

ISSUE BRIEF

Bangladesh Draft Data Protection Act 2023: Potential and Pitfalls

BY CHRISTABEL RANDOLPH

The Bangladesh government's updated draft data protection bill is a welcome revision of its 2022 attempt to address the country's lack of a comprehensive data protection law, but there is still room for constructive change to heighten regulatory certainty.

The Information and Communications Technology Division of the Ministry of Posts, Telecommunication, and Information Technology released the proposed Data Protection Act 2023 (DPA 2023 or the bill)¹ on March 14—just days after the publication of the South Asia Center's March issue brief²—and the revised version responds to some of the criticism of the digital protectionism and restrictive provisions on digital business activity in the 2022 draft.³

Specifically, the proposed legislation reflects an operational sensibility based on stakeholder feedback on significant issues. It has incorporated more flexibility to frame rules to address changing situations, provided for a transition period, relaxed data localization requirements, and expressly recognized the importance of international cooperation and safeguard measures for facilitating data flows.

WHAT HAS CHANGED?

The DPA 2023 retains the provisions of the prior draft with substantive changes in four areas.

Transition Period

The law provides for a transition period of three years. It goes one step further to guarantee that this period is a minimum or floor by prohibiting the fixation of an earlier date. This means that the Data Protection Agency cannot set an earlier effective date without an amendment in the law. This is a strong protection for entities impacted by this law, many of whom will need to build capacity to comply. It also gives stakeholders sufficient time to engage with the authorities on matters to be covered in the rules and the standards which will be framed by the agency to co-create operating procedures that are implementable and aligned to the principles of data privacy.

The South Asia Center serves as the Atlantic Council's focal point for work on greater South Asia as well as relations between these countries, the neighboring regions, Europe, and the United States. It seeks to foster partnerships with key institutions in the region to establish itself as a forum for dialogue between decision-makers in South Asia, the United States, and NATO. These deliberations cover internal and external security, governance, trade, economic development, education, and other issues. The Center remains committed to working with stakeholders from the region itself, in addition to partners and experts in the United States and Europe, to offer comprehensive analyses and recommendations for policymakers.

1. The Draft Data Protection Act 2023, Information and Communications Technology (ICT) Division, Ministry of Posts, Telecommunication and Information Technology, Government of the People's Republic of Bangladesh, March 14, 2023, <https://icdt.gov.bd/site/page/d05a8088-8272-49b4-883c-1698796dce3e/খসড়া-আইন-বিসি-এক-নীতমিলা>.
2. Stephen Weymouth, "Bangladesh's Draft Data Protection Act," Issue Brief, South Asia Center, Atlantic Council, March 8, 2023, <https://www.atlanticcouncil.org/in-depth-research-reports/issue-brief/inside-bangladeshs-new-data-protection-laws/>.
3. Global Data Alliance, "Comments to the People's Republic of Bangladesh on the Cross-Border Policy Implications of the Draft Data Protection Act of 2022," September 2022, <https://globaldataalliance.org/wp-content/uploads/2022/09/09072022gdabgdpa.pdf>.

Data Transfers and Data Localization Mandates

The DPA 2023 limits the data localization mandate to “sensitive data.”⁴ It also relaxes data flow requirements, providing that data may be transferred outside of Bangladesh for the purpose of interstate trade/commerce, international relations, or any other purpose determined by the government in compliance with the general standards and principles set out in Section 5 of the Act.⁵ It does away with the cumbersome ad hoc approvals for cross-border data transfers and moves toward a more uniform “underlying basis” approach for enabling data flows. The DPA 2023 does not detail the procedures or safeguards applicable to such transfers and rather leaves that determination to rules to be framed pursuant to the law.

At the same time, the DPA 2023 adds a provision on “rules by sectoral regulators” that is likely to lead to an ambiguous and conflicting patchwork of regulations.⁶ According to the new provision, sectoral regulators like the central bank, the telecommunications regulatory commission, and the national board of revenue will frame and follow their own regulations on data transfers regarding matters under their remit. The Bangladesh Bank and the National Board of Revenue cover the entire gamut of the economy. This “carve out” in the law coupled with the expanded definition of sensitive data indicate that the government could try to utilize the DPA 2023 to achieve other policy objectives like control on outward remittances, capital flight, and tax evasion/avoidance.

The bill also provides that sensitive data may be transferred outside of Bangladesh to another state or international organization with the consent of the data subject in the manner set forth in the rules. However, there is no indication in the bill as to the contour of these rules.

Cross-border Enforcement Cooperation

Section 71 is new and has been added for “cross-border enforcement cooperation.” This section provides that the government will enter into cooperation agreements with other states or participate in any multilateral organization or consortium and abide by any instrument or terms of such agreement or consortium in furtherance of the objectives of the law. This provision appears to be motivated both by the pragmatism of participating in international arrangements as well as the broadening of avenues to achieve surveillance cooperation. There have been instances where governments utilize such provisions to surveil political and media dissidents.

Risk-based Protections

Clauses (h) and (i)⁷ have been added to Section 5 to provide for “risk-based,” “consistent” protection for data transfers and “enforceable standards.” For context, Section 5 sets out the scheme or general principles of data protection. Clause (h) provides that data processing and transfers in compliance with bilateral and multilateral agreements can only be carried out after implementing appropriate safeguards based on a data risk assessment. Clause (i) additionally provides that data protection systems must adhere to enforceable standards in any bilateral or multilateral treaty concluded by Bangladesh for data processing and data transfers and further comply with any terms of cooperation.

However, as drafted, it is unclear whether the requirement of impact assessments is a precondition or contemporaneous requirement. It also is unclear whether the requirement of impact assessments or risk assessments would be required for all manner of processing, for all types of data, or whether it would only be required in cases of data transfers under bilateral or multilateral agreements.

Expansion of “Sensitive Data”

The DPA 2023 expands the categories of “sensitive data” to include “commercial data.” A new definition introduced in the bill defines commercial data as data collected or processed relating to any transaction between buyer and seller, but does not otherwise reference this definition in the body of the proposed legislation. Typically, commercial data will relate to the data of a consumer or customer. Without a definition of “personal data” itself in the bill, this expansion is plainly an overreach that could complicate compliance and enforcement.

REMAINING ISSUES

No Definition of “Personal Data” or “Personally Identifiable Data”

In the absence of a clear definition or criteria of what constitutes “personal data” or “personally identifiable data,” all data can potentially come within the definition of “sensitive data” with an indiscriminate risk categorization and unreasonably burdensome compliance measures. This is a departure from data protection laws in the region. Personal data is typically defined or categorized as identity information which can directly or indirectly be associated with a person such as name, address, phone number, passwords, location data, or even employee data. Other countries in the region including

4. Draft Data Protection Act 2023, Section 44.

5. Draft Data Protection Act 2023, Section 45.

6. Draft Data Protection Act 2023, Section 45 (2).

7. See (ja) and (jha), respectively, in the Bangla text released by the government.

India, Vietnam, Indonesia, and Thailand, with which Bangladesh is generally benchmarked in terms of both economic growth and regulatory frameworks, all have a clear definition of “personal data” distinguished from “sensitive data.” Conflating both categories of data without distinction will lead to unintended consequences and regulatory uncertainty. Unlike other data protection laws, racial, ethnic, religious, or sexual orientation are excluded from the scope of “sensitive data.” This exclusion, which persists from the prior version, continues to cause concern about the protection of marginalized or vulnerable groups and adequate alignment with constitutional protections of “personal liberty”⁸ and “freedom of thought, conscience, and speech.”⁹ It also is silent on “authentication” requirements, a key to ensuring quality of data.

Data Transfer and Data Flow Restrictions

While the 2023 version relaxes the requirements around data transfers and data flows, the expanded definition of “sensitive data,” separate rules by “sectoral regulators,” and the retention of localization requirements of “user-generated data” leave room for considerable uncertainty on data transfer protocols. If the current draft is enacted, in practice it could result in the same onerous data localization requirements present in the previous draft.

Inconsistencies in Regulatory Authority and Enforcement

The bill does not clearly distinguish between “data breaches,” which affect users on an aggregate or mass scale, and “privacy violations,” which can affect only an individual user. The result is that there is the same level of sanction for different scales of violations, which again is an overreach. The 2023 version retains the extraordinary enforcement powers through interconnected regulatory bodies, which were established by the controversial Digital Security Act of 2018.¹⁰ Any government agency can issue an order or request to access data; there are no procedural safeguards against such interception built into the draft bill. It also retains the discriminatory provision on higher penalties (administrative fines) on foreign companies.¹¹ This provision is likely to violate the most-favored-nation treatment obligation under the World Trade Organization (WTO) General Agreement on Trade in Services (GATS) regime¹² and jeopardize Bangladesh’s meaningful participation in digital trade.

Lack of Exemptions for Small- and Medium-Sized Enterprises
Section 33 of the draft DPA 2023 fails to include any exemptions for small- and medium-sized (SME) enterprises. This lack of exemption for SMEs would be a terrible setback to the progress made in female entrepreneurship. This is also counterintuitive to the fiscal policies advocated by the Bangladesh Bank in its policy paper, which states: “Small and medium enterprises are thought to be the driving force behind the rapid economic growth in Bangladesh. Despite its significance in the economy, this sector has not realized its maximum capacity yet, facing some constraints to reach its full potential.”¹³ The report also cites Bangladesh Bureau of Statistics estimates that the SME sector contributed 21.36 percent of gross domestic product in Fiscal Year (FY) 2017, followed by 21.98 percent in FY18 and 22.86 percent in FY19.¹⁴ The government would be well advised to revisit the exemptions section to include specific revenue or turnover-based carve outs for SMEs and rather incentivize further investment and technology transfer in this sector toward economic upgrading initiatives.

In sum, there is still room for constructive change to the draft DPA 2023 by further defining and distinguishing “personal data” from “sensitive data,” based on which “data flow” provisions and the scheme of the proposed act would be operationalized. It also is important to remove provisions that discriminate between local and foreign companies, create exemptions for SMEs, and clarify the basis of regulatory intervention and enforcement by sectoral regulators.

Cocreation Opportunities

The DPA 2023 contemplates a framing of Rules for most of the matters covered under the bill, including the powers and functions of the data protection agency, issuance of standard operating procedures (for example on data processing, portability, and cross-border transfers), conduct of inquiry/investigations, data storage, enrollment of controllers and processors, and data security measures, among others.

Bangladesh’s draft data protection law is inspired by the European Union’s General Data Protection Regulation (GDPR), and Section 5 reproduces Article 5 of the GDPR almost in its entirety.¹⁵ Therefore, it could be assumed that Bangladesh might want to follow the Brussels approach in ensuring privacy by

8. Bangladesh Constitution, Article 32.

9. Bangladesh Constitution, Article 39.

10. Weymouth, “Bangladesh’s Draft Data Protection Act,” 2.

11. See Draft Data Protection Act 2023, Section 57.

12. World Trade Organization, “The General Agreement on Trade in Services (GATS): Objectives, Coverage and Disciplines,” https://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm. Bangladesh has been a member of the WTO since 1995 and a member of GATS. Bangladesh has made specific commitments in relation to telecommunications under the GATS regime; as such, the draft DPA would interact with those commitments.

13. Bangladesh Bank, “Estimating the Contribution of SMEs Output on GDP Growth in Bangladesh: A VECM Approach,” Research Department Division-4 (Special Studies and Fiscal Affairs Wing), November 2022, https://www.bb.org.bd/pub/research/sp_research_work/srwsdp2022-02.pdf.

14. Bangladesh Bank, “Estimating the Contribution of SMEs,” 3.

15. GDPR, Article 5, “Principles Relating to Processing of Personal Data,” <https://gdpr-info.eu/art-5-gdpr/>.

design and enforcement. Given that the draft DPA 2023 sets a minimum transition timeline, stakeholders including industry bodies and civil society organizations should work closely with the government to cocreate rules benchmarked with peer countries to produce reasonable, proportionate standards for implementing the mandate of the law. In particular, it leaves room for consultations and collaboration on identifying clear “underlying basis” for data transfers, “safeguard measures,” “certification mechanisms” and clarity on violations resulting in criminal penalties.

Notably, Europe adopted the GDPR¹⁶ in 2016 and the law came into effect in May 2018. Neighboring India does not provide transition timelines in its Personal Data Protection bill of 2022.¹⁷ By setting a floor period for transition and implementation, the Bangladesh government has left sufficient time for refining the regulatory framework and developing institutional capacity. Stakeholders can engage with the government for a phased implementation approach like Singapore, starting first with “baseline standards” and then moving forward with implementation of the registry and higher-order protocols.¹⁸

Given that financial data is included within the scope of “sensitive data” and Bangladesh’s experience with major cybercrime,¹⁹ there is much capacity development needed on privacy measures and security infrastructure aligned with the Payment Card Industry Data Security Standards.²⁰ Ideally, this would create opportunity for financial sector-specific privacy design development and refinement to the cloud computing guidelines issued by the central bank.²¹ Lastly, Bangladesh should also seize the opportunity to collaborate with stakeholders to include protections for algorithmic processing and decision-making, consider emerging privacy-enhancing technologies, and leapfrog toward a future-forward, agile regulatory framework.

Concluding Remarks

The Boston Consulting Group (BCG) has recently released a report titled Trillion Dollar Prize,²² which documents the

remarkable progress Bangladesh has made and terming it an “unmatched growth story.”²³ Notably, it highlights Bangladesh’s “burgeoning gig economy with ~650k freelancers—the second-largest online workforce globally—and a rising digital adoption rate with ~177 [million] mobile subscribers.”²⁴ Bangladesh is on track to be a trillion-dollar economy by 2030, with leading growth indicators significantly ahead of regional peers like Vietnam, Thailand, Philippines, Indonesia, and India. In charting the key priorities for the way ahead, the report notably mentions building global alliances, driving foreign direct investment, and “betting on digital and data.”²⁵

BCG presented the report to Prime Minister Sheikh Hasina in November 2022. The premier is known for her astute economic measures and driving ahead with focus and resilience to achieve the unprecedented growth the country has made. It’s time for Bangladesh to reflect its regional leadership not just in economic strategy but also in regulatory certainty to accelerate its growth aspirations. The EU GDPR has been a game changer in setting regulatory norms globally, with a “Brussels Effect”²⁶ witnessed across the world. Bangladesh is well-positioned to negotiate gain-sharing outcomes by engaging in technology alliances and boosting digital trade through sensible regulation: the Data Protection Law can be a start.

ABOUT THE AUTHOR

Christabel Randolph is pursuing her LLM in technology law and policy as a merit scholar at the Georgetown University Law Center. She is a Law & Policy Fellow, Center for AI & Digital Policy; an advocate, Supreme Court of Bangladesh; and an Atlantic Council contributing author.

16. “History of the General Data Protection Regulation,” European Data Protection Supervisor (website), accessed April 9, 2023 https://edps.europa.eu/data-protection/data-protection/legislation/history-general-data-protection-regulation_en.

17. See “India: The Draft Digital Personal Data Protection Bill—Closer to a Reality in 2023,” OneTrust DataGuidance (regulatory research site), February 2023, <https://www.dataguidance.com/opinion/india-draft-digital-personal-data-protection-bill>; and Suraksha P, ed., “Industry Bodies for Staggered Data Law Implementation,” Economic Times, January 10, 2023, <https://economictimes.indiatimes.com/tech/technology/industry-bodies-for-staggered-data-law-implementation/articleshow/96862564.cms?from=mdr>.

18. “Singapore-Data Protection Overview,” OneTrust DataGuidance (regulatory research site), May 2022, <https://www.dataguidance.com/notes/singapore-data-protection-overview>. BBC, “The Lazarus Heist: How North Korea Almost Pulled Off a Billion-dollar Hack,” June 21, 2021, <https://www.bbc.com/news/stories-57520169>.

19. Payment Card Industry (PCI) Security Standards Council, “Data Security Standards,” accessed April 9, 2023, <https://www.pcisecuritystandards.org/standards/>.

20. Bangladesh Bank, Banking Regulatory and Policy Department, Guidelines on Cloud Computing, March 16, 2023, <https://www.bb.org.bd/mediaroom/circulars/brpd/mar-162023brpd05.pdf>; see also “Central Bank Issues Cloud Computing Guidelines for Financial Sector,” Financial Express, updated March 16, 2023, <https://thefinancialexpress.com.bd/trade/central-bank-issues-cloud-computing-guideline-for-financial-sector>.

21. Zarif Munir, Saibal Chakraborty, and Tausif Istiaque, *The Trillion-Dollar Prize: Local Champions Leading the Way*, Boston Consulting Group (BCG), November 2022, <https://web-assets.bcg.com/6e/15/0081bc4b4871b53ea0f25348bb0d/the-trillion-dollar-prize-local-champions-leading-the-way.pdf>

22. Munir, Chakraborty, and Istiaque, *The Trillion-Dollar Prize*, 3.

23. Munir, Chakraborty, and Istiaque, *The Trillion-Dollar Prize*, 2.

24. Munir, Chakraborty, and Istiaque, *The Trillion-Dollar Prize*, 20.

25. Munir, Chakraborty, and Istiaque, *The Trillion-Dollar Prize*, 20.

26. See Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford, United Kingdom: Oxford University Press, 2021).



Atlantic Council

Board of Directors

CHAIRMAN

*John F.W. Rogers

EXECUTIVE CHAIRMAN EMERITUS

*James L. Jones

PRESIDENT AND CEO

*Frederick Kempe

EXECUTIVE VICE CHAIRS

*Adrienne Arsht

*Stephen J. Hadley

VICE CHAIRS

*Robert J. Abernethy

*C. Boyden Gray

*Alexander V. Mirtchev

TREASURER

*George Lund

DIRECTORS

Todd Achilles

Gina F. Adams

Timothy D. Adams

*Michael Andersson

Barbara Barrett

Colleen Bell

Stephen Biegun

Linden P. Blue

Adam Boehler

John Bonsell

Philip M. Breedlove

Richard R. Burt

*Teresa Carlson

*James E. Cartwright

John E. Chapoton

Ahmed Charai

Melanie Chen

Michael Chertoff

*George Chopivsky

Wesley K. Clark

*Helima Croft

*Ankit N. Desai

Dario Deste

Lawrence Di Rita

*Paula J. Dobriansky

Joseph F. Dunford, Jr.

Richard Edelman

Thomas J. Egan, Jr.

Stuart E. Eizenstat

Mark T. Esper

*Michael Fisch

Alan H. Fleischmann

Jendayi E. Frazer

Meg Gentle

Thomas H. Glocer

John B. Goodman

*Sherri W. Goodman

Marcel Grisnigt

Jarosław Grzesiak

Murathan Günal

Michael V. Hayden

Tim Holt

*Karl V. Hopkins

Kay Bailey Hutchison

Ian Ihnatowycz

Mark Isakowitz

Wolfgang F. Ischinger

Deborah Lee James

*Joa M. Johnson

*Safi Kalo

Andre Kelleners

Brian L. Kelly

Henry A. Kissinger

John E. Klein

*C. Jeffrey Knittel

Joseph Konzelmann

Franklin D. Kramer

Laura Lane

Almar Latour

Yann Le Pallec

Jan M. Lodal

Douglas Lute

Jane Holl Lute

William J. Lynn

Mark Machin

Marco Margheri

Michael Margolis

Chris Marlin

William Marron

Gerardo Mato

Erin McGrain

John M. McHugh

*Judith A. Miller

Dariusz Mioduski

*Richard Morningstar

Georgette Mosbacher

Majida Mourad

Virginia A. Mulberger

Mary Claire Murphy

Julia Nesheiwat

Edward J. Newberry

Franco Nuschese

Joseph S. Nye

Ahmet M. Ören

Sally A. Painter

Ana I. Palacio

*Kostas Pantazopoulos

Alan Pellegrini

David H. Petraeus

*Lisa Pollina

Daniel B. Poneman

*Dina H. Powell

McCormick

Michael Punke

Ashraf Qazi

Thomas J. Ridge

Gary Rieschel

Michael J. Rogers

Charles O. Rossotti

Harry Sachinis

C. Michael Scaparrotti

Ivan A. Schlager

Rajiv Shah

Gregg Sherrill

Jeff Shockey

Ali Jehangir Siddiqui

Kris Singh

Varun Sivaram

Walter Slocombe

Christopher Smith

Clifford M. Sobel

Michael S. Steele

Richard J.A. Steele

Mary Streett

*Gil Tenzer

*Frances F. Townsend

Clyde C. Tuggle

Melanne Vermeer

Charles F. Wald

Michael F. Walsh

Ronald Weiser

*Al Williams

Ben Wilson

Maciej Witucki

Neal S. Wolin

*Jenny Wood

Guang Yang

Mary C. Yates

Dov S. Zakheim

HONORARY DIRECTORS

James A. Baker, III

Robert M. Gates

James N. Mattis

Michael G. Mullen

Leon E. Panetta

William J. Perry

Condoleezza Rice

Horst Teltschik

William H. Webster

**Executive Committee Members*

List as of April 18, 2023



The Atlantic Council is a nonpartisan organization that promotes constructive US leadership and engagement in international affairs based on the central role of the Atlantic community in meeting today's global challenges.

© 2023 The Atlantic Council of the United States. All rights reserved. No part of this publication may be reproduced or transmitted in any form or by any means without permission in writing from the Atlantic Council, except in the case of brief quotations in news articles, critical articles, or reviews. Please direct inquiries to:

Atlantic Council

1030 15th Street, NW, 12th Floor,
Washington, DC 20005

(202) 463-7226, www.AtlanticCouncil.org