

STAKEHOLDER CONSULTATION ON THE NON PERSONAL DATA GOVERNANCE FRAMEWORK

31st July 2020

16:00 to 19:30 Hours

1. Background

The past few years have seen a series of regulatory changes that are aimed at protecting individual, community rights over data while incentivizing economic activity and innovation in the new data economy. The Personal Data Protection Bill (“**PDP Bill**”) was introduced in the Parliament in 2019 December, the government has also published the Report of the Committee of Experts on Non-Personal Data Governance Framework (the “**Report**”) in July 2020, that seeks to govern and regulate non-personal data in India. Both these areas are going through heavy discussions in the technology policy ecosystem and hold the potential of altering the status quo substantially. Decisions regarding the regulation of data governance are bound to drastically affect the way the society functions, and it needs to take into consideration the interests of all stakeholders involved.

The report lays down recommendations for a proposed framework that discusses the issues with Non-personal Data (“**NPD**”), and then provides suggestions on the regulatory framework to govern it. The Report speaks of leveraging data in a digital economy for social, economic, and sovereign purposes. It identifies India as the largest user of smartphones in the world, and consequently the “leading consumer market in the world. Noting that the digital economy is producing greater opportunities for market participants to innovate, the Report talks about imbalances in the market and aims at solving this imbalance through data sharing.

While there is merit in the argument of using data for the growth of the digital economy, there needs to be clear processes in place, and regulatory checks and balances to allow for the free flow of NPD. The report builds a case for the regulation of data by referring to its economic and social value and refers to the harms it could cause to the subjects, in the absence of regulation. It also speaks of the concept of collective privacy of vulnerable groups, and the harms that could befall them due to exposure or handling of data. It establishes data trusts, speaks of ownership rights over data, and establishes a new class of business called “Data businesses”, creating a “policy switch” that will act as a digital clearing house for all regulatory compliance. To ensure

effective regulation, the report also recommends legislation, with a Non-Personal Data Authority in place. Around the world, non-personal is one of the lesser discussed topics. In India, as it stands today, there is a wide gap in the discourse on issues NPD. Given India's scope for economic development and developmental solutions with the aid of data, NPD could have a huge role in driving policy interventions. With the report being out in the public domain, informed discussions on the nuances of a proposed regulatory regime can help in fixing the gaps and help to overcome these collective challenges as a community.

Towards this, The Dialogue proposed a Virtual Stakeholder Consultation on Non-Personal Data Governance, on 31st July, 2020 from 16:00 to 19:30 Hours.

Objectives:

1. Drive discourse on NPD through discussion of principles referred to in the report
2. Discuss the challenges in establishing a smooth functioning regulatory structure
3. Conceptualize means of incorporating elements that instill trust in citizens, in both industry and government
4. Discuss means of allowing economic activity using data without disrupting status quo drastically.
5. Chalk out implementational roadblocks that could provide nuanced policy prescriptions.

2. Proposed themes of Discussion

2.1 Key Definitions and roles

The committee has defined NPD as any data that is not related to an identified or identifiable natural person or is personal data (“PD”) that has been anonymized. It identifies three categories of NPD namely- public, private, and community. NPD can be sensitive, in some circumstances. In such cases, it will be denoted as sensitive NPD, and the report mentions a category of critical NPD which would be in line with the definition per the PDP Bill, 2019.

Criticisms are already in place regarding the lack of clarity in definitions in the PDP Bill. There is a lack of regulatory clarity on what would be considered as “critical personal data” and “sensitive data”. This has been left to rulemaking and has not found its way into the body of the bill. For the operation of these companies, based on the data they collect, the compliance costs also go up. Lack of supporting infrastructure, regulatory uncertainty, increased cost of compliance that could otherwise have been used for the development of products, will set back innovation and solutions. Against this backdrop, it is important to articulate the basis for classification and come up with more guidance that would clarify the regulatory stance on the issue.

The Report identifies three key NPD roles, namely data principal, data custodian, and data trustee; and an institutional form of data infrastructure, namely a data trust. The **data custodian** undertakes collection, storage, processing, use, etc. of data in a manner that is in the best interest of the data principal. Data custodians have a **‘duty of care’** towards the concerned community in how they handle the NPD related to it. The data principal group/community will exercise its data rights through an appropriate data trustee. The community’s **‘best interest’** is communicated to data custodians by data trustees on behalf of the data principal community in the form of data advice, recommended data practices requirements/guidelines, etc. Clearer prescription on who can be eligible to be a trustee needs to be laid down along with the rights and liabilities. It is also important to understand the role of the government in this ecosystem. The Report points towards the government taking on the role of both the trustee and the custodian, thus creating conflicts. We intend to discuss the interactions between the various players in the NPD ecosystem, and how this would shape the future of data flows.

2.2 Rights over Data

On the basis of the categories introduced above, the committee aims to articulate a legal basis for establishing rights over NPD. The term ownership implies a set of economic and other statutory rights. Since data is an intangible asset, the committee recognizes that many actors may have

simultaneous overlapping rights and privileges. The Committee has introduced the principles of 'best interest' and 'beneficial interest' that will aid in tackling this overlap in ownership of data with respect to Community NPD and Private NPD.

In the case of community NPD, the rights over such data collected in India would vest with the trustee of that community, with the community as the beneficial owner. A data trustee would be implementing decisions on the behalf of the community, in their “best interest”. While this aims to give agency to the community to take charge of data collected from them, deeper deliberation must go into setting out limits of such community rights. It becomes important to conceptualize how rights would be vested in communities, decide how overlaps would be looked at, and means of reducing any possible conflicts of interest.

Concepts of beneficial ownership of data, contours of “best interest” need to be articulated. Clearer articulation of rights will reduce the possibilities of clashes with privately owned IP. The consultation would be discussing the aspects regarding rights and ownership of data as envisaged in the report and the steps forward.

2.3 Data Sharing and Data Businesses

In the form it is envisioned by the report, raw/factual data would be shared for predefined purposes. The report identifies various stakeholders, including governments, citizens, startups, companies, universities, research labs, NGOs, etc., who may request data businesses for underlying data for defined purposes. The purposes are defined broadly and allows for leeway for data requests. The horizontal category of “data business” and the reporting procedures once they cross the “data related threshold” also stand out.

The consultation will have discussions around models that can be used for defining “data related threshold”, stronger checks and balances needed to prevent misuse of the data sharing purposes as defined.

2.4 Commonalities with the PDP Bill

As per the Bill, using anonymized personal and non-personal data for promotion of the Digital Economy is permitted. It exempts the Government from obligations and allows them to use personal data to frame policies for the digital economies with respect to non-personal data. Such a provision is likely to discourage innovation and investments in India, as the government is seeking access to non-personal data as well as anonymized personal data. It will also have IP conflicts as asking for business intelligence could amount to a violation of the intellectual property rights of a business entity. Moreover, asking for non-personal data and anonymized personal data might also give the government leverage to monetize data which could hurt competition in India.

Now with the launch of the report, there is a greater need to discuss the modalities of data access to the government along with the checks and balances on the same. As mentioned earlier, the PDP Bill has many points of intersection with the proposed legislation as hinted by the report. It draws from the PDP Bill for definitions and that determines many key obligations regarding data collection, storage, and processing. The functions of the Data Protection Authority (“DPA”) and the Non-Personal Data Authority (“NPDA”) and the Competition Commission of India (“CCI”) will need to be harmonized to prevent future clashes. Clarity on government access and clearly defined means of access must be finalized across the board for uniform application of the law. The consultation will be discussing some of these issues to understand the nuances of how these frameworks would interact with each other.

2.5 Regulatory Challenges and Harmonization:

A major overlap can be expected in the nature of functioning of the regulators. The report hints at the harmonisation of the roles of the DPA, CCI and NPDA for effective data governance. There will also be interactions between the above mentioned horizontal regulators with sectoral

regulators such as RBI, SEBI, DGCA, etc. In this context, it is important for internal harmonization of the powers and functions, and further define the nature of these interactions. The consultation will discuss how we can start the process of harmonization of the internal regulatory structures for effective functioning of the data governance frameworks and laws.

3. Event Details

The details are as follows:

Time: **180 minutes + 30 minutes (Q&A)**

Moderator: **Kazim Rizvi**

Format: **Moderated Open House Discussion**

Date: **31 July 2020**

Time: 4:00pm- 7.30pm

Software: **Zoom**

Do mark your calendar, and join us for the event- we hope to see you there!