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# A REVIEW OF THE NIGERIA DATA PROTECTION REGULATION 2019.

# INSIGHTS

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## INTRODUCTION

The Nigeria Data Protection Regulation 2019 (*“the Regulation”*) was issued by the National Information Technology Development Agency (*“the Agency”*) on January 25, 2019, in realization of emerging data protection regulations within the international community geared towards security of lives and property and fostering the integrity of commerce and industry in the volatile data economy<sup>2</sup>.

The world today has become a technological village where data and information are collated, processed and used by private individuals, corporate bodies and organizations in diverse transactions. The regulation was modelled after the European Union General Data Protection Regulation (*“GDPR”*); which has been described as “The most important change in data privacy regulation in 20 years”<sup>3</sup>.

This brief shall highlight key features of the regulation and shall further discuss the necessary steps to be carried out by private and public entities in order to comply with the provisions of the regulation.

## SCOPE OF THE REGULATION

The regulation applies to all transactions intended for the processing of personal data. Personal data by virtue of the regulation means:

- 1 [https://www.google.com/search?q=data+protection&source=lnms&tbm=isch&sa=X&ved=0a-hUKEwiK0NemoP3hAhUG\\_RQKHYNFDRgQ\\_AUIDigB&biw=1366&bih=608#imgrc=2ltbBUc-cPan66M:](https://www.google.com/search?q=data+protection&source=lnms&tbm=isch&sa=X&ved=0a-hUKEwiK0NemoP3hAhUG_RQKHYNFDRgQ_AUIDigB&biw=1366&bih=608#imgrc=2ltbBUc-cPan66M:)
- 2 <https://nitda.gov.ng/wp-content/uploads/2019/01/NigeriaDataProtectionRegulation.pdf>
- 3 <https://eugdpr.org/>

*any information relating to an identified or identifiable natural person ('Data Subject'); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person; It can be anything from a name, address, a photo, an email address, bank details, posts on social networking websites, medical information, and other unique identifier such as but not limited to MAC address, IP address, IMEI number, IMSI number, SIM, Personal Identifiable Information (PII) and others.<sup>4</sup>*

The regulation is applicable to natural persons residing in Nigeria and Nigerian citizens residing outside Nigeria.

## MAJOR HIGHLIGHTS OF THE REGULATION

Some of the major highlights of the regulations are:

### 1. CONSENT

- No data shall be obtained except the specific purpose of collection is made known to the data subject.
- A data controller is under obligation to ensure that consent of a data subject has been obtained without fraud, coercion or undue influence.
- No consent shall be sought, given or accepted in any circumstance that may give rise to direct or indirect propagation of atrocities, hate, child rights violation, criminal acts and anti-social conducts.
- Data subjects must be informed of their rights to withdraw consent. However, the withdrawal of consent shall not affect the lawfulness of processing based on consent given before its withdrawal.
- Consent must be sought from the data subject before personal data is transferred to a third party for any reason whatsoever.

From the above, it is quite clear that the regulation seeks to protect the interests of data subjects by ensuring that their consent is sought before their personal data is used.

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4 <https://nitda.gov.ng/wp-content/uploads/2019/01/NigeriaDataProtectionRegulation.pdf>

## **2. PUBLICITY AND CLARITY OF PRIVACY POLICY**

The regulation provides that any medium through which personal data is being collected or processed shall be displayed in a simple, clear, intelligible and easily accessible form of privacy policy which the class of data subject being targeted can understand.

The privacy policy shall in addition to any other relevant information contain the following:

- a) What constitutes the data subject's consent?
- b) Description of collectable personal information.
- c) Purpose of collection of personal data;
- d) Technical methods used to collect and store personal information, cookies, JWT, web tokens etc.
- e) Access (if any) of third parties to personal data and purpose of access.
- f) Available remedies in the event of a violation of the privacy policy.
- g) The time frame for remedy.

## **3. DATA SECURITY**

The regulation provides that anyone involved in data processing or the control of data shall develop adequate security measures to protect data; such measures include but not limited to protecting systems from hackers, setting up firewalls, storing data securely with access to specific authorized individuals, employing data encryption technologies, developing organizational policy for handling personal data (and other sensitive or confidential data), protection of emailing systems and continuous capacity building for staff.

## **4. THIRD PARTY PROCESSING CONTRACT**

Data processing by a third party shall be governed by a written contract between the third party and the data controller. Accordingly, any person engaging a third party to process the data obtained from data subjects shall ensure adherence to the regulation. The regulation is silent about the party who bears liability in the event of any breach by a third party.

Al-Jabbar Riddle in his article “*GDPR and Third Parties: What Companies need to know*” suggests that “*third parties are simply extensions of controllers and primary organizations; therefore mandating compliance with the GDPR is an organic stride in maximizing the effectiveness of all rules under the regulation. The controllers are legally responsible for all acts performed by an applicable processor, therefore, any noncompliance by the processor shall result in noncompliance by the controller*”<sup>5</sup>. In view of the above, it could be inferred that liability for a breach by a third party shall lie with the data controller considering that data controllers are required to do everything in their power to ensure the protection of data subjects personal data. The data controller may however, proceed to seek redress for any breach by the third party, by virtue of the agreement between the controller and the third party.

## 5. PENALTY FOR DEFAULT

In the event of a breach to the data privacy rights of a data subject, the controller may be liable;

- a) In the case of a data controller dealing with more than 10,000 data subjects, payment of the fine of 2% of the annual gross revenue of the preceding year or payment of the sum of ₦10,000,000, whichever is greater.
- b) In the case of a data controller dealing with less than 10,000 data subjects, payment of the fine of 1% of the annual gross revenue of the preceding year or payment of the sum of ₦2,000,000 whichever is greater.<sup>6</sup>

## 6. RIGHTS OF THE DATA SUBJECT

The regulation recognises the right of a data subject to deletion of personal information, restriction in processing information, right to rectify and to have information in a portable format, the right to transfer information to another data controller. The data subject has the right to object to the processing of personal information where it is for marketing purposes, the right to withdraw consent for the use of personal data, the right to be informed where there has been a breach.

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5 <https://www.riddlecompliance.com/blog/gdpr-and-third-parties-what-companies-need-to-know>

6 <https://nitda.gov.ng/wp-content/uploads/2019/01/NigeriaDataProtectionRegulation.pdf>

## TRANSFER OF PERSONAL DATA TO A FOREIGN COUNTRY OR INTERNATIONAL ORGANISATION:

The agency is empowered by the regulation to give directives under the supervision of the Attorney General of the Federation to determine what countries, territories or international organizations have adequate laws and regulations to protect data subjects. In the absence of any directives by the agency or Attorney General of the Federation, the data controllers may proceed to transfer data subject's personal data on either of the following instances;<sup>7</sup>

- The data subject has explicitly consented to the proposed transfer, after having been informed of the possible risks of such transfers.
- The transfer is necessary for the performance of a contract between the data subject and the controller or the implementation of pre-contractual measures taken at the data subject's request.
- The transfer is necessary for important reasons of public interest.
- The transfer is necessary for the establishment, exercise or defence of legal claims.
- The transfer is necessary in order to protect the vital interests of the data subject or of other persons, where the data subject is physically or legally incapable of giving consent.

## STEPS PRIVATE AND PUBLIC BODIES NEED TO TAKE TO COMPLY WITH THE REGULATION

1. All public and private organizations in Nigeria that control data of natural persons shall within three (3) months after the date of the issuance (April 25, 2019) of the regulation, make available to the general public their respective data protection policies; these policies shall be in conformity with this regulation.
2. Every data controller shall designate a data protection officer for the purpose of ensuring compliance to the regulation, relevant data privacy instruments and data protection directives of the data controller; provided that a data controller may outsource data protection to a licenced firm or individual.

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<sup>7</sup> <https://nitda.gov.ng/wp-content/uploads/2019/01/Nigeria%20Data%20Protection%20Regulation.pdf>

3. A data controller or processor shall ensure continuous capacity building for data protection officers and the generality of her personnel involved in any form of data processing.
4. Within six (6) months after the date of issuance of the Regulation (June 25, 2019), each organization shall conduct a detailed audit of its privacy and data protection practices with at least each audit stating:
  - a) Personally identifiable information the organization collects on employees of the organization and members of the public.
  - b) Any purpose for which the personally identifiable information is collected.
  - c) Any notice given to individuals regarding the collection and use of personal information relating to that individual.
  - d) Any access given to third parties to review, amend, correct, supplement, or delete personal information relating to that individual.
  - e) Whether or not consent is obtained from an individual before personally identifiable information is collected, used, transferred, or disclosed and any method used to obtain consent.
  - f) The policies and practices of the organization for the security of personally identifiable information.
  - g) The policies and practices of the organization for the proper use of personally identifiable information.
  - h) Organization policies and procedures for privacy and data protection.
  - i) The policies and procedures of the organization for monitoring and reporting violations of privacy and data protection policies.
  - j) The policies and procedures of the organization for assessing the impact of technologies on the stated privacy and security policies.
5. Where a data controller processes the personal data of more than 1000 in a period of six months, a soft copy of the summary of the audit containing the information stated above shall be submitted to the agency.



6. On an annual basis, a data controller who processes the personal data of more than 2000 data subjects in a period of 12 months shall not later than the 15th March of the following year, submit a summary of its data protection audit to the agency.

## FINAL THOUGHTS

1. The steps taken by the agency with regards to the issuance of the regulation is a laudable one. We however believe that in order to ensure maximum compliance with the provisions of the regulation, the agency has to fully be on their feet to ensure that the regulation is implemented, as the mere issuance of the regulation is not a sufficient basis for compliance.
2. The agency needs to engage in sensitization of public and private individuals in order to create awareness on the provisions of the regulation.
3. The timeframe for compliance as set out by the regulation might be an unrealistic target to achieve. The regulation amongst other things provides for private and public bodies to set up privacy policies within 3 months of its issuance (April 25, 2019). The timeline has lapsed and up until this moment, a lot of organizations are yet to comply. In comparison with the timeframe of the GDPR which provided a two-year grace period for all member states and organizations to comply before the implementation of the regulation. The approach adopted by the GDPR could be said to have been one of the reasons for its success.
4. The scope of applicability of the regulation is limited. The regulation provides that *"this Regulation applies to natural persons residing in Nigeria or residing outside Nigeria but of Nigerian descent"*. It is not as extensive as the GDPR which applies to *"an establishment of a controller or a processor in the Union, regardless of whether the processing takes place in the Union or not, the processing of personal data of data subjects who are in the Union by a controller or processor not established in the Union, where the processing activities are related to:*
  - 4.1 *the offering of goods or services, irrespective of whether a payment of the data subject is required, to such data subjects in the Union; or*
  - 4.2 *the monitoring of their behaviour as far as their behaviour takes place within the Union.*

*Lastly, the processing of personal data by a controller not established in the Union, but in a place where Member State law applies by virtue of public international law”.*<sup>8</sup>

5. The regulation does not provide sufficient protection for child data subjects.

The issuance of the regulation is a breath of fresh air and a starting point for further development in the Information Technology and Privacy Law sectors in Nigeria. The regulation has the potential to safeguard and further improve the exchange and protection of data and information in Nigeria.

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8 Article 3 GDPR

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