

OVERVIEW OF THE **SALIENT PROVISIONS** OF THE NIGERIA DATA PROTECTION ACT, 2023

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Introduction

The Nigeria Data Protection Act, 2023 (“NDPA”) was signed into law on June 12, 2023, by President Bola Ahmed Tinubu. Prior to the enactment of the Act, the Nigeria Data Protection Regulation of 2019 regulated data protection in Nigeria.

Technological advancements have created an increased need for the security and protection of personal data. The main objective of the Act is to safeguard the fundamental rights, freedom and the interest of data subjects as guaranteed under the Constitution of the Federal Republic of Nigeria, 1999¹. The Act further establishes the Nigeria Data Protection Commission² with functions geared towards effecting implementation, enforcement and actualization of the objectives of the Act. This article presents an overview of the salient provisions of the Act.

Application of the Act

The Nigeria Data Protection Act applies to the processing of personal data whether done by automated means or not.³ The Act defines processing as any operation or set of operations which is performed on personal data, whether or not by automated means, such as collection, recording, organization, structuring, storage, adaptation, alteration, retrieval, consultation, disclosure by transmission amongst others.⁴ A data controller refers to an individual, private entity, public commission, agency or any other body who alone or jointly with others determines the purpose of processing personal data. While a data processor means an individual, private entity, public authority or any other body who processes personal data on behalf of or at the direction of a data controller.⁵

The provisions of the Act apply where the data controller or data processor is domiciled in, resident in, or operating in Nigeria; where the processing of personal data occurs within Nigeria, or where the data controller or data processor is not domiciled in, resident in, or operating in Nigeria, but is processing personal data of a data subject in Nigeria.⁶ This definition captures a broader data subject class when compared to the provisions in the Nigeria Data Protection Regulation (‘NDPR’). The Act however, does not apply to the processing of personal data by one or more persons solely for personal or household purposes. However, it is important that such processing does not breach the fundamental right of privacy of a data subject.⁷

¹ Section 1(a) of the Nigeria Data Protection Act, 2023.

² Section 4 of the Nigeria Data Protection Act, 2023

³ Section 2(1) of the Nigeria Data Protection Act, 2023.

⁴ Section 65 of the Nigeria Data Protection Act, 2023.

⁵ Section 65 of the Nigeria Data Protection Act, 2023.

⁶ Section 2(2) of the Nigeria Data Protection Act, 2023.

⁷ Section 3(1) of the Nigeria Data Protection Act, 2023.

Exemptions and Limitations under the NDPA

Data controllers and data processors are bound by the provisions of the Act in processing personal data and must be guided by the principles of data processing contained in the Act. However, they are exempted from certain obligations contained under Part V of the Act. However, these exemptions are subject to the rights and freedoms provided in the constitution and the limitations. They include; where data is processed for certain purposes, such as the prevention or prosecution of a criminal offence; the prevention or control of a national public health emergency; the maintenance of national security; certain publications made in the interest of the public and in order to defend a legal claim.⁸ The obligations relating to the principles of personal data processing, lawful basis of personal data processing, the designation of a data protection officer, and the process of handling personal data breaches are not subject to the exemption.⁹ The Commission may by a regulation, exempt certain personal data processing from the application of the Act.¹⁰

Establishment of the Nigeria Data Protection Commission

The Act establishes the Nigeria Data Protection Commission (“NDPC/the Commission”). The Commission replaces the Nigeria Data Protection Bureau which was originally established in 2022 and takes over its rights, functions and obligations.¹¹ The functions of the Commission include regulating the deployment of personal data protection technologies in accordance with international best practices; registration of data controllers and data processors of major importance; promoting public awareness and understanding of personal data protection, rights and obligations imposed under the Act; receiving complaints relating to the violation of the Act or subsidiary legislations made pursuant to the Act, etc.¹² The Act further establishes the office of a National Commissioner for the Commission who is to be appointed by the President on the recommendation of the Minister.

Lawful Basis for Data Processing and Legitimate Interest

A data controller or data processor must ensure that certain requirements are complied with while processing personal data. These requirements include the need for personal data to be processed in a fair, lawful and transparent manner; the collection of personal data for specified, explicit and legitimate purposes; and the collection of adequate, relevant and necessary personal data which is not misleading.

The processing of personal data is lawful where the data subject has given and not withdrawn consent to the processing of his data. However, there are other lawful basis for processing data. These include; where the processing is necessary for the performance of a

⁸ Section 3(2) of the Nigeria Data Protection Act, 2023.

⁹ These relate to the provisions of sections 24, 25, 32 and 40 of the Act

¹⁰ Section 3(3) of the Nigeria Data Protection Act, 2023

¹¹ Section 64 of the Nigeria Data Protection Act, 2023

¹² Section 5 of the Nigeria Data Protection Act, 2023

contract to which the data subject is a party; for the compliance of a legal obligation to which the data controller or data processor is subject; to protect the vital interest of the data subject or a third party, for the performance of a task in the interest of the public or in the exercise of official authority vested in the data controller or data processor; and for the purposes of the legitimate interest pursued by the data controller or data processor or by a third party to whom the data is disclosed.¹³

The Nigeria Data Protection Act, 2023 introduces a new concept referred to as “legitimate interest” as a lawful basis for processing personal data. Although the term; legitimate interest is not explicitly defined in the Act, the provisions of the Act provide the guiding principles upon which legitimate interest may be exercised. The Act states that interests in personal data processing shall not be legitimate where they override the fundamental rights of freedoms and interests of the data subjects; where they are incompatible with the other lawful basis of processing; and where the data subject would not have a reasonable expectation that the personal data would be processed in the manner envisaged.¹⁴

Fraud prevention, ensuring network and information security; or indicating possible criminal acts or threats to public security, have all been stated as constituting a legitimate interest for the purpose of data processing.¹⁵

Rights of a Data Subject

Data subjects are entitled to a number of rights under the Act. They include the right to obtain from the data controller certain information regarding the processing of their personal data such as whether a data controller is storing or processing their personal data¹⁶. A data subject also has the right to object to the processing of personal data,¹⁷ the right to withdraw consent to the processing of personal data at any time,¹⁸ the right to personal data portability¹⁹ and the right to not be subject to automated decision making.²⁰

It is pertinent to state that the data controller bears the burden of proving that consent was obtained²¹ and the silence or inactivity of the data subject shall not constitute consent²².

¹³ Section 25(1) of the Act. These provisions are similar to the provisions of article 6 of the GDPR.

¹⁴ Section 25(2) of the Nigeria Data Protection Act, 2023

¹⁵ <

[https://ico.org.uk/for-organisations/uk-gdpr-guidance-and-resources/lawful-basis/legitimate-interests/what-is-the-legitimate-interests-basis/#:~:text=interests%20override%20ours%3F-,What%20does%20Article%206\(1\)\(f\)%20say%20about%20legitimate,%2C%20fairness%20and%20transparency%20principle.](https://ico.org.uk/for-organisations/uk-gdpr-guidance-and-resources/lawful-basis/legitimate-interests/what-is-the-legitimate-interests-basis/#:~:text=interests%20override%20ours%3F-,What%20does%20Article%206(1)(f)%20say%20about%20legitimate,%2C%20fairness%20and%20transparency%20principle.) >

¹⁶ Section 34

¹⁷ Section 36

¹⁸ Section 35

¹⁹ Section 38

²⁰ Section 37

²¹ Section 26(1)

²² Section 26(3)

Data Controller/Processor of Major Importance

The Act defines a Data Controller or Processor of major importance (*‘DCMI/DPMI’*) as one who is domiciled, resident in, or operating in Nigeria and processes or intends to process personal data of more than such number of data subjects who are within Nigeria as the commission may prescribe or one that is processing personal data of particular value or significance to the economy, society or security of Nigeria as the commission may designate.²³ These data controllers/processors of major importance are required to register with the commission within six months after the commencement of the Act or on becoming one of major importance.²⁴ They are also obligated to appoint a Data Protection Officer with expert knowledge of data protection law and practices, and the ability to carry out the tasks prescribed under the Act²⁵. The Act further mandates the Commission to create guidelines for determining data controllers/processors of major importance. The parameters are not clearly defined under the Act.

Protection of Children and Persons Lacking Legal Capacity

The NDPR did not contain adequate provisions to protect the personal data of children and persons who lack legal capacity to give consent. However, the DPA addressed this lacuna. Where a data subject is a child or a person lacking the legal capacity to consent, a data controller shall obtain the consent of the parents or legal guardian.²⁶ A data controller shall verify the age of the child and consent by employing appropriate mechanisms such as the use of government approved identification documents. The exceptions are where the processing is necessary to protect the vital interest of the child or person lacking capacity to consent; carried out for the purpose of education, medical or social care provided that such processing is undertaken by a professional or similar service provider owing a duty of confidentiality; and where such processing is necessary for proceedings before a court relating to the individual.

Cross Border Transfer of Data

The Act prohibits data controllers and processors from transferring or permitting the transfer of personal data from Nigeria to another country unless the recipient of the data is subject to a law, binding corporate rules, contractual clauses, code of conduct or certification mechanism that affords an adequate level of protection with respect to the personal data in accordance with the Act. Where the country to which data is to be transferred lacks adequate protection as required by the Act, such data can only be transferred upon meeting the requirements contained in section 43(1) of the Act. One of the functions of the Commission is to determine whether countries, regions, business sectors, binding corporate rules,

²³ Section 65

²⁴ Section 44

²⁵ Section 32

²⁶ Section 31(1)

contractual clauses, codes of conduct, or certification mechanism, afford adequate personal data protection standards for cross border transfer.²⁷

Data Security and Personal Data Breaches

The Act mandates data controllers and data processors to implement appropriate technical and organizational measures to ensure the security, integrity, and confidentiality of personal data in their possession or under their control, including protections against accidental or unlawful destruction, loss, misuse, alteration, unauthorized disclosure, or access.²⁸

Furthermore, the Act provides a data breach management procedure. Where a personal data breach has occurred with respect to personal data being stored or processed, the data controller shall notify the commission within seventy-two hours of becoming aware of such breach where that breach is likely to result in high risk to the rights and freedoms of affected data subjects.²⁹

Data Protection Impact Assessment.

A Data Protection Impact Assessment (DPIA) is a process that aims to identify the risks and impact of the processing of personal data in a data processing operation and how those risks might be mitigated. The Act further prescribes the contents of a DPIA. Where the processing of data may result in high risks to the rights and freedoms of data subjects, a data controller shall carry out a DPIA which shall contain a systemic description of the envisaged processing, an assessment of the necessity and proportionality of the processing, an assessment of the risks to the rights and freedoms of data subjects as well as the measures envisaged to curtail the risks.³⁰

Civil Remedies under the Act

A data controller or data processor who has violated any provision of the Act will be subject to sanction which may include the payment of compensation to the victim who has suffered injury, loss or harm as a result of such a violation. ³¹The Act further prescribes penalties which may be an amount up to ₦10,000,000 (Ten Million Naira) and 2 percent of the gross revenue of the data controller in the preceding year.

Where a data subject is dissatisfied with the decision of the commission, such a person may apply to the Court for judicial review. ³²

²⁷ The NPDR Implementation framework in Annexure C contains a list of 41 countries which are deemed to have adequate data protection laws. Otherwise referred to as “the White List”

²⁸ Section 39 of the Act

²⁹ Section 40 of the Act

³⁰ Section 28 of the Act

³¹ Section 48 of the Act

³² Section 50 of the Act

Possible Concerns with the Implementation of the Act

Although the enactment of the Nigeria Data Protection Act 2023 is commendable as it heralds the development of robust regulations towards the protection of personal information for natural persons residing or operating in Nigeria. It is however not without its lacunae and limitations. These limitations include lack of independence of the Commission and the absence of specific timelines for data controllers to respond to data subject access requests. Another notable short coming of the Act is the apparent lack of independence for Data Protection Officers. A Data Protection Officer is a liaison between the data controller and the Commission and they are appointed by the data controller. In the absence of regulatory measures to ensure independence and objectivity of the Data Protection Officers, they act under the absolute control of their employers.

Conclusion

The Nigeria Data Protection Act is a landmark legislation which creates a more detailed framework for the protection and processing of data in Nigeria. The enactment of the Act is a huge step towards achieving personal data protection and regulation. It is hoped that the regulations which the Commission is empowered to make to help achieve the objectives of the Act will be made.

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