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India: Data Privacy Legislation

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As international companies increase their outsourcing and other business activities in India, data protection laws in India are coming under increased international scrutiny. On his recent visit to India, British Prime Minister David Cameron urged Indian Prime Minister Manmohan Singh to ensure better protection for U.K. data held on Indian computer servers. ¹ The European Union still considers Indian data protection laws as inadequate and this has become a sore point in the negotiations between India and the European Union to enter into the proposed Bilateral Investment and Protection Agreement, which India hopes to conclude by April 2013. ²

1. Existing Data Protection Framework

The existing data protection framework in India is covered primarily under Section 43A of the Information Technology Act, 2000 (ITA) which was introduced through the Information Technology (Amendment) Act, 2008. ³ According to Section 43A, a company is required to compensate any wrongful loss or gain arising from any negligence in implementing and maintaining reasonable security practices and procedures for any sensitive personal data or information in systems owned or controlled by such companies. ⁴ The framework providing for government surveillance and interception of communications are also covered under the ITA and the Indian Telegraph Act, 1885 together with the respective rules thereunder. ⁵

2. Clarifications

In 2011, India augmented its data protection laws by notifying the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 (2011 ITR Rules) which defined what constituted "sensitive personal data or information" and listed the provisions governing the collection, disclosure and overseas transfer of data. ⁶ A subsequent clarification issued by the Department of Information Technology (DIT) restricted the applicability of the above rule to companies located in India. ⁷

While these measures did provide some improvement, the data protection laws were still found to be inadequate and unclear by both the industry as well as the lawmakers themselves. Additionally, in terms of proposed reforms, the Union Ministry of Home Affairs and Information Technology and the Department of Personnel and Training (DoPT) under the Ministry of Personnel were reported to have different views. ⁸

3. Draft Privacy Bill 2011

In parallel to the 2011 IT Rules being issued under the Right to Privacy Bill, 2011 which was discussed by DoPT be asked to redraft the Right to Privacy Bill. The DoPT headed by Justice AP Shah, which submitted its report with recommendations of the report were that the new legislation (i) be technologically neutral and interoperable with international standards, (ii) apply to both private and public sectors, (iii) create a uniform level of privacy protection, and (iv) establish an enforcement regime within the industry and monitored by a regulatory framework which would include Privacy Commissioners appointed at central and regional levels.⁹

the ITA, the Union Ministry of Law had prepared a draft committee of secretaries (CoS) who suggested that the DoPT constituted a Group of Experts on Privacy to the DoPT in October 2012. Some of the key provisions (i) be technologically neutral and interoperable with international standards, (ii) apply to both private and public sectors, (iii) create a uniform level of privacy protection, and (iv) establish an enforcement regime within the industry and monitored by a regulatory framework which would include Privacy Commissioners appointed at

4. Need for Stand-Alone Privacy Legislation

In January 2013, the Law Minister wrote to the Prime Minister underlining the urgent need to bring in a stand-alone privacy legislation based on the report of the

Group of Experts on Privacy.¹⁰

With conflicting views by different arms of the government and the clock ticking down on India's need to improve data protection law to meet its international commitments, it remains to be seen how fast the government will be able to establish and implement a

satisfactory data protection framework in India.

Fußnoten

- 1) Vina, Gonzalo, "Cameron to Press for Better Data Protection in India", Bloomberg, February 19, 2013.
- 2) "India asks EU to declare it a data secure country" Press Trust of India, October 17, 2012 ; Sen, Amiti, "India protests European Union study of data laws", The Economic Times, July 9, 2012.
- 3) Chowdhury, CRI 2009, 62.
- 4) Section 43A: Where a body corporate, possessing, dealing or handling any sensitive personal data or information in a computer resource which it owns, controls or operates, is negligent in implementing and maintaining reasonable security practices and procedures and thereby causes wrongful loss or wrongful gain to any person, such body corporate shall be liable to pay damages by way of compensation, not exceeding five crore rupees, to the person so affected. Explanation.—For the purposes of this section (i) "body corporate" means any company and includes a firm, sole proprietorship or other association of individuals engaged in commercial or professional activities ; (ii) "reasonable security practices and procedures" means security practices and procedures designed to protect such information from unauthorised access, damage, use, modification, disclosure or impairment, as may be specified in an agreement between the parties or as may be specified in any law for the time being in force and in the absence of such agreement or any law, such reasonable security practices and procedures, as may be prescribed by the Central Government in consultation with such professional bodies or associations as it may deem fit, (iii) "sensitive personal data or information" means such personal information as may be prescribed by the Central Government in consultation with such professional bodies or associations as it may deem fit.
- 5) See (i) Sections 69 and 69B of the Information Technology Act, 2000, (ii) Procedure and Safeguards for Interception, Monitoring, and Decryption of Information Rules 2009, (iii) Procedure and Safeguard for Monitoring and Collecting Traffic Data or Information Rules 2009, and (i) Indian Telegraph (Amendment) Rules, 2007 (under Section 7 of the Indian Telegraph Act, 1885).
- 6) Chowdhury/Ray, CRI 2011, 165.

- 7) *Clarifications dated August 24, 2011 and May 11, 2011 issued by the Department of Telecommunications.*
- 8) *Chhibber, Maneesh, "Law Minister seeks stand-alone privacy legislation, writes to PM", Indian Express, January 20, 2013.*
- 9) *Report dated October 16, 2012 of the Group of Experts on Privacy under the chairmanship of Justice A.P. Shah, Former Chief Justice, Delhi High Court.*
- 10) *Supra. 9.*

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