Striving for secure status: The state of data privacy laws in Mauritius

Following the adoption of the Data Protection Act 2017, the island economy is hopeful of securing a favourable adequacy decision under the GDPR, which is expected to facilitate international data flows from the EU, reduce the transaction costs of sending personal data to the country and give a boost to trade with the EU

Mauritius has had a new data privacy law since 15 January 2018 – the Data Protection Act 2017 (DPA). The DPA is largely inspired by the General Data Protection Regulation (GDPR) which came into force on 25 May 2018.

The GDPR is a regulation with extraterritorial effect; it applies not only to the European Union (EU) Member States but beyond, which applies any time that goods and services are offered to a person in the EU or when a person's behaviour in the EU is being monitored. A non-EU sovereign state might consider this extraterritorial reach to be objectionable, but the EU represents a huge market and it holds unparalleled bargaining power.

Why are data protection standards needed?

In today's digital era, promoting personal data protection standards goes hand in hand with facilitating international trade. It was important for Mauritius to have data privacy laws which are in line with the GDPR so that there is no hindrance to international trade and cooperation, especially with the EU which is a key commercial partner of Mauritius.

The EU is the main contributor to FDI flows to Mauritius and it represents about 50% of Mauritian exports. It is also the island's main source of tourists; tourism being one of the key pillars of the Mauritian economy.

What are "secure third countries"?

According to the GDPR, personal data can flow freely to countries within the EU. Free flow is also possible to countries outside the EU which offer an adequate level of protection to personal data, either through their domestic law or their international commitments. These countries are considered as "secure third countries", for which the European Commission (EC) has confirmed a suitable level of data protection on the basis of an adequacy decision.

The effect of such a decision is that personal data can flow from the EU to the "secure third country" without any further safeguard being necessary. In other words, transfers to the country in question will be assimilated into intra-EU transmissions of data. Mauritius is not there yet.

There are only 13 countries which are considered to be "secure third countries" by the EC, of which none hail from African soil. More significantly, 12 of them have had adequacy decisions in place under the Data Protection Directive 95/46/EC (the Directive), which remain in place under the GDPR, while Japan is the only country to have received an adequacy decision under the GDPR itself.

Looking to the future, key trading partners of the EU such as South Korea and Brazil are in active talks as regards adequacy. Moreover, the EU has expressed interest in exploring adequacy with India.

Are data transfers possible to other countries?

If a country, such as Mauritius, is not considered "secure", it does not necessarily prevent data transfers to this country. Transfer of personal data to

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Mauritius is still possible if the controller or processor has provided appropriate safeguards to the transfer and has given enforceable rights and effective legal remedies to data subjects.

Appropriate safeguards may, for example, be provided by having standard data protection clauses adopted by the EC or adopted by the Data Protection Commissioner (the Commissioner) and approved by the EC in contracts for the transfer of personal data. Up to now, neither the EU nor the Commissioner have come up with standard contractual clauses (SCCs) under the GDPR. Controllers and processors are still using SCCs under the Directive, which now stands repealed. However, it is important for controllers and processors to amend those clauses so as to be fully compliant with the GDPR.

Are we there yet?

Mauritius, unsuccessfully, applied for an adequacy decision in 2010 of the now repealed Data Protection Act 2004. Following the adoption of the new DPA, Mauritius has applied for an adequacy decision to the EC under the GDPR.

Though we hope that we will be successful this time, possible obstacles to an adequacy decision being granted could be:

(i) the exemption in the DPA as to its application, when there is an exchange of personal data between ministries, government departments and public sector agencies where such exchange is required on a need-to-know basis;

(ii) the weak enforcement powers of the Commissioner; and

(iii) not all data subject rights as in the GDPR are provided for in the DPA.

> A favourable adequacy decision will facilitate international data flows from the EU to Mauritius

What would a "secure" future hold?

Once an adequacy decision is obtained in favour of Mauritius, it will have the effect of facilitating international data flows from the EU and reduce the transaction costs of sending personal data to Mauritius.

As a consequence, trade between the EU and Mauritius will receive a boost and Mauritius shall have a competitive edge over countries where the flow of personal data is met with restrictions.