDPR, the Proposed Law prescribes that at least one 'live serving copy' of all personal data should be stored within India.

iv. Data Breach Notifications

If there is a breach of personal data which is likely to cause harm to an individual, the data fiduciary should notify the data protection authority of such breach. Upon receipt of the breach notification, the authority may determine if the data fiduciary is required to report the breach to the individual.

v. Penal Provisions and Worldwide Turnover

A The Proposed Law not only proposes financial penalties which may extend up to 2% or 4% of the total worldwide turnover of the Data Fiduciary; but also, the requirement to compensate the individual in certain circumstances where 'harm' or 'significant harm' has been suffered. The Proposed Law additionally prescribes criminal penalties (fines, an imprisonment that may extend to 3-5 years, or both) for intentional, or reckless contraventions of the Proposed Law, for certain offences.

Way Forward

It seems likely that the Proposed Law be introduced in the Indian Parliament in the monsoon session (July – September 2019), after the dust from the upcoming General Elections in India is well settled. One could anticipate another 12-18 months for the introduction of the Proposed Law to be effective.

However, there is also the possibility that there could be further deliberations which could modify the current draft of the Proposed Law. Interesting times lie ahead, so let's wait and watch!

ABOUT NISHITH DESAI ASSOCIATES

www.nishithdesai.com

Nishith Desai Associates (NDA) is a research based international law firm with offices in Mumbai, Bangalore, Silicon Valley, Singapore, Mumbai-BKC, New Delhi, Munich and New York. It specializes in strategic legal, regulatory and tax advice coupled with industry expertise in an integrated manner.

¹ Justice K. S. Puttaswamy (Retd.) and Anr. v. Union of India And Ors. Supreme Court of India, Writ Petition (Civil) No 494 Of 2012.