

## Privacy Please – Third Party Data Processing Agreements and Notification Requirements – Series 5

### Introduction

Over the course of a business arrangement, organizations often need to share and transfer data to various third parties in order to carry out the transaction. Almost every business relies on third parties to process personal data. However, the transfer of personal data to a third-party may expose such data to certain privacy risks. The NDPA provides for certain obligations between data controllers, data processors, and other third-party processors and the need for a functional data processing agreement.

In this series of our #PrivacyPlease, we will analyze the relationship between data controllers and processors and what the provisions of the NDPA may mean for businesses.

### Data Controllers v. Data Processors (Third Party Processors)

A data controller means an individual, private or public entity, agency, or any other body who, alone or jointly with others, determines the purposes and means of processing of personal data. A data controller is the party that determines why and how the data obtained from a data subject is processed. On the other hand, the NDPA defines a data processor as an individual, private or public entity, or any other body that processes personal data on behalf of or at the direction of a data controller or another data processor.

Essentially, a data controller collects data directly from the data subject, it controls said data, and determines how it will be processed by the data processor. While a data processor processes any data it receives in line with directions given by the data controller. Similarly, a third-party processor may be assigned to process data on behalf of a data controller or processor.

### Legal Obligations of Data Controllers / Processors (Third party processors) under the NDPA

The NDPA provides several obligations that will apply where a data controller engages the services of a data processor or a data processor engages the services of another data processor (third-party processor)<sup>1</sup>. It requires that when a data controller or a data processor engages another data processor, the engaging entity shall ensure, that the engaged entity complies with the provisions of the NDPA. The parties must ensure that the third-party processor;

- a. complies with the principles and obligations set out in the NDPA as applicable to the data controller;
- b. assist the data controller or data processor, by using appropriate technical and organisational measures, for the fulfilment of the data controller's obligations to honour the rights of a data subject under the NDPA;
- c. provide the data controller or engaging data processor, where applicable, with information reasonably required to comply and demonstrate compliance with the NDPA; and
- d. notifies the data controller or engaging data processor, where applicable, when a new data processor is engaged.

These obligations also include a written agreement which is discussed in detail below.

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<sup>1</sup> Section 29 of the NDPA

## Data Processing Agreement (DPA)

A Data Processing Agreement (DPA) is a legally binding contract that states the rights and obligations of each party concerning the protection of personal data during the course of processing. Under Nigerian privacy laws, a DPA is an essential document, as the NDPR requires that data processing by a third-party should be governed by a written contract between the third-party and the data controller,<sup>2</sup> and third-party processors are required to process data only based on authorization expressly granted by the data controller through a written agreement.<sup>3</sup> The need for a DPA is also reiterated in the NDPA<sup>4</sup>. The DPA should typically include the subject matter, duration of the processing, purpose, types of personal data, categories of data subjects, technical and organizational measures, obligations, rights and jurisdiction of the third-party processors, etc.

### Key Considerations for Businesses:

Data controllers and processors should ensure that third parties to whom data is transferred to are strictly compliant with the NDPA. Some key considerations include:

- 1. Due Diligence on third-party data processors** – Businesses (data controllers or data processors) must ensure that they thoroughly evaluate the third-party data processor's level of compliance with the NDPA, NDPR, and its Implementation Framework, before engaging in any data sharing activity.
- 2. Notification of a new data processor** - The NDPA has introduced a notification requirement for third-party processors to notify data controllers and processors when another data processor is engaged. Third-party processors are now mandated to notify data controllers or engage data processors when a new data processor is engaged. Also, data controllers are required to publish a list of third-party processors<sup>5</sup>. Consequently, businesses must pay attention to this requirement and ensure that adequate measures are put in place to publish the list of third-party processors.
- 3. Prepare and review existing agreements** - Businesses should ensure that they execute DPA's with any third-party processor they wish to engage. Existing DPA's with third-party processors must also be reviewed to ensure compliance with the NDPA. Also, the new provision of notification should also be included in such agreements. The agreement should contain terms that comply with the NDPA and should clearly define the roles and responsibilities of both parties in relation to the processing and sharing of personal data.

### Conclusion

As noted earlier almost every organization that processes personal data will need to engage a third-party processor. DPA's are an essential requirement to comply with the NDPA when engaging a third-party processor. The NDPA has also clearly outlined obligations that must be complied with in respect to third party processing. Non-compliance with the NDPA can lead to hefty fines and reputational damage thus, we recommend that businesses stay compliant.

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<sup>2</sup> NDPR, Article 2.7

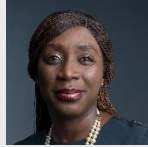
<sup>3</sup> Article 12.3 of the Implementation Framework

<sup>4</sup> Section 29(2) of the NDPA

<sup>5</sup> Article 12.2 of the Implementation Framework

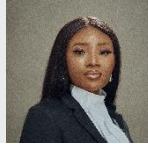
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