

## WHAT IS NEW: A COMPARISON BETWEEN THE DATA PROTECTION ACT 2023 AND THE NIGERIA DATA PROTECTION REGULATIONS 2019



**O**n 12 June 2023, President Bola Ahmed Adekunle Tinubu signed the Data Protection Bill into law (“the Act”), now referred to as the Data Protection Act 2023. Prior to the Act, the principal law on data protection in Nigeria was the Nigeria Data Protection Regulations (“NDPR”) amongst other relevant data privacy provisions across various statutes and sector-specific regulations. The NDPR was issued in 2019 by the National Information Technology Development Agency (NITDA) in the exercise of its rule-making powers under the National Information Technology Development Agency Act of 2007.

The NDPR made provisions for the manner in which personal data may be processed lawfully in Nigeria and includes governing principles of data processing, lawful basis for processing, rights of data subjects, the obligations of data controllers and data processors and transfer of data to a foreign territory amongst others. Sometime later in 2022, President Muhammadu Buhari via executive fiat established the Nigeria Data Protection Bureau (“NDPB”) as an enforcement agency to oversee the implementation of the NDPR.

Though the regulation was significant in that it was the first to fill the longstanding void in regulating the processing of personal data in Nigeria, the NDPR had its fair share of criticisms many of which stemmed from its legality, whether NITDA had the legal authority to issue the regulation and its being merely subsidiary legislation.

Prior to the enactment of the Act and while the NDPR was in force, the Incorporated Trustees of Digital Rights Lawyers Initiative brought an application against the Federal Republic of Nigeria before the Economic Community of West African States (ECOWAS) Court claiming that Nigeria as a member state is in breach of its community obligations by failing to enact a data privacy legislation. The ECOWAS Court gave Nigeria a pass mark on her legal framework on data protection as well as the NDPR and its Implementation Framework.<sup>1</sup>

The Act fortifies and expands on the provisions of the NDPR on lawful personal data processing, consent of data subjects, obligations of data controllers and processors, data protection officers and compliance services, data subject rights, data security, penalties for data breaches and cross border transfers of data. However, aiming to silence some of the criticisms on the NDPR, the Act introduces a few additions and changes in the law. A few notable provisions of the Act that introduce changes to the regime of the NDPR are summarised below.

### Scope of the Act

The NDPR was criticized for its restrictive scope. Under the NDPR protection was restricted to only data rights of “natural persons”<sup>2</sup>. This means that if a company’s data had been exposed, processed

<sup>1</sup> In the Matter of Incorporated Trustees of Digital Lawyers Initiative v Federal Republic of Nigeria (2023) Application No ECW/CCJ/APP/27/21, Judgment No ECW/CCJ/JUD/02/23 dated 13 March 2023 on page.19, paragraph 55 and accessible at <<https://barristerng.com/wp-www.sskohn.com>>

<content/uploads/2023/05/ECOWAS-Court-judgment-on-NDPR-copy.pdf>> accessed on 19 June 2023

<sup>2</sup> Regulation 1.2a of the Nigeria Data Protection Regulations 2019

unlawfully or misused, it could not take protection under the Act. This inadequacy is tackled by the Act. Though artificial persons are not expressly covered, the Act extends its scope of protection to any processing of data that occurs within Nigeria.<sup>3</sup> The Act will however not apply to the processing of data for personal or household purposes provided that such processing does not breach the data subject's right to privacy<sup>4</sup> or law enforcement, national security, or to prevent or control a public health emergency, or in respect of a publication in public interest or in court proceedings.<sup>5</sup>

### **Establishment of the Nigeria Data Protection Commission**

Section 64 of the Act transfigures the NDPB into the independent Nigeria Data Protection Commission ("the "Commission") mandated to, among others, regulate the deployment of technological and organisational measures to enhance personal data protection; foster the development of personal data protection technologies, in accordance with recognised international best practices and applicable international law and conduct investigations into any violation of a requirement under the Act.<sup>6</sup> There have always been concerns with respect to the degree of independence of NITDA from government control.

The Commission which is to be "independent" is the successor-in-title in every way to the power, duties, and functions of the former NDPB<sup>7</sup>. As at the date of this writing, the NDPB has renamed itself on its website and all other social media handles as the NDPC. It is noteworthy however, that a review of the composition of the governing council of the Commission shows a heavy reliance on the executive arm of government as the appointment and removal of the members lie on the President's prerogative. The national commissioner who heads the governing council is to be appointed by the President on the recommendation of the Minister of Communications and the Digital Economy<sup>8</sup> but is in the interim occupied by Dr Vincent Olatunji, the National

Commissioner of the former NDPB.

### **Legitimate Interest as a Lawful Basis for Processing Data**

Under the NDPR, the lawful basis for the processing of personal data by controllers and processors was limited to consent, compliance with a legal obligation, protection of the vital interest of the data subject or another person, public interest, and performance of contracts as the only lawful bases for processing personal data. Legitimate interest though recognised in most data protection legislations of other jurisdictions as a lawful basis for processing data was not given the same recognition in the NDPR.

Now, the Act officially recognises legitimate interest as one of the lawful bases for processing personal data.<sup>9</sup> Certain processing activities, for instance, such as in a company/client relationship, when it processes personal data to prevent fraud or to ensure the network and information security of employees' IT systems can now be covered under legitimate interest with safeguards.

### **Data Privacy Impact Assessment**

The Act makes provision for the need for a Data Protection Impact Assessment ("DPIA") where processing of data may likely result in high risk to data subjects' rights and freedoms.<sup>10</sup> While the NDPR was silent on this, however NITDA in the Implementation Framework requires that a DPIA must be conducted prior to engaging in any 'intensive' data processing activity<sup>11</sup>. In addition, while the Implementation Framework sets out the contents of a DPIA, the Act is silent on what should be the constituent elements of a DPIA. The Acts also empowered the Commission to issue guidelines and directives on DPIA, including the categories of processing subject to the requirement for a DPIA.

For instance, if a company is using new technologies, tracking people's location or behaviour, processing sensitive personal data i.e., genetic data, biometric

<sup>3</sup> Section 2 of the Data Protection Act 2023

<sup>4</sup> Section 3 of the Data Protection Act 2023

<sup>5</sup> Section 3(2) of the Data Protection Act 2023

<sup>6</sup> Section 5 of the Data Protection Act 2023

<sup>7</sup> Section 64 of the Data Protection Act 2023

<sup>8</sup> Section 14 of the Data Protection Act 2023

<sup>9</sup> Section 25(1)(b) of the Data Protection Act 2023

<sup>10</sup> Section 28 of the Data Protection Act 2023

<sup>11</sup> Paragraph 3.2(vii) of the NITDA Implementation Framework 2020

data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation, a DPIA will be required by law to minimise the risk of data breaches.

## **Registration of Data Processors and Controllers of Major Importance**

A data controller or data processor of major importance is defined by the Act as “a data controller or data processor that is domiciled, ordinarily resident, or ordinarily 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 such other class of data controller or data processor that is processing personal data of particular value or significance to the economy, society or security of Nigeria as the Commission may designate”<sup>12</sup>.

The Act requires data processors and data controllers of major importance to register with the Commission within six months from the passage of the Act. The registration of any processors or controllers was not a requirement under the NDPR. The Commission is yet to prescribe which processors and controllers fall within this category and the procedure for registration.

## **The Powers and Functions of the Administrative Redress Panel**

Under the NDPR, NITDA was mandated to set up an Administrative Redress Panel to Investigate allegations of any breach of the provisions of the Regulations. The Panel was empowered to invite any party to respond to allegations made against it within seven (7) days and was to conclude the investigation and determination of appropriate redress within twenty-eight (28) working days. These powers and functions of the Administrative Redress Panel provided for in the NDPR<sup>13</sup> are now ascribed to the Commission.

The Commission under the Act is empowered to

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<sup>12</sup> Section 65 of the Data Protection Act 2023

<sup>13</sup> Regulation 3.2 of the Nigeria Data Protection Regulations 2019

<sup>14</sup> Sections 46 and 47 of the Data Protection Act 2023.

investigate any complaints or violation of the Act and to make appropriate compliance orders and determinations accordingly.<sup>14</sup> Criticisms on the lack of express provisions on the timeline for the setup, membership, qualifications or disqualification, existence/emergence of the Administrative Redress Panel have also now been tackled with the clear provisions on the composition and functions of the Commission contained in the Act.

## **Conclusion**

The Act, which as a comprehensive legal framework for data protection passed by the legislature is the first of its kind, is predicted to occasion a huge boost to the Nigerian Economy. In Kenya, the passage of the Data Protection Act was succeeded by announcements of new investments in the country by Microsoft, Amazon Web Services and AWS<sup>15</sup>, including Amazon establishing part of its data cloud infrastructure in Nairobi.

This Act succeeds numerous criticisms of the NDPR and settles the legitimacy issue hovering around the establishment of NDPB. While some of the provisions are significantly the same as those provided for under the NDPR, the Act makes noteworthy improvements to the legal framework of data protection in Nigeria. It is our hope that further clarification and information shall promptly made available by the Commission including the implementation framework of the Act, the status of Data Protection Compliance Officers under the NDPB and what constitutes sensitive personal data. I envisage that this will be done by Regulations and Guidelines which the Commission is empowered by the Act to issue.

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<sup>15</sup> Finextra Research, ‘Kenya Adopts a Data Protection Law to Bolster Tech Investments’ (14 Nov 2019)

<<https://www.finextra.com/blogposting/18138/kenya-adopts-a-data-protection-law-to-bolster-tech-investments>> accessed

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