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Overview of the Regulations Concerning Data Protection in Kenya

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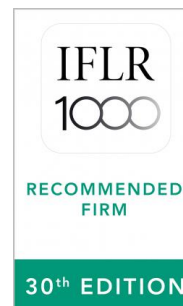


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About Us

- Oraro & Company Advocates is a **top-tier**, full-service law firm in Nairobi, Kenya established in 1977.
- We provide specialist legal services both locally and regionally in **Arbitration, Asset Tracing & Recoveries, Banking & Finance, Capital Markets, Conveyancing & Real Estate, Corporate & Commercial, Dispute Resolution, Employment & Labour, Fintech, Infrastructure, Projects & PPP, Restructuring & Insolvency and Tax.**
- We have also been consistently ranked and recognized by Chambers Global, IFLR 1000 and Legal 500 as a top-tier firm.



About the Speakers



Ms. Immaculate Kassait, MBS

DATA COMMISSIONER

Ms. Kassait is the current and first Data Commissioner in the Office of the Data Protection Commissioner in Kenya. She is an advocate of the High Court of Kenya and holds a Global Executive MBA from USIU-A, a Post-graduate Diploma in Law from KSL, and an LLB (Honours) from Makerere University. She is also an accredited Facilitator in Building Resources in Elections Democracy and Governance. Previously, she worked at the Independent Electoral and Boundaries Commission for close to 11 years as a Director; Voter Education Partnerships and Communication and; Voter Registration and Electoral Operations. She has also worked at the Institute for Education in Democracy and Federation of Women Lawyers. Ms. Kassait is a member of the Law Society of Kenya, East Africa Law Society and FIDA Kenya.

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About the Speakers



John Mbaluto, FCI Arb

DEPUTY MANAGING PARTNER

A Partner at the Firm's dispute resolution practice group, John specialises alternative dispute resolution and litigation. He has built a respected legal career spanning over 12 years, having represented and advised local and international clients particularly in employment and labour law, pension law, construction law, banking and commercial disputes and constitutional law. John very recently attained qualification as a Fellow of the Chartered Institute of Arbitrators (FCI Arb), a globally recognised standing in arbitration circles.

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About the Speakers – Contd.



Jacob Ochieng

PARTNER

Jacob is a Partner at the Firm's corporate & commercial practice group. With over 10 years' experience, he has advised local and international corporates on infrastructure projects, commercial contracts, corporate restructuring, mergers & acquisition and privatisations.

Chambers Global ranked Jacob its 2020 Guide under Corporate/M&A and commented that he *"is commercially astute and always looks out for his clients in any transaction."*

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Daniel Okoth

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Daniel is a Partner in the dispute resolution practice group. With over 7 years' experience, Daniel has advised local and international clients from various sectors including financial services, education and real estate in arbitration, banking and commercial litigation, constitutional and administrative law,, employment & labour law disputes and land disputes.

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Milly Mbedi

SENIOR ASSOCIATE

Milly is a Senior Associate in the firm's corporate and commercial practice group and specializes in corporate & commercial law, competition law, employment & labour law and intellectual property law. With over 7 years' experience, she has advised both local and international clients from various sectors on corporate restructurings, mergers & acquisitions, commercial contracts, drafting employment contracts, reviewing of employment policies & procedures and trademark and copyrights.

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ASSOCIATE

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In This Presentation

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Background: The Road to the Development of the Data Protection Regulations

- 2019 – Kenya enacts the Data Protection Act (No. 24 of 2019) (“**DPA**”) which ushers the country into a data-conscious era.
- The DPA was the first of its kind with subject centric provisions, for instance the DPA:
 - i. reverted control over one’s personal data to the natural person – consent requirement;
 - ii. introduced organizational and classification measures governing the data including:
 - a. establishing the office of the Data Protection Commissioner;
 - b. classifying of data as personal data and sensitive personal data; and
 - c. the prescription of data controllers (“**Controllers**”) and data processors (“**Processors**”) under section 2.
- Main challenge with the DPA was the enforcement of its provisions. At the time Kenya did not have a Data Protection Commissioner (“**DPC**”), further there were no guidelines and/ or regulations as to the registration of data controllers and processors.

Background: The Road to the Development of the Data Protection Regulations – Contd.

- On 12th November 2020, the first Data Protection Commissioner, Ms. Immaculate Kassait, MBS was appointed.
- Following her appointment, a Taskforce on the Development of the Data Protection, General Regulations (the “**Taskforce**”) was constituted.
- The Taskforce’s terms of reference (“**TORs**”) were *among others* to:
 - i. undertake a comprehensive audit of the DPA;
 - ii. identify any gaps or inconsistencies in the DPA and the Data Protection Policy and propose specific review requirements;
 - iii. propose any new policy, legal and institutional framework that may be required to implement the DPA; and to
 - iv. develop the Data Protection (General) Regulations

Background: The Road to the Development of the Data Protection Regulations – Contd.

- In line with their TORs the Taskforce then developed the following regulations:
 - The Data Protection (General) Regulations, 2021
 - The Data Protection (Registration of Data Controllers and Data Processors) Regulations, 2021; and
 - The Data Protection (Compliance and Enforcement) Regulations, 2021
- The regulations are to be passed into law, and are currently, waiting approval from Cabinet Secretary.

DATA PROTECTION (GENERAL) REGULATIONS, 2021



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Enabling the Rights of Data Subjects

The Data Protection (General) Regulations, 2021 (the “**General Regulations**”) enable the rights of data subjects in the following manner:

- **Establishing the primacy of a data subject’s consent.**

Consent must be:

- ☐ informed, direct, specific and voluntary,
- ☐ acquired by through the prescribed modes of giving consent,
- ☐ consequences of withholding consent must be stipulated;
- ☐ consent cannot be presumed nor indirect;
- ☐ The data subject must have capacity to understand and communicate their consent.

Enabling the Rights of Data Subjects

- **Regulation on the Collection and Use of Personal Data.**

The General Regulations prescribe the modes of collecting and processing data.

- Collection of personal data:** the means of collecting are prescribed with the inclusion of biometric collection of personal data and the application of principle of limitation and collection of sensitive personal data from the data subject
- Restriction to processing:** the use of personal data will be restricted, subject to the issuance of a request for restriction by a data subject

Enabling the Rights of Data Subjects

- **Control on use of data:**

Data Subjects can exercise more control over the use, storage and content of their personal data through:

- i. Objecting to the processing of personal data-
- ii. Data Access Requests –
- iii. Rectification of Personal Data –

Enabling the Rights of Data Subjects.

- iv. Right of erasure
- v. Requests for anonymization and pseudonymization
- vi. Protection in automated decision making instances

Obligations of Data Controllers and Data Processors

Data Controllers

- Obligations to make, publish and regularly update a privacy policy, with contents of the privacy policy being prescribed by the General Regulations.
- Engagement of data processor through a written agreement prescribing among others the processing details of the set of personal data to be processed and the security measures to be undertaken by the data processor

Data Processors

- Prohibition from engaging third parties without the consent of Data Controllers

Data Transfers and Data Localization

Data Portability Request

- A data subject may apply to transfer or copy their personal data from one controller or processor to another.
- Within thirty (30) days and upon payment of any charge, transfer or copy the personal data as directed by the data subject.
- Notify the data subject within 7 days if they decline to port the personal data.
- The exercise of this data portability should not negate their other rights under the DPA.

Data Transfers and Data Localization

Data Localization (regulation 25, General Regulations)

- Applies to data controllers and data processor where personal data is being processed for a public good purpose.
- The following actions fall within the meaning of the term ‘ *public good*’:
 - i. Administering a national civil registration system including registration of births and deaths, persons, adoption and marriages;
 - ii. Operating a population register and identity management system including any issuance of any public documents; and
 - iii. The conduct of national elections in Kenya, among others.
- Data Controllers and Data processors that process data for public good purposes will be required to ensure that such processing is effected through a server and data centre that is located in Kenya and at least one servicing copy of the concerned data is stored in a data centre located in Kenya.

Data Transfers and Data Localization

Data Transfers (part VII of the General Regulations)

- Geographical limits
- Exclusion of network service providers from “receipt” definition
- Safeguards prior to transfer, data transfer contracts and how to determine the existence of appropriate safeguards for recipient's

Data Protection by Design and Default

- Built on the existing principles of data protection and apply in the life cycle of processing personal data. These are the principles of:
 - i. lawfulness;
 - ii. transparency
 - iii. purpose limitation
 - iv. integrity, confidentiality and availability
 - v. data minimization
 - vi. accuracy; and
 - vii. Storage limitation

Breach and Notification

The 'real risk of harm' test

- Data breaches will be considered to have occasioned real risk of harm for the purposes of notification under section 43 of the PA where the data breach concerns:
 - i. The data subject's full name or identification number and any of the personal data or classes of personal data relating to the data subject concerning any of the following : wages, income, credit card numbers, data identifying children in conflict with the law, private keys etc or;
 - ii. Personal data relating to a data subject's account with data controller or data processor e.g their personal account identifier and passwords

Where the breach involves any of the above data sets, then the breach amounts to a notifiable breach to be dealt with in accordance with section 43 of the DPA.

Data Protection Impact Assessment

- Required where an operation is likely to result in high risks.
- They are identified as:
 - automated decision making with legal or similar significant effect;
 - use of personal data on a large-scale for a purpose other than that for which it was initially collected;
 - processing biometric or genetic data;
 - a single processing operation or a group of similar processing operations;
 - where there is a change in any aspect of the processing that may result in higher risk to data subjects;
 - processing sensitive personal data or data relating to children or vulnerable groups;
 - combining or cross-referencing separate datasets;
 - a systematic monitoring of a publicly accessible area on a large scale;
 - innovative use or application of new technological or organizational solutions; or
 - where the processing itself prevents a data subject from exercising a right.

Exemptions: National Security

- Relates to processing of personal data by the following national security organs: (i) Kenya Defence Forces; (ii) National Intelligence Service; and (iii) the National Police Service.
- In the event that that a data controller or data processor, processes data for these purposes, they may apply for an exemption from the Cabinet Secretary for ICT and Youth Affairs.
- No prescribed form for such an application

Exemptions on the ground of public interest:

- i. **Permitted general situation:** Data processors and controllers are exempted from the provisions of the DPA where the processing of data exists as a permitted general situation such including for :
- Lessening or preventing a serious threat to life , health or safety of any data subject;
 - Locating a person reported as missing;
 - Asserting a legal or equitable claim, among others.

Exemptions on the ground of public interest:

- i. **Permitted health situation:** Data processors and controllers are exempted from the provisions of the DPA where the processing of data exists as a permitted health situation such as:
- the collection of health information to provide a health service;
 - the collection , use or disclosure of health data for health research and connected purposes; and
 - The use or disclosure of genetic information if necessary and obtained in the course of providing a health service among others.

General Provisions

Compounding of Offences

- Upon compounding an offence, the DPC shall:
 - i. make the order in writing and attach a written admission of the person who has committed the offence and the concurrence of the Director of Public Prosecution to compound the offence;
 - ii. give the person who has committed the offence a copy of the order upon the request of that person; and
 - iii. specify the offence committed, the sum of money ordered to be paid, and the date to which payment is due
- DPC shall not institute any proceedings against the offender where the money has been paid within 14 days of the order.
- If the offender fails to pay the money, the DPC may institute proceedings in relation to the offence.
- Compounding of an offence shall not prejudice any of the DPC's orders of compensation or restitution.

The background of the slide is a close-up, high-angle shot of a hard drive's internal platters. The platters are stacked and have a metallic, reflective surface. A black fingerprint is overlaid on the lower-left portion of the image, partially covering the platters. The text is centered over the image in a large, white, sans-serif font.

THE DATA PROTECTION (REGISTRATION OF DATA CONTROLLERS AND DATA PROCESSORS) REGULATIONS, 2021



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Salient Provisions

- Determination of data controllers and data processor
- Application for registration
- Registration by public body
- Exemption from mandatory registration
- Electronic registration



THE DATA PROTECTION (COMPLIANCE AND ENFORCEMENT) REGULATIONS, 2021



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Salient Provisions

- Complaint handling procedure
- Enforcement provisions-
 - Issuance, service, review and appeals of enforcement notices
 - Issuance and enforcement of penalty notice



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Thank you