

Privacy Please – New Legal Basis of Processing

Introduction

Over the past few weeks, our **#PrivacyPlease** series has given a detailed analysis on some of the key provisions in the Nigeria Data Protection Act (NDPA) 2023. So far, we have talked about the *Introduction of a “New Categorization of Data Controller/Processor & the Duty to Register as a Data Controller and Processor”* and *“Cross-Border Transfer of Personal Data”*.

Lawful basis simply means the justification or condition of processing of Personal Data. The NDPA provides six (6) lawful bases that data processors can rely on including consent, performance of a contract, protection of vital interest of a data subject¹ etc. These provisions are similar to what was provided in the Nigeria Data Protection Regulation (NDPR) 2019² except for the inclusion of legitimate interest. For this week, we will be focusing on the lawful bases for processing of personal data – Legitimate Interest and its impact on businesses.

Legitimate interest as a basis of processing personal data

Legitimate Interests is generally, regarded as one of the most flexible lawful bases for processing of personal data. Simply put, legitimate interest means any legally justifiable reason that a data processor or data controller may rely on to process personal data that has been disclosed to it and usually applies whenever an organisation uses personal data in a way that the data subject would reasonably expect.

The term ‘Legitimate Interests’ does not have a specific definition under the NDPA and can refer to almost any processing scenario, such as a data controller’s commercial interest or general societal benefits. Whilst it appears that legitimate interest can be used for a broad range of scenarios by data controllers and processors as it is quite flexible, there is usually a catch or limitation that controllers and processors must pay attention to. We will discuss this in further details below.

Legitimate Interest under Nigerian Privacy Law

As noted earlier, the NDPR did not include legitimate interest as a lawful basis for processing personal data. What this meant was that organizations whose processing activities did not fall within the listed lawful bases, could not process personal data, even where there was a fair and appropriate reason to do so, unless additional consent was obtained from the data subjects. The NDPA has now specifically included this as a lawful basis:

“Without prejudice to the principles set out in this Act, data processing shall be lawful, where the processing is necessary for the purposes of the legitimate interests pursued by the data controller or data processor, or by a third party to whom the data is disclosed”³.

However, there are some limitations⁴ to the application of legitimate interest as a lawful basis for processing, these include where:

- a) they override the fundamental rights, freedoms and the interests of the data subject;
- b) they are incompatible with other lawful basis of processing under the NDPA; or
- c) the data subject would not have a reasonable expectation that the personal data would be processed in the manner envisaged.

¹ Section 25 of the NDPA

² Article 2.2 of the NDPR

³ Section 25(1)(b)(v) NDPA

⁴ Section 25(2) (a-c) NDPA

Consequently, data controllers and processors who wish to rely on this basis for processing personal data must ensure that their processing activity does not fall under the limitations above.

Key considerations for businesses

Business organizations that process the personal data of data subjects in Nigeria can now rely on legitimate interest as a basis for processing personal data. However, before relying on these grounds, a data controller or processor must consider certain issues such as:

1. When can a business rely on Legitimate Interest?

Because the term legitimate interest is not specifically defined under the NDPA, there is a likelihood for businesses to want to apply it on a broad basis. However, the limitations highlighted above should serve as guide. It may also be worthwhile to apply the popular European Information Commissioner's Office's three-part tests which can be summarised as:

- Purpose: why do you want the data?
- Necessity: is the data processing necessary for the primary purpose?
- Balancing: do the individual's interests outweigh the legitimate interest?

2. What Counts as Legitimate Interest?

The provisions of the NDPA are still quite nascent and as such, we have not had a lot of opportunities to observe how certain provisions will play out in practice. However, we can expect that the Nigeria Data Protection Commission (NDPC) may issue guidelines on this, and also rely on the European Union General Data Protection Regulation (GDPR) practice, that legitimate interest can be when the processing takes place within a client relationship, to prevent fraud or to ensure the network and information security of your IT systems etc.

3. Are there any specific compliance obligations that apply to Legitimate Interest?

When relying on legitimate interest, your organization must ensure that it carefully and accurately records the legitimate interest that it is relying on, in processing the personal data of a data subject⁵. One of the best ways to ensure that your business stays on the right side of compliance, is conducting a **Legitimate Interest Assessment (LIA)**. An LIA is a sort of pseudo-Data Protection Impact Assessment (DPIA) that focuses on the specific context and circumstances of the processing to determine, affirm and record the businesses' legitimate interest regarding any processing activity.

4. Special Category of Data - Sensitive Data and Child Data.

Certain types of data such as Sensitive Personal Data and Children's Data enjoy a higher standard of protection and care must be taken when dealing with this type of data. It is usually understood that legitimate interest as a basis of processing is best applied to non-sensitive personal data.

Conclusion

Privacy professionals typically say that no basis of processing is more lawful or potent than another. However, it is quite clear that businesses would rather rely on legitimate interest for most of their processing activities as it is more suitable for the broad nature of their processing activities. We understand that data protection authorities around the world, try to limit the scope of this processing basis, we expect to see how the NDPC is likely to react. The inclusion of Legitimate Interest is a welcome development in Nigerian privacy laws, however we recommend that businesses carefully consider all the relevant issues before relying on it for their processing activities.

Aluko & Oyebo is a registered Data Protection Compliance Organisation (DCPO) and we are able to assist organisations facilitate their data protection compliance plans in line with the prevailing practices.

⁵ Section 28(4)(a), NDPA

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