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Anna Roy
Senior Advisor
NITI Aayog
Government of India

November 21, 2020

Re: Draft Data Empowerment and Protection Architecture

Dear Ms. Anna Roy,

ALG India Law Offices LLP ("ALG") submits these comments in response to the invitation for feedback on the Draft Data Empowerment and Protection Architecture prepared by NITI Aayog, which was published in August 2020.

ALG represents several domestic and foreign companies having an interest in data governance. In the course of advising its clients, ALG has had the occasion to consider and reflect on the current legal landscape in India pertaining to data governance in general, and the aforementioned draft in particular.

Our key comments and suggestions, discussed in detail in the enclosed Note, are summarized below –

1. Lack of clarity on how benefits under DEPA will be accessible by people who do not have access to mobile phones.
2. The implementation of DEPA should be done after robust data protection safeguards being put in place.
3. The DEPA only contemplates regulation of data by the Data Protection Authority established under the PDP Bill and does not address the possibility of governmental breach of personal data
4. Lack of clarity on whether user data will pass through and/or be stored on the servers of consent managers.

We appreciate the considerable effort that has gone into preparation of the Draft. We recognize the time pressures and challenges under which the committee is working, particularly in light of the COVID-19 pandemic. We thank you for your time and consideration of these comments.

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Through
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NOTE CONTAINING ALG'S COMMENTS AND SUGGESTIONS ON THE DRAFT DATA EMPOWERMENT AND PROTECTION ARCHITECTURE (DEPA)

1. Lack of clarity on how benefits under DEPA will be accessible by people who do not have access to digital devices (particularly mobile phones and computers).

1.1. *ALG's Observations*

1.1.1. India is a diverse economy with people belonging to various economic strata. Further, a sizable portion of India's population falls in the low-income category. It is well recognised that this considerable portion of the Indian population does not have access to digital devices (particularly mobile phones and computers). On this note, Page 27 of the Draft also recognises that one-third of the Indians do not have access to mobile phones. Moreover, the lack of awareness coupled with lower literacy levels in some sections of the society, it is unlikely that they will have access to benefits under the DEPA.

1.1.2. The Report fails to elaborate and explain how the benefits under DEPA will be accessible to this large Indian population which does not have access to digital devices.

1.2. *ALG's Recommendations*

1.2.1. There should be elaborated clarification on how benefits under the envisaged architecture will be made available to people who do not have access to mobile phones or computers. It should further be clarified whether people who do not have access to digital devices will be deprived of benefits under the DEPA which would render it violative of the principle of equality afforded to citizens of India.

2. The implementation of DEPA should be done after putting in place robust data protection safeguards.

2.1. *ALG's Observations*

2.1.1. With vast amount of data being generated in India, there is an ever-growing concern of data breaches. It goes without saying that these data breaches could have catastrophic impact on lives of affected individuals. While large scale data sharing by individuals could facilitate various benefits for individuals, it also opens up opportunities for miscreants to misuse the data. Accordingly, it would be better to have appropriate data protection safeguards in place prior to implementation of data sharing architecture.

2.1.2. Recognising this, the Draft on Page 29 also states that – *"The key learning from existing global efforts is clear: strong data governance needs a combination of a legal and regulatory*

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framework, the right institutional arrangements, and a robust technology architecture encompassing both data protection as well as data sharing. India will need to bring all of these elements together to create an evolvable framework that is secure, empowering, and scalable for a diverse population, and suited to a vibrant and diverse democracy."

2.1.3. Page 30-31 of the Draft also states that - *"While customers are in control and can consent to various uses of their data, individual consent does not absolve institutions holding data (data fiduciaries) of responsibility to protect, manage, and minimise data misuse. They can and will be penalised under governing laws (for example the RBI Act, or the upcoming Personal Data Protection Bill) for misusing data, not taking appropriate measures to ensure data security, and misusing the consent framework.".* Insofar as the Architecture relies on standards and regulation by authorities that are not yet in place, the system proposed by the Architecture could leave personal data vulnerable to misuse.

2.1.4. The Personal Data Protection Bill, 2019 (which would eventually be the legislation for protection of personal data) is currently under review by a Joint Parliamentary Committee. It is pertinent to note that there are significant concerns regarding some provisions of the envisaged legislation (particularly with respect to inadequacy of privacy safeguards) which have been raised by numerous individuals and organizations.

2.1.5. As regards protection of non-personal data, the Government has come up with a draft report for its governance and some issues in the envisaged model are yet to be addressed. It seems that it would take some time until these issues are addressed, and the envisaged legislation is drafted and brought in force.

2.2. *ALG's Recommendations*

2.2.1. The implementation of DEPA in various sectors should be deferred until appropriate frameworks are put into place for protection of personal data (through the envisaged legislation from the Personal Data Protection Bill) and non-personal data (through the envisaged legislation based on the non-personal data governance framework).

2.2.2. As an exception to the above, components of the DEPA which do not involve collection, handling or processing of data could be put into place since the risk of data breaches in such cases would be ruled out.

2.2.3. In the scenario that the implementation of DEPA cannot be deferred, the architecture must address and propose alternative and/or ad-hoc measures for regulation and standards (for data handling, storage and use) in the time leading up to the final notification of the statutes for protection of personal as well as non-personal data.

3. The DEPA only contemplates regulation of data by the Data Protection Authority

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established under the PDP Bill and does not address the possibility of governmental breach of personal data.

3.1. *ALG's Observations*

3.1.1. The Draft on Page 41 states that *"DEPA also relies on adoption of related technology standards around data storage and processing techniques. Some of these are outlined in the Personal Data Protection Bill - which for instance states that all processing of sensitive and critical data must occur within India. Further technology standards around data storage, based on the sensitivity of data, ought to be designed and regulated by the forthcoming Data Protection Authority"*.

3.1.2. Although the Draft provides for regulation of Data Controllers and Users by the Data Protection Authority, it does not address the possibility of breach of personal data by the Government. Notably, the members of the Data Protection Authority under the PDP Bill are appointed by the Central Government, and not through an independent process. This poses a serious concern for lack of safeguards against governmental misuse/threat to personal data.

3.2. *ALG's Recommendations*

3.2.1. DEPA should contemplate and address the potential threat of governmental breach over personal data and propose safeguards towards its prevention.

4. Lack of clarity on whether user data will pass through and/or be stored on the servers of consent managers.

4.1. *ALG's Observations*

4.1.1. Page 35 of the Draft states *"The primary function of a Consent Manager is to allow users to access and share data, but the* ***data itself is not necessarily streamed through the servers where the account is hosted****. Consent managers are data blind by design; they are not permitted to store user data."*

4.1.2. The Draft emphasizes that the role of the consent managers will be to allow the data users to access and share data. While the Draft states that user data will not 'necessarily' be stored on/streamed through the servers of the consent managers, it does not rule out such possibility.

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4.2. *ALG's Recommendations*

4.2.1. If there is a possibility that data will be streamed through and/or stored on the servers of the consent managers, the architecture should envisage and ensure that appropriate data protection standards are put in place even at the consent manager level. This will ensure that user data is also protected from any misuse at the consent manager level.

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