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The NDPR and the Data Protection Bill 2020

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Introduction



The advent of the internet and information age has led to an exponential increase in the amount of data created by users of the internet and stored on it. As such, the security of personal data shared online has become a matter of national concern as companies, organisations and hackers continually seek to exploit the information for commercial and malicious purposes.

On the heels of the EU Data Protection Regulations 2018 (GDPR), the National Information Technology Development Agency (NITDA) issued the Nigerian Data Protection Regulation (NDPR) in 2019 on the use and protection of personal data of Nigerians. While this was a commendable step for the NITDA, there are conflicting positions as to the efficacy and enforceability of the NDPR considering that it is not an Act of the National Assembly and the NDPR is limited in form and scope to adequately protect the personal data of Nigerians. This has led to a clamour for a single data protection Act just like other countries.

According to the United Nations Conference on Trade and Development (UNCTAD), in its summary of the Data Protection and Privacy Legislation Worldwide (updated as at February 2020), over 66% of countries globally have data protection legislation (over 50% of African countries have data protection legislation).

There is currently a draft Data Protection Bill 2020 (“the Bill”) before the National Assembly, which will replace the NDPR if passed into law.

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Scope and Objective of the Data Protection Bill, 2020

The objective of the Bill is to create a regulatory framework for the protection and processing of personal data and to safeguard the rights and freedoms of data subjects which are guaranteed under the Nigerian Constitution.

The scope of the Bill covers the collection, storage, processing and use of personal data of persons residing in Nigeria and Nigerians residing outside Nigeria by private and public sector entities in Nigeria. The Bill will also apply to the data controller and data processor if:

- Both are established in Nigeria, and the personal data of data subjects in Nigeria are processed within Nigeria,
- the data subject resides within or outside Nigeria,
- the data controller is not established in Nigeria but uses equipment or a data processor in Nigeria to process personal data of data subjects who reside within or outside Nigeria, or
- processing is carried out in respect of information relating to data subjects who reside within or outside Nigeria and personal data which originates partly or wholly from Nigeria.

The Bill however does not apply to processing of personal data in the course of a purely personal or household activity.

Specifically, the following categories of persons are required to comply with the Bill:

- a. a data subject who is a citizen of Nigeria;
- b. a data subject who is ordinarily resident in Nigeria;
- c. a body incorporated under the laws of Nigeria;
- d. an unincorporated joint venture or association operating in part or in whole in Nigeria; and
- e. any person who does not fall within paragraphs (a), (b), (c) or (d), but maintains an office, branch or agency through which business activities are carried out in Nigeria.
- f. Foreign entities targeting persons resident in Nigeria

Compared to the NDPR, the category of persons covered by the Bill has been expanded and provides more certainty on the application of the Bill.

The wording of the Bill should be reviewed to reflect the intention of section 2(3) which is the categories of persons who are covered by the scope of the Act. This is because the use of the phrase, "required to comply" presupposes that the data subject is the target of the Bill and is legally required to perform some specific compliance obligations. However, the Bill targets handlers of data for the purpose of protecting data subjects. The wording needs to be updated to truly reflect the intention of the Bill similar to the description used in Section 2(4) which covers "categories of data".

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Category of Data

The category of data covered by the Bill includes:

- a. personal and biometric data revealing a data subject's identity, racial or ethnic origin, political opinions, religious or philosophical beliefs, sexual orientation or trade union membership;
- b. personal banking and accounting records;
- c. personal data revealing a data subject's flight reservation or itinerary;
- d. student's academic transcripts records;
- e. personal medical and health records;
- f. telephone calls, call data records, messages, websites, and other information stored on any electronic device
- g. personal subscription data which reveals data subject behavior; and
- h. such other categories of data usually processed by service providers and commercial entities as may be determined by the guidelines of the Commission.

Compared to the NDPR, the category of data covered by the Bill has been expanded although the Data Protection Commission still has powers to issue guidelines to cover other categories not specifically listed in the Bill.

Principles and Legal Basis of Processing Personal Data

While the principles and legal basis provided in the Bill are similar to those contained in the NDPR, the Bill expands the provisions of the NDPR by:

- a. allowing processing for archiving, scientific, historical research and statistical purposes in accordance with any relevant law in Nigeria; and;
- b. ensuring that the data is kept in a form that permits identification of data subjects for no longer than is necessary for the purposes for which the personal data is processed, and data shall be deleted once the purpose for which it was processed has been achieved or kept in a form that prevents any direct or indirect identification of the data subject.

Similarly, the legal basis for processing personal data was also expanded by including the protection of the vital interests of the data subject or of another natural person and prevailing legitimate interests pursued by the data controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedom of the affected data subjects.

Establishment of the Data Protection Commission

The Bill also sets up the Data Protection Commission (the "Commission") with responsibility to implement and monitor compliance with the provisions of the Bill, provide the process to obtain, store, process, use or disclose personal information, investigate any complaints arising from non-compliance with the Bill, impose fines and

penalties, to enforce compliance and make regulations necessary for carrying out its functions.

The Commission will replace the role that NITDA has played to date in terms of the regulation of data protection.

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Processing of Sensitive Data

The Bill clearly defines what is categorised as sensitive personal data and provides detailed procedures and basis for processing such data. Unlike the NDPR which defines sensitive personal data as data relating to the religious or philosophical beliefs, ethnic origin, race, political opinions, trade union membership, health, sexual tendencies, criminal records, or other sensitive data, the Bill includes genetic data, biometric data for the purpose of uniquely identifying a natural person, the data of a child who is under the age of 16 years and any other data designated as sensitive by the Commission through its guidelines.

The Bill also restricts processing of such data except processing is either necessary for the exercise or performance of a right or an obligation conferred or

imposed by law or prior consent of the child or guardian is obtained. Also, the requirement for consent can be waived if it is necessary for the protection of the vital interests of the data subject but it is impossible for consent to either be given or obtained or it cannot be reasonably expected that consent will be obtained.

Although the processing of sensitive data is generally restricted, there are other exceptions in addition to what has been stated above, such as when the processing is for the protection of the legitimate activities of a body or association which is established for non-profit purposes, political, philosophical, religious or trade union purposes. The Bill provides other conditions and requirements for processing sensitive personal data.

Rights of the Data Subject and Records obtained from Data subjects

The Bill set out the rights of data subjects to include the right to be notified of data breaches within 48 hours after the Commission is notified of the breach; right of access; rights in respect of automated decision making; right to rectification, erasure and restitution of processing; right to seek judicial remedy; right to prevent processing of personal data; right to have data processing suspended, among others.

Some other important issues to note are as follows:

- Section 38 of the Bill provides that a data subject or any person affected by the processing of any personal data can request the Commission to perform an assessment as to whether such processing complies with the Act. This assessment will be done after the payment of prescribed fees.

- The Bill protects data subjects from providing personal data as a condition for the provision of goods, facilities or services except the imposition of the requirement is required for the identification of persons or it is authorised under an enactment, law, valid commercial transaction or in the public interest.
- With the exception of the right to suspend data processing and the right of automated processing, the other rights provided in the Bill are similar to those in the NDPR.

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Duties of Data Controllers and Processors

The Bill makes provisions for the duties of data controllers and processors. These duties include ensuring that processing is proportionate to the purpose for which it is processed; designing data processing in a manner that minimises the risk of interference with privacy rights and fundamental freedoms, appointing a Data Protection Officer who will be responsible for ensuring adherence to the Bill, etc.

The Bill also makes provisions for the vicarious liability of a data controller that engages a data processor to process information on its behalf. This liability is however subject to having a binding contract with the processor. Finally, all data processors and third-party contractors are required to maintain a record of processing activities.

Data Location and Security

The Bill requires data controllers and processors to process data on devices within their control and ensure that measures are put in place to protect the personal data against accidental or unauthorised access, destruction, loss, use, modification or disclosure.

Data controllers and processors are also required to test and assess the effectiveness of their technical and organizational measures for ensuring security of processing.

Trans-Border Flow of Personal Data

The provisions of the Bill on the transfer of personal data are similar to those contained in the NDPR. However, the Bill does not require the supervision of the Attorney-General of the Federation in any instance.

This will help reduce the bureaucratic bottlenecks faced by data controllers and processors in transferring data outside Nigeria.



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Compliance Obligations and Sanctions for Non-Compliance

Other notable matters included in the Bill are as follows:

- a. Data Controllers are now required to submit their annual data protection audit report on the 30th of March of each year as opposed to 15 March as provided in the NDPR.
- b. Fixed penalties for non-compliance as against the percentage of annual gross revenue under the NDPR. For instance, knowingly obtaining information, disclosing information to a third party or retaining information without the consent of the data controller can attract a fine of N5million upon conviction or 1 year imprisonment.
- c. Sale of personal data obtained without proper consent or advertising the data where it was improperly obtained could attract up to 5 years imprisonment upon conviction in addition to a fine.
- d. A data controller or processor that does not put in place appropriate technical and managerial safeguards could be liable for up to N10 million for every year of default or 1 year imprisonment. It further imposes stricter penalties on data protection officers or officials of the Commission where such persons are involved in a breach of data confidentiality.
- e. The Bill stipulates that privacy of personal data will not apply when the data is processed to protect members of the public from:
 - financial loss or malpractice
 - dishonesty or malpractice in the provision of professional services
 - misconduct or mismanagement in the administration of a non-profit making entity health, safety and welfare of persons at work; or
 - to protect non-working persons against the risk to health or safety arising out of or in connection with the action of persons at work; and
 - on the grounds of public interest which may include the prevention or detection of crime, the assessment or collection of tax or duty or the publication of a literary or artistic material.



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Conclusion

The passage of the Bill will play a pivotal role in protecting personal data and by extension, strengthen the protection of the right to privacy which is recognised as a fundamental right in Nigeria and many countries around the world. However, more provisions should be included on the role of the Data Protection Officer and Data Protection Compliance Organisation, requirements of a privacy policy to be made available to data subjects, minimum security measures required to safeguard personal data, Data Privacy Impact Assessments, etc.

Although the Bill provides that the Commission can make Regulations for carrying out its functions, the NDPR currently has some detailed provisions in its Implementation Framework which was issued to provide further clarity and guidance on the NDPR. The provisions of the existing Framework (as may be amended) can be adopted or incorporated into the Bill at this stage in order to avoid unnecessary delays and to ensure that there is no vacuum once the Bill is passed into Law.

In reviewing this Bill, the National Assembly should consider the various thresholds available under the NDPR for the various compliance obligations. The NDPR clearly sets out the criteria for those companies that must appoint a DPO and the threshold of the volume of data that needs to be processed before a company is penalised for breach. This option should be explored as

additional compliance obligations on a flat line for all companies will increase the compliance burden and may erode the ease of doing business for small and medium scale enterprises in general.

The disapplication of the protection of personal data on grounds of public policy tends to provide a wide basis for the government to negate the protection of privacy of data and it is especially curious when it is disapplied to protect the public from the publication of a literary or artistic material. This provision may be used by the government to discourage/target dissent which is antithetical to the objective of the Bill.

Finally, the Commission is expected to have a Fund for its activities. The Fund will largely be drawn from various existing agencies of government by the deduction of 5% of the revenue from the activities of the National Identity Management Commission (NIMC), the Nigerian Immigration Service, the Federal Road Safety Corps, the 1% NITDA levy, Nigerian Communications Commission, and other sources. Effectively, there is a possibility that the proposed fund will push these various agencies to increase their administrative charges to make up for the contributions to the Fund and will eventually be borne by Nigerians in general.

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