



Regulatory Alert



An Overview of the Nigeria Data Protection Act 2023

Background

The President assented to the Nigeria Data Protection Act (“**NDPA**” or **the “Act”**) on 12 June 2023. The Act brought about a number of changes to the existing Nigeria Data Protection Regulation (“**NDPR**”) 2019.

This article highlights the key provisions of the Act.

1. The Commission

The Act introduced the establishment of an independent body, the Nigeria Data Protection Commission (**the “Commission”**). The Commission replaces the Nigeria Data Protection Bureau (“**NDPB**”) created under the NDPR.

2. Transitional Provision

The Act saves previous subsidiary legislation issued by the National Information Technology Development Agency and Nigeria Data Protection Bureau (“**NITDA**” and “**NDPB**”) to the extent that all actions carried out by either of the above bodies will be deemed as actions of the Commission.

3. Scope of Application

The Act expanded the scope of application to include the processing of personal data linked to Nigeria (i.e., where the Data Controller or Data Processor) is domiciled, resident or operates in Nigeria; or where the data processing occurs within Nigeria. It also applies to Data Controllers, though not domiciled, resident or operating in Nigeria, but process data of persons in Nigeria.

4. Public Interest Exemptions

The Act provides exemptions (from certain obligations) on the ground of public interest.

The exemptions cover:

- acts of competent authorities for the prevention, investigation, detection, prosecution or adjudication of a criminal offences or the execution of a criminal penalty, in accordance with any applicable law.
- acts of competent authorities in respect of the prevention or control of a national public health emergency.
- acts done by competent authority as necessary for national security; or
- publications made in the public’s interest for journalism, educational, artistic, and literary purposes.
- acts that are necessary to establish, exercise, or defend legal claims whether in court proceedings, or in an administrative or out of court procedure.

The public interest exemptions do not remove the requirement for personal data to be processed in accordance with the principles and lawful basis for data processing under the Act. The exemptions do not also remove the obligations to appoint a DPO (where required) and to report a personal data breach.

5. Definition of Key Terms

- Data Controller:** A Data Controller is an individual, private entity, public Commission, agency, or any other body who, alone, or jointly with others, determines the purposes and means of processing personal data.
- Data Processor:** A Data Processor is an individual, private entity, public Commission, agency, or any other body who processes personal Data on behalf of or at the direction of a Data Controller or another Data Processor.
- Data Subject:** A Data Subject is an individual to whom personal data relates.
- Data Controller/ Processor of Major Importance:** A Data Controller or Data Processor of Major Importance is one that is domiciled, resident, or operating in Nigeria and processes or intends to process personal data of Data Subjects in Nigeria within the threshold that the Commission may prescribe.

6. Rights of a Data Subject

The Act expanded the right of Data Subjects. A Data Subject has the right(s) to:

- consent to Data Collection/Processing
- withdraw consent at any time.
- object to or restrict the processing of personal data.
- obtain from the data controller confirmation as to whether or not personal data concerning him/ her are being processed.
- lodge a complaint with a regulatory authority.
- data portability, i.e., to collect and transfer personal data from a data collector to another.
- request access to and rectification of personal data and request erasure of personal data concerning Data Subject

In addition to the above, a Data Subject can object to a decision that is based solely on the automated processing of Personal Data. This right is subject to certain exceptions.

7. Protection of underage Data Subjects

The Act introduced the obligation to obtain consent of parents and guardians where the Data Subject is a child or minor. The Act adopted the definition of child under the Child’s Right Act, 2003, i.e., a person under the age of 18 years.

Data Controllers are also required to apply mechanisms that allow for the verification of a Data Subjects’ age.

8. Penalties

The Act modified the penalties against defaulters. There are two bands of penalties - "higher maximum amount" and the "standard maximum amount".

The higher maximum amount is applicable to Data Controllers and Data Processors of Major Importance and is calculated as the greater of NGN 10 Million or of 2% of annual gross revenue of the preceding year of the defaulter.

The standard maximum amount is applicable to all other Data Controllers and Data Processors, and it is calculated as the greater of NGN 2 Million or of 2% of annual gross revenue of the preceding year of the defaulter.

Criminal proceedings may also be taken against a defaulter.

9. Cross Border Transfer of Personal Data

The Act broadened the basis for cross-border transfer of personal data and removed the requirement of the Attorney-General of the Federation's supervision in the NDPR

Personal Data can be transferred cross border where the recipient of the Personal Data is subject to a law, binding corporate rules, contractual clauses, codes of conduct or certification mechanisms that affords an adequate level of protection of the Personal Data.

10. Compliance Obligations

The Act introduced compliance obligations applicable to Data Controllers and Data Processors (of Major Importance):

- a. Registration of Data Controllers & Data Processors of Major Importance:-** Data Controllers and Data Processors of Major Importance are required to register with the Commission within six months (12 December 2023) of the commencement of the Act, unless extended by the Commission. The Commission may also designate anyone who processes personal data of particular value or significance to the economy, society or security of Nigeria as a Data Controller or Data Processor of Major Importance.
- b. Appointment of a Data Protection Officer (DPO):-** Data Controllers of Major Importance are required to appoint a DPO who would have the responsibility of monitoring compliance. The DPO may be an employee of the Data Controllers of Major Importance or an external party.
- c. Data Privacy Impact Assessment:-** Data Controllers whose processing of personal data may result in high risk to the Data Subject are required to carry out a Data Privacy Impact Assessment and to notify the Commission before commencing the processing of personal data. The purpose of the assessment is to identify any associated risk and to develop measures to mitigate them. The Act does not define "high risk" in relation to breaches, it is expected that the Commission will issue Guidelines in this regard.
- d. Personal Data Breach:-** A Data Processor or Controller is required to report data breaches without delay. Where the breach is likely to result in a risk and freedoms to the rights of the Data Subjects, the Data Controller must notify the Commission within 72 hours of becoming aware of the breach.

Takeaway

The Act did not do away with the previous legislation issued by NITDA and NDPB. It however introduced some sort of co-existence between the NDPR and the NDPA in the sense that both laws will fill in legislative gaps, where one law is silent on a matter. Hence both the Act and the subsidiary legislation issued by NITDA, and the Bureau will apply.

Companies/ organisations who may be subject to international Data Protection Laws and the Act (by virtue of their operations in Nigeria), are advised to adopt the stricter/ stiffer measures imposed by the legislation to eliminate the risk of default/penalty.

The Act in its definition of a Data Controller/ Processor of Major Importance did not provide a definite number/ threshold of Data that can be processed for one/ an organisation to be classified a Data Controller/ Processor of Major Importance.

The registration timeline of Data Controllers/Data Processors of Major Importance is considered to be short. Also, since no threshold has been provided by the Commission, there will still be uncertainties as to when one/ an organisation can register as a Data Controller/Data Processor of Major Importance .

The Act did not provide for the timeline for when a Data Audit may be conducted, Data Controllers/Processors through their Data Protection Officers, should liaise with the Commission for a synchronised regulation which will regulate compliance to the Act; provide detailed processes, steps, and timelines to carry out obligations required of them by the Act.

The outright exception created on the application of the Act on "publications made in the public's interest for journalism, educational, artistic and literary purposes" may be considered a dangerous one and could be subject to abuse in future. The GDPR advising that data privacy should be balanced with freedom of expression, in our view, should have been the right approach adopted by the Act rather than creating the exception.

Companies/ organisations are encouraged to review their Data Protection policies to ensure adequate measures are in place to align and comply with the Act.



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