

India's digital future: Navigating cross-border data flows in the age of the fourth Industrial revolution

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The rapid growth of India's digital economy is fuelling the need for cross-border data flows, as businesses and consumers alike look to take advantage of the opportunities presented by the Fourth Industrial Revolution. The Digital Personal Data Protection Act, 2022, proposed by India's Ministry of Electronics and Information Technology, aims to allow cross-border data transfers with "certain notified countries and territories" and establishes a Data Protection Board to oversee compliance and impose penalties.

India's digital economy is on the rise, and it's no secret that data is the driving force behind this growth. With a projected value of \$1 trillion by 2025, it's clear that the Fourth Industrial Revolution is well underway. However, there's a problem: data protection and privacy laws are becoming increasingly fragmented around the world. As a result, cross-border data flows are being restricted, putting global trade and economic and social activities at risk.

One critical aspect that seems to have been overlooked in the ongoing policy debates is the effect of cross-border data flows on India's trade volume. An analysis by the Indian Council for Research on International Economic Relations reveals that a mere 1% decrease in such flows could potentially result in a loss of \$696.71 million in trade for the country. This staggering statistic underscores the significance of unrestricted data flows to India's economic growth. Any limitations on this front could have severe repercussions for the nation's trade and overall prosperity.

In addition, one of the key concerns raised by the government is the need for law enforcement agencies to access data efficiently. While it's important to address this issue, a whitelist approach that burdens cross-border data flows is not the solution. Ultimately, any data privacy law must strike a balance between protecting citizens' privacy rights and providing law enforcement with the necessary tools to keep them safe.

In the USA, the lack of comprehensive data protection and privacy legislation has led to a patchwork of state and federal laws, making it difficult for businesses to comply with all the requirements. Europe, on the other hand, has adopted the General Data Protection Regulation (GDPR), which provides a high level of protection for personal data and ensures that data flows are consistent across the European Union. In Asia, data protection and privacy laws vary widely, from the comprehensive protection offered by Japan to China's endeavour of cyber-sovereignty by controlling the cross-border transfers of

critical data. Thus, there are noticeable differences in the laissez-faire approach adopted by the US, the individual rights approach adopted by the EU and the focus on national interests showcased by China.

To facilitate cross-border data flows, countries have adopted various approaches, such as adequacy decisions, industry certifications, and contractual clauses. The role of data protection agencies in implementing these regimes is critical, as they ensure that companies comply with the data protection and privacy requirements of each country.

India can learn from the experiences of these countries as it develops its own approach to cross-border data flows. The proposed Digital Personal Data Protection Act, 2022, contemplates a white list of countries that will be notified for cross-border data transfers. However, the criteria for selecting such countries are yet to be addressed, and the countries that will be on the list are yet unknown. This approach does not seem promising for it will require India to enter into cumbersome negotiations with several nations in order to successfully whitelist them thereby de-facto blacklisting the countries with unsuccessful or pending negotiations. As it is currently framed, Clause 17 of the DPDP Bill does not clarify whether there is a prohibition on transferring personal data to any other country unless the central government has notified it. In other words, the bill bans all cross border data transfers unless a country gets notified or whitelisted by the government. In essence, this approach seems to advocate for imposing a data localisation provision and a non-sharing requirement of digital personal data on the businesses until specific countries are notified as permitted territories.

To simplify the complicated issue of cross-border data flows, a potential solution is to use a “Black List Approach,” which involves allowing data to flow freely unless a country is specifically barred or blacklisted. This will allow a seamless flow of data without any trade disruptions or market distortions.

In addition to the FTAs, and to ensure that India can adopt a liberalized way forward to cross-border data flows through the Black List Approach, it can consider introducing the following statutory language:

Firstly, the law should define what is meant by “adequate” data protection and privacy standards. This will ensure that personal data is protected and maintained when it is transferred across borders. The law should also establish clear criteria for evaluating whether other countries have adequate data protection standards.

Secondly, the law should allow for the use of binding corporate rules (BCRs) as a mechanism for data transfers. BCRs are rules adopted by multinational companies that provide adequate protection for personal data across different countries. This will enable businesses in India to transfer data within their multinational groups while still maintaining high data protection and privacy standards.

Lastly, the law should provide for the use of model contractual clauses as another mechanism for data transfers. These clauses are standardized and approved by regulatory authorities, and they provide a contractual basis for transferring personal data. This will

allow businesses in India to transfer data to other countries while ensuring that adequate data protection and privacy standards are maintained.

In conclusion, India needs to adopt a progressive cross-border data flow policy that balances privacy and data protection concerns while fostering economic growth. The proposed Digital Personal Data Protection Act, 2022, provides a framework for balancing these concerns, but India must also look to the experiences of other countries and adopt best practices to ensure a thriving digital economy that benefits all.

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