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Analysing developments impacting business

THREE SUPREME COURT JUDGMENTS AND NINETEEN MONTHS LATER, TELECOM COMPANIES ARE BACK TO SQUARE ONE

1 November 2018

Introduction

After days of prolonging uncertainty amongst telecom service providers (TSPs) with regard to the use of Aadhaar based e-KYC for verification and re-verification of subscriber in wake of the Supreme Court (SC)'s judgment dated 26 September 2018 (Aadhaar Judgment), the Department of Telecommunications, Government of India (DoT) has issued a notification on 26 October 2018 (Notification) to put this issue to rest.

Background

On 26 September 2018, a five-judge constitution bench of the SC passed the Aadhaar Judgment while upholding the Aadhaar scheme by a 4:1 majority. However, several provisions of the Aadhaar (Targeted Delivery of Financial and other Subsidies, Benefits and Services) Act, 2016 (Act) have been read down on *inter alia* the grounds of threat to privacy and lack of an effective data protection framework. Notably, the Aadhaar Judgment was preceded by another landmark judgment of the SC where the '*right to privacy*' was declared as a fundamental right under the Constitution of India, which has in many ways paved the way for a ubiquitous discussion on data protection and privacy in India.

Section 57 of the Act, which *inter alia* allowed private entities to use Aadhaar number of an individual to establish her/ his identity, was also struck down pursuant to the Aadhaar Judgment. Consequently, private companies, including TSPs, can no longer use Aadhaar based e-KYC as a means of verification or re-verification of customers. In his dissenting judgment, Justice Chandrachud called for the destruction of the Aadhaar data of subscribers already available with TSPs in a time bound manner. This has particularly posed as a challenge to TSPs as they are unable to use Aadhaar based e-KYC for verification and re-verification of applicants, especially considering that the same was permitted by DoT after thorough testing and deliberation. This is bound to make customer onboarding an inefficient, arduous and expensive process.

Salient features of the Notification

After the Aadhaar Judgment was passed, there was lack of clarity amongst TSPs regarding use of Aadhaar. Several representations were made to DoT and Unique Identification Authority of India (UIDAI) by industry bodies in this regard and consultations were also undertaken by DoT with the Ministry of Law and Justice. The DoT has now issued the Notification directing TSPs to discontinue usage of Aadhaar based e-KYC for re-

verification of customers as well as for issuing of new mobile connections. The key takeaways from the Notification are set out below:

- Issuing of new SIM cards and re-verification of existing customers: The TSPs will not use Aadhaar based e-KYC process to issue new mobile connections to customers and for re-verification of existing telecom subscribers.
- Reverting to the old regime: The TSPs may adopt the conventional paper-based KYC process where the customer is required to provide proof of identity (PoI), proof of address (PoA) and photograph in the prescribed manner, as well as execute a customer acquisition form (CAF).
- Alternate digital process: An alternate digital process (recommended by telecom industry in wake of Aadhaar judgment) for KYC of mobile subscribers is also suggested. The DoT has directed the TSPs to ensure readiness of their systems and proposed digital process by 5 November 2018, for approval by DoT. However, the notification appears to suggest that TSPs may use the proposed process provisionally and modifications may be suggested by the government at a later stage.
- Other conditions:
 - Acceptance of Aadhaar as PoI / PoA document: Insofar as voluntarily offered by a customer, the Notification prescribes that TSPs may accept a copy of physical Aadhaar or e-Aadhaar letter having masked or unmasked Aadhaar number as a PoI or PoA document for issuance of new mobile connections.
 - Deletion of column for Aadhaar number on CAF: The TSPs are also required to delete the existing column in CAF document designated for providing Aadhaar number (an optional information).
 - Compliance report: A compliance report regarding discontinuing usage of Aadhaar based e-KYC process is required to be furnished by the TSPs to DoT by 5 November 2018.

Comment

The plight of TSPs over restriction on use of Aadhaar based e-KYC process is understandable. TSPs had made significant investment to comply with the earlier notification issued by the DoT mandating TSPs to re-verify all telecom subscribers through Aadhaar based e-KYC process. The Notification now requires TSPs to revert to paper-based KYC process, which is tedious and slow. According to some reports, the cost of carrying out verification or re-verification using Aadhaar based e-KYC is nearly six times cheaper than carrying it out physically. Further, with Aadhaar based e-KYC process, the TSPs could onboard and verify customers in a quick and easy manner, which was also a boon for the subscribers who could get an active telephone connection within a matter of hours as opposed to several days. In the past, physical verification processes have also led to frauds, which have resulted in heavy penalties being imposed on TSPs.

The only silver lining appears to be the consideration and interim approval of DoT on alternate digital process as a means of paperless KYC. The cost and time associated with paper-based verification is considerable for a cash strapped telecom sector. Therefore, DoT's approval on a digital and paperless process will act as a blessing for TSPs as well as save the customers from hardship and inconvenience.

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