6 SEPTEMBER 2021

TECHNOLOGY, MEDIA & TELECOMMUNICATIONS **ALERT**

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The foreign applicability of the Kenyan Data Protection Act

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For the better part of the last decade, regulating personal data in Kenya has been the subject of debate and even a few draft and published bills. It was therefore a most welcome development when Kenya finally enacted its Data Protection Act (DPA) in November 2019. As expected (especially considering the content of the draft bills that preceded it), the DPA ended up replicating a number of salient features of the European Union's General Data Protection Regulation (GDPR). One feature that is common to both the DPA and the GDPR is the concept of extraterritorial applicability, that is, the applicability of a particular law to entities that are located outside the jurisdiction that passed it.

Following the enactment of the DPA, significant measures have been taken towards its implementation, including the appointment of a data commissioner in November 2020, the establishment of a taskforce for the development of implementing regulations in January 2021, and the circulation of a set of draft regulations for public comments shortly thereafter. In light of the significant momentum that has been exhibited in the journey towards the practical implementation of the DPA, it would be prudent for both foreign and Kenyan based data controllers and processors to note and comply with the obligations imposed upon them under this law. This article, however, focuses on the possible extra territorial applicability of the DPA on foreign based data controllers and processors and analyses the implications that arise in that context.

Extraterritorial applicability of the DPA

Section 4(b)(ii) of the DPA indicates that the extraterritorial applicability of the DPA arises from the fact that it regulates, among other matters, the processing of personal data by *"a data controller or data processor who is not established or ordinarily resident in Kenya, but who processes the personal data of data subjects located in Kenya"*. As such, where foreign based controllers and processors process personal data of data subjects who are in Kenya, they would need to comply with the requirements of the DPA or face the risk of penalties in the event of default.

The DPA provides for three levels of remedial measures for the breach of its provisions. Firstly, the data commissioner is empowered to apply administrative remedies in the form of enforcement notices and penalty notices. Enforcement notices are essentially directions from the data commissioner citing instances of breach of the DPA by a data controller or processor and requiring corrective measures to be applied by the breaching entity. Non-compliance with an enforcement notice constitutes an offence under the DPA. According to section 63 of the DPA, penalty notices, on the other hand, are administrative fines that could run up to Ksh5 million (currently approximately USD 47,000) or 1% of the annual turnover of the breaching entity for the preceding financial year, whichever is lower. While this figure may appear not to be as deterrent as the possible higher fines provided for under equivalent laws such as the GDPR or the Protection of Personal Information Act 4 of 2013 (POPIA) in South Africa, it could add up and cause significant losses for a

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According to section 8(1)(a) of the DPA, the data commissioner has wide powers under the DPA to undertake *"any activity"* that is necessary for the fulfilment of the functions of their office, which includes the implementation and enforcement of the DPA.

controller or processor that lacks proper compliance mechanisms and commits repeated breaches of the DPA resulting in several consecutive fines. By way of comparison, section 109(2)(c) of POPIA provides for an administrative fine of up to R10 million (currently approximately USD 680,000) while the GDPR, under Article 83 (4) and (5), provides for fines of up to Euro 10 million and Euro 20 million respectively.

Secondly, the DPA provides for criminal penalties the stiffest of which is a maximum fine of Kshs 5 million (currently approximately USD 47,000) and a maximum jail term of 10 years. Lastly, the DPA provides for civil remedies in the form of compensation for damage caused, including financial loss or non-financial loss such as distress.

While it is clear how such remedies may be sought and enforced against Kenyan based controllers and processors, the situation becomes a bit more complicated when an infringing controller or processor is based outside Kenya. The law does, however, provide for basic frameworks through which such extra territorial enforcement could be pursued, and remedies and sanctions imposed on foreign based data controllers and processors.

Extra-territorial enforcement of administrative remedies

According to section 8(1)(a) of the DPA, the data commissioner has wide powers under the DPA to undertake *"any activity"* that is necessary for the fulfilment of the functions of their office, which includes the implementation and enforcement of the DPA.

This power could be relied on by the data commissioner to pursue the enforcement of administrative remedies against any foreign based data controllers or processors through possible co-operation with foreign data protection regulators or comparable government agencies. To this end, the DPA specifically gives the data commissioner the power to *"enter into association with bodies or organisations within and outside Kenya as appropriate in furtherance of the object"* of the DPA.

The success of any such arrangement would, to a significant degree, depend on the conclusion of intergovernmental treaties and ultimately whether the laws in the relevant foreign jurisdictions have provisions that could be relied on by their regulators to lawfully enforce penalty notices issued by the data commissioner against controllers and processors in those foreign jurisdictions.

Foreign enforcement of Kenyan judgments

The Foreign Judgments (Reciprocal Enforcement) Act confers enforceability within Kenya to both civil and criminal judgments that are delivered by the superior courts of certain designated jurisdictions. The jurisdictions are designated based on whether their laws, in the Kenyan Government's view, contain (or will at some point in the future contain) provisions for the reciprocal enforcement of judgments that are issued by Kenyan courts. The list of designated jurisdictions presently includes: Australia, Malawi, Seychelles, Tanzania, Uganda, Zambia, the United Kingdom and Rwanda. As such, any relevant Kenyan judgments delivered

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Foreign based data controllers and processors who process personal data relating to data subjects who are in Kenya would do well to note the Kenyan government's resolve towards the implementation of the DPA and to monitor further developments in this regard.

against data controllers and processors that are based in these eight countries either are or will generally be enforceable under the laws of those countries.

Further, in the context of any criminal breach of the provisions of the DPA, the data commissioner may, by virtue of the provisions of the Mutual Legal Assistance Act, initiate a request for legal assistance from competent authorities in relevant foreign jurisdictions for the purposes of enforcing criminal remedies. Legal assistance could take the form of executing searches and seizures, freezing of proceeds of unlawful activity, recovery and disposal of assets etc. Kenya's extradition laws do not currently designate offences under the DPA as extraditable offences. As such, the extradition to Kenya of foreign based persons who commit offences under the DPA is currently not possible. However, the amendment of relevant portions of such laws could, in theory, be carried out to include DPA offences among the list of extraditable offences, thereby altering this position.

Conclusion

Foreign based data controllers and processors who process personal data relating to data subjects who are in Kenya would do well to note the Kenyan government's resolve towards the implementation of the DPA and to monitor further developments in this regard. It will be interesting to observe whether the data commissioner will seek to make use of these extraterritorial enforcement mechanisms in due course and, more particularly, what the general response of such foreign based data controllers and processors to any such enforcement against them would be in terms of compliance with the DPA going forward. There may also be room for amendment of the DPA in due course to adopt GDPR-like workarounds for enforcement against certain prescribed categories of foreign controllers and processors, such as requiring them to designate local representatives within Kenya who could be addressed (in addition to or instead of the foreign controller or the processor) by the data commissioner on all issues related to processing of personal data and for purposes of ensuring compliance with the DPA.

Shem Otanga and Tyler Hawi Ayah

Regulations Relating to the Promotion of Access to Information, 2021 issued by the Minister of Justice and Correctional Services

Information officers of public and private bodies should review their existing PAIA manuals and internal processes in order to ensure alignment with the new PAIA Regulations.

On 27 August 2021 the Regulations relating to the Promotion of Access to Information, 2021 (new PAIA Regulations) were issued in Government Gazette No. 45057 by the Minister of Justice and Correctional Services under section 92 of the Promotion of Access to Information Act 2 of 2000 (PAIA).

The new PAIA Regulations repeal and replace the previous regulations that were issued in terms of PAIA and include new prescribed forms and a new schedule of fees that apply to requests made under PAIA (as well as fees chargeable where copies of records are requested).

Below, we highlight some of the pertinent aspects of the new PAIA Regulations:

- Requests for access to information held by both public and private bodies are to be made in accordance with the new (now combined) prescribed Form 2 set out in Annexure A.
- The specific forms provided for under the new PAIA Regulations include those to:
  - request a copy of the guide;
  - record the outcome of a request or notify a requester of fees payable;
  - lodge an internal appeal against a decision of an information officer of a public body;
  - lodge (and acknowledge receipt in respect of) a complaint to the information regulator;
  - notify the information officer of a complaint received by the information regulator;
  - record the outcome of an investigation;
  - address settlements and conciliation of matter; and
  - request the information regulator to carry out a PAIA compliance assessment.
- The new PAIA Regulations specifically stipulate that the provisions of the Electronic Communications and Transactions Act 25 of 2002 (ECTA) are applicable to all forms, records and documents or any information electronically communicated, and specifically incorporate the definitions of "*in writing*" and "*signature*" as contemplated in the ECTA.
- In respect of the schedule of fees (per Annexure B of the new PAIA Regulations), the new PAIA Regulations introduce capped fees for the searching and preparation of the record/s for disclosure by public and private bodies respectively (i.e. in respect of public bodies, the amount of R100 for each hour, not to exceed R300; and in respect of private bodies, the amount of R145 for each hour, not to exceed R435).

In light of the above, information officers of public and private bodies should review their existing PAIA manuals and internal processes in order to ensure alignment with the new PAIA Regulations.

In addition, the information regulator has recently made templates available on its website which can be used by public and private bodies as a guide when preparing their PAIA manual in accordance with the requirements set out in PAIA. The templates can be accessed by visiting the information regulator's website at https://www.justice.gov.za/inforeg/docs2-f.html.

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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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