

NASSCOM Update on EU Data Protection Regime

Existing EU Data Protection Directive

The European Union (EU) is a significant market for the IT/BPO industry in India. However, the industry has not been able to realize the full potential of this market because of various barriers including those related to language and visa. One of the most important issues that stands out among other issues in the EU is of data protection. The EU came up with its **Data Protection Directive (DPD)** in 1995, which has led to the establishment of Data Protection laws in nearly all of the European countries. Article 25 of the Directive, governs trans-border data flows, and lays down the conditions for transfer of personal data of EU citizens outside EU/EEA. Under this, free flow of information can only take place with a 'third country' if its data protection regime is considered '**adequate**' by the EU. The process for granting 'adequate' status remains opaque and only a handful of countries have been considered as 'adequate' by the EU (India is not part of this list). For countries that do not qualify as 'adequate', the Directive provides alternative legal instruments for data transfer which includes Standard Contractual Clauses (SCCs) that is majorly used by the IT/BPO service providers in India to serve EU based clients. These legal instruments together with the enforcement mechanisms across member countries put too much obligations on businesses (that are not witnessed in other markets such as the US). For instance, the data transfer to third countries needs to be authorized by the Data Protection Authorities (DPAs) established in each member state. The DPAs also have the powers to call for databases, agreements and approve legal instruments such as SCCs leading to delays and inefficiencies. Such bureaucratic structures and procedures have been heavily criticized, as they are considered to be unfriendly to businesses esp. SME service providers, which create non-tariff trade barriers for transfer of information outside the EU, without necessarily improving the data protection. The inconsistent implementation of the EU DPD in member countries further complicates the issue.

A recent **NASSCOM-DSCI survey** on the data protection issues in EU vindicated many of the issues faced by the Indian IT/BPO industry in the EU. The survey revealed that there is an opportunity loss of USD 2.0 billion - 2.5 billion for the sample size of 15 companies (which excludes loss of offshoring opportunities by EU SME companies and the possibilities of EU companies setting up their in-house centres in India) on the account of data transfer related issues as the EU clients are hesitant to offshore work to India because of stringent data protection requirements in the EU. Almost half of the companies surveyed had to establish their offices at near shore locations in the EU to overcome such concerns, adding to their costs of serving EU based clients. The top 3 conservative member countries are Germany, France and Switzerland (France and Germany represent nearly half of the European IT Services market, which industry body European Information Technology

Observatory pegs at about \$155 billion¹). This clearly is a market issue for the Indian IT/BPO industry.

NASSCOM and DSCI along with Department of Commerce (DoC) and Department of Electronics & Information Technology (DeitY), Government of India have been working on this trans-border data flow issue between EU and India. The issue has been made an important agenda item in the on-going negotiations between the EU and India for Free Trade Agreement. India is demanding 'adequate' status as per the provisions of the EU DPD based on the strong data protection regime established in India post amendments were made to the Information Technology Act to include provisions for protection of sensitive personal information. In this regard, DSCI prepared a detailed white paper² on adequacy assessment of India and submitted to government authorities in EU and India. Several rounds of negotiations / discussions have taken place at various levels regarding this issue. EU last year sent a high level delegation to India to meet the concerned stakeholders including the industry to better understand industry's concerns. Following this visit, the EU appointed a consultant to assess the different possibilities of easing transfer of data to India, who visited India earlier this year. The findings and recommendations of the consultant are yet not known to India. NASSCOM and DSCI, through DoC are continuously following up with the EU on the matter.

Proposed EU Data Protection Regulation

The European Commission proposed a comprehensive reform of EU DPD to strengthen online privacy rights and boost Europe's digital economy against the backdrop of technological progress and globalisation by unveiling the proposed 'EU Data Protection Regulation' in January 2012. Acknowledging that enforcement of EU DPD was done differently in different member countries, the EC proposed a single law to do away with the current fragmentation and costly administrative burdens, leading to savings for businesses. The EC believes that the regulation will help reinforce consumer confidence in online services, providing a much needed boost to growth, jobs and innovation in Europe.

The world community including NASSCOM and DSCI welcomed EC's vision to harmonize data protection laws in EU member states, even though many feel this may be difficult to achieve in practice, given the different privacy cultures and trade imperatives of EU member states. It was expected that the existing issues in the EU DPD would be addressed in the new proposed EU data protection regulation. NASSCOM and DSCI even submitted a consultation paper³ in response to the open consultation exercise undertaken by the EU when gathering inputs to draft proposed regulation, where the issues faced by the IT/BPO industry in India were highlighted. **Though, the proposed regulation does address some areas of concern, but some critical reforms especially with respect to international data flows have been left unaddressed.**

¹ http://articles.economicstimes.indiatimes.com/2013-03-20/news/37872424_1_data-protection-data-breach-personal-data

² <http://www.dsci.in/node/1328>

³ <http://www.dsci.in/node/572>

Overall, the proposed regulation tries to create a single EU market from a compliance viewpoint, but fails to address the imperative of free flow of information outside EU/EEA. The regulation still has lot of restrictions in place which will continue to act as non-tariff trade barriers, and make it difficult for businesses to explore outsourcing opportunities that can help them save costs, become more productive and overall increase the competitiveness of the EU companies. The regulation is also very detailed and prescriptive leaving less space for businesses to assess risk and take decisions when transferring data outside EU/EEA. Though some bureaucratic requirements have been removed, new such requirements have been added. The 'adequacy' requirements have been made more complex and stringent. The new principles such as 'right to be forgotten', 'privacy by default' among others have been introduced that can hamper the business innovation and user experience. **The proposed regulation brings the service providers directly under its purview, detailing their responsibilities which are more extensive than the present EU DPD.** These include documentation of processing, conducting privacy impact assessments in certain circumstances, obligations towards data breach notification, enlisting a sub processor only with the prior permission of the data controller (EU based client organizations), among others. **The regulation, if enacted, will further lead to opportunity loss for the Indian IT/BPO industry as it further increases the threshold for data transfer outside EU/EEA. The regulation will also significantly add to the compliance costs for the service providers** - which are already higher when serving EU based clients as compared to other markets such as the US. NASSCOM and DSCI prepared a detailed position paper⁴ on proposed regulation highlighting industry's concerns and issues and also organized a seminar in Brussels in Oct'12 to educate the key EU policy makers on industry's concerns. As the internal consultations continue in the EU for finalizing the regulation (which is expected to be enacted not before 2015), the criticisms from international business community, non-EU governments and trade bodies is growing. NASSCOM and DSCI are engaged with EU authorities, EU parliamentarians, think tanks, industry bodies and US business representatives for more pragmatic data protection regime in EU that respects business innovations around data and data flows.

⁴ <http://www.dsci.in/node/1260>