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NAVIGATING THE UNCERTAINTIES IN THE NIGERIAN DATA PROTECTION ACT, 2023:

**EXPECTATIONS FROM
THE NATIONAL COMMITTEE
FOR GAID**

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Introduction

The Nigerian Data Protection Act, 2023 (NDPA) is the primary legislation governing data protection in Nigeria. However, despite its robust provisions, the NDPA has left the task of crafting specific regulations and directives for the implementation of the NDPA to the Nigerian Data Protection Commission (NDPC). While this approach provides adaptability to changing circumstances, it also underscores the urgent need for NDPC's intervention in providing the necessary regulatory framework to effectively implement the NDPA.

In response to this need, the NDPC recently inaugurated the National Committee for NDPA General Application and Implementation Directive ('GAID') to ensure the implementation of the NDPA.¹ It is a welcome development as it holds the potential to bring much-needed clarity to the interpretation and application of critical and novel provisions within the NDPA. This article highlights key areas and issues where we anticipate GAID's guidance and offers some recommendations on the implementation of the NDPA.

A. Designation of data controllers or processors of major importance

The NDPA introduced the designation "data controllers or data processors of major importance" and empowered NDPC to ascertain the specific threshold for qualifying as such.² This designation carries additional compliance obligations, such as mandatory registration with the NDPC and the appointment of Data Protection Officers (DPOs).³ This marks a departure from the NDPR, which requires all data controllers and processors to have designated DPOs.⁴ Hence, further guidance from NDPC is needed to (a) clarify which data controllers and processors are exempt or required to comply with these additional obligations and (b) ascertain the registration procedure and requirements for data controllers and processors of major importance. In addition, GAID may



¹Kwen, J. (2023, September 7), NDPC DG Raises Committee to Implement Data Protection Act. Leadership News, <https://leadership.ng/ndpc-dg-raises-committee-to-implement-data-protection-act/>.

²Section 44 of the NDPA

³Section 31 of the NDPA

⁴Article 4.1.2 of the NDPR

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consider the possibility of limiting the requirement to submit annual audit reports to data controllers and processors of major importance, streamlining the compliance process, and concentrating efforts on key data protection stakeholders.

B. Consent for Children:

Another key area that requires clarity is consent for children. Unlike the GDPR Implementation Framework which defines a child to be any person less than 13 years of age,⁵ the NDPA adopts the definition under the Child Rights Act which is 18 years.⁶ The NDPA suggests that a person 13 years and above, may be able to provide consent in certain circumstances subject to NDPC's regulation. In an increasingly digital world with children having unrestricted access to the internet and social media,⁷ it is important that NDPC makes adequate regulations regarding consent and the processing of children's data. Among other things, such regulation should provide for simplified policies and consent requests for children or their guardians, parental control rights, and instances where verifiable parental consent will be required (i.e. processing of sensitive data or further processing of data), target marketing to children, measures to ensure the security of children's data, and data minimization.⁸

C. The Application of Legitimate Interests as a Lawful Basis for Data Processing

The NDPA extends the lawful basis for data processing to include processing necessary for legitimate interests pursued by the data controller or data processor, or a third party to whom the data is disclosed.⁹

⁵Article 5.5 of the GDPR Implementation Framework

⁶Section 65 of the NDPA

⁷See Kang, C. (2022, December 7), Indiana sues TikTok for Security and Child Safety Violations, The New York Times, <https://www.nytimes.com/2022/12/07/technology/tiktok-lawsuit.html>

⁸See the United Kingdom's Age-Appropriate Design Code, 2020, and the United States Children's Online Privacy and Protection Act of 1998

⁹Section 25 (1) (v) of the NDPA

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This is in addition to the pre-existing basis of

- (a) consent,
- (b) compliance with a legal obligation,
- (c) protection of the vital interest of a data subject, or
- (d) third party and public interest.

While the NDPA does not define the phrase “legitimate interest”, it describes legitimate interest to exclude processing that

- (a) overrides the fundamental rights/interests of the data subject,
- (b) is incompatible with other lawful basis for processing outlined in the NDPA or
- (c) is done in a manner that the data subject did not reasonably envisage.¹⁰

Legitimate interest appears to be the most flexible basis for data processing allowing data controllers or processors to process data for commercial interests without express consent (i.e., marketing, product development, etc.). To prevent potential misuse or misinterpretation, further guidance from NDPC on the scope of legitimate interest is essential. We may in fact lend a leaf from the GDPR which has more extensive application, and interpretation of legitimate interest as a basis for data processing.¹¹

D. Complaints and Administrative Remedies

Efficient handling of complaints is vital for ensuring compliance with the NDPA. NDPC

is required to set up a unit for receiving, investigating, and resolving complaints lodged with them.¹² NDPC is also empowered to issue compliance orders or enforcement orders where it finds merit in a complaint.¹³ To ensure efficiency in providing administrative remedies to the aggrieved people, it is important for NDPC to establish the practice guidelines and procedures for filing complaints, conducting investigations, and issuing compliance or enforcement orders.

E. High-Risk Processing after Data Privacy Impact Assessment

The NDPA introduces the requirement for data controllers to consult with the NDPC before processing where a Data Privacy Impact Assessment (DPIA) indicates a high risk to data subjects' rights and freedoms (“**High-Risk Processing**”).¹⁴ However, the NDPA does not specify additional measures or considerations before high-Risk Processing can proceed or the expected action from NDPC in such cases. Clear guidelines on reporting High-Risk Processing, risk assessment, and additional measures or conditions to be put in place before High-Risk Processing can commence, will help prevent unnecessary delays where High-Risk Processing is inevitable.

F. Cross-Border Transfer of Personal Data

For cross-border transfer of personal data, data controllers and processors are required

¹⁰Section 25 (2) of the NDPA

¹¹Though new in Nigeria, the concept of legitimate interest has since been recognized under the European Union's General Data Protection Regulation. Hence, it may be helpful to learn from its application in the EU. See GDPR EU. (2022, July 29), What is the legitimate Interests lawful basis for data processing? at <https://www.gdpreu.org/the-regulation/key-concepts/legitimate-interest/>

¹²Section 46 (8) of the NDPA

¹³Section 47 of the NDPA

¹⁴Section 28 of the NDPA.

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to ensure that the recipient of the personal data is subject to a framework that affords an adequate level of protection of personal data in line with the NDPA. The adequacy of the data protection framework applicable to the recipient is to be assessed based on the parameters in the NDPA and guidelines to be issued by the NDPC.

In today's digital world cross-border data transfer is inevitable. Hence, it is pertinent for NDPC to review the whitelist of countries with adequate data protection frameworks, provide standard contractual clauses to ensure data protection in cross-border transfer, outline conditions and measures for cross-border transfers, define the circumstances that will require NDPC's specific confirmation on the adequacy of the recipient's data protection framework, and establish a clear channel and procedure for NDPC's confirmation.

Conclusion and Recommendation

Without doubt, the NDPA is built on the foundation laid by the NDPR; however, there are some notable deviations that necessitate the amendment or replacement of the NDPR and the NDPR implementation framework as discussed in this article. The revised NDPR need not include provisions already replicated in the NDPA rather, it should focus on providing clarity and addressing specific gaps in the NDPA to ensure the effective implementation of the NDPA.

The inauguration of GAID is a pivotal step

towards the effective implementation of the NDPA. As we await the recommendations and guidance from GAID, we recognize the crucial role they are poised to play in shaping the data protection landscape in Nigeria. The issues outlined above are some of the key challenges and complexities that GAID can address. With their expertise and diligent efforts, GAID will play a central role in ensuring that the NDPA is not only enacted but also effectively enforced.

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