



*An Article*

# A SYNOPSIS OF THE PROVISIONS OF THE NIGERIA DATA PROTECTION REGULATIONS VIS-A-VIS THE GENERAL DATA PROTECTION REGULATION



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**Echoga Caleb**

Member, Technology Law Team  
caleb.echoga@omaplex.com.ng



## ➤ INTRODUCTION

The European Union passed the General Data Protection Regulation, (GDPR) on the 25<sup>th</sup> of May 2016 to serve as the cardinal legislation governing matters of data privacy and protection amongst her member countries.

Similarly, as part of its efforts at having a comprehensive data protection regime, the Nigeria Information Technology Development Agency enacted the Nigeria Data Protection Regulations, NDPR on the 25<sup>th</sup> of January, 2019.

The NDPR is modelled in the light of the GDPR, and indeed the data legislations of several countries including Chile, Japan, Kenya, South Korea, Brazil and Argentina are also patterned after the GDPR for its extensiveness, comprehensiveness and general efficacy.

However, in spite of the NDPR following in the steps of the provisions of the GDPR, there nonetheless exist a number of divergences between the legislations. Indeed, it is these divergences that this article seeks to consider with a view to provide a guide on possible areas of development of the Nigerian legislation.

## ➤ A COMPARISM OF THE LEGISLATIONS

### Scope as to Entities

The GDPR and the NDPR make provisions as to the protection of privacy rights of natural and living persons. Both legislations expressly refer to only data pertaining to living persons and make no mention of deceased individuals.<sup>1</sup> This is suggestive of an indication that both legislations were not intended to, as matter of general speaking, cover matters relating to dead persons.

A further area of convergence is the definition both legislations assign to Data Controllers.

It is important to note that there is a consensus between the legislations that a Data Controller is essentially an entity which controls data. As such, whilst language in definition may differ, there nonetheless reflect the same meaning.

In its definition of a Data Controller, the GDPR defines the concept as: *“the natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data.”*<sup>2</sup>

The NDPR on its part defines the concept as: *“a person who either alone, jointly with other persons or in common with other persons or a statutory body determines the purposes for and the manner in which Personal Data is processed or is to be processed.”*

### Key Definitions

There are a number of definitions akin to both legislations as follows:

- i. **Personal Data:** Both the GDPR and the NDPR in their definitions regard personal data as identifiers by which a person can be identified directly or indirectly such as an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic,

<sup>1</sup> Art. 3 GDPR, 2016 and Art. 1.1 NDPR, 2019

<sup>2</sup> Article 4 GDPR



mental and economic factors etcetera.<sup>3</sup>

- ii. *Definition of A Child:* Both legislations do not define who a child is. They nonetheless place a duty on data processors to ensure that in the collection of data, they take practical steps to ensure that any demand for personal information must be in an easily intelligible and clear language for a child to comprehend.<sup>4</sup>

### Scope as to Material Application

The NDPR and GDPR both provide for what the processing of data entails in the exact same terms. The legislations particularly provide that processing involves dealing with data by any means whether automated or not. The provisions of the Article of the NDPR which is *in pari materia* with those of GDPR, explain processing to mean:

*“any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction.”*

### A CONTRAST OF THE LEGISLATIONS

There exist a number of discrepancies between the legislations. The most notable and worthy of consideration in the scope of this paper are as follows:

#### Scope as to Territorial Application

The GDPR's scope of application on issues of data processing is wide. In view of its territorial scope, it applies to all organisations (Data Controllers) established in the European Union (EU) who carry out processing activities whether or not such processing is done in the EU or not. Outside the EU, the GDPR still applies to any processing activity that has European entities as its data subject.

The NDPR in contrast is relatively limited in its scope. By the provisions of the NDPR, the law only applies to Nigerian citizens resident within and outside the country. As such, on the face of the legislation it seems to suggest that it does not extend to Data Controllers outside Nigeria but processing the data of Nigerian subjects.

#### Processing Activities

The GDPR does not apply to processing activities carried out for personal 'household' purposes that are not of a commercial/professional nature.<sup>5</sup> For example, where a person wilfully consents to his personal data (which may be information as to his address and religious beliefs) being processed by a social networking site he has elected to join.

The NDPR is silent in this regard. It makes no provisions as to whether data processed for household activities is subject to the law and the attendant obligations therein.<sup>6</sup> Indeed, it is observed that this absence of certainty is burdensome as data processors processing their own personal data for non-commercial uses would be bound by the liabilities that may arise from failure to adhere to the law.

<sup>3</sup> Art. 4.1 GDPR, 2016 and Art. 1.3 NDPR, 2019

<sup>4</sup> Art. 6 GDPR, 2016 and Art. 3.1(1) NDPR, 2019

<sup>5</sup> Art. 9(2) of the GDPR, 2016.



The GDPR also provides for a higher standard in relation to the processing of highly personal and sensitive data by prohibiting same<sup>7</sup>. In this regard, **Article 9(1) of the GDPR** provides thus:

*“Processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person’s sex life or sexual orientation shall be prohibited.”*

The NDPR makes no distinction as to what constitutes sensitive personal data requiring a higher standard of protection. The NDPR only makes provisions as to the protection of personal data in line with the global principles of lawfulness, legitimacy, accuracy etc.<sup>8</sup>

### Duty of Care Obligations

As part of its aims to safeguard the data of Data Subjects and reduce harm, (that may be occasioned on them in the case of a breach) the GDPR mandates Data Controllers to promptly notify data subject of a breach.<sup>9</sup>

In contrast, the NDPR imposes no obligation on Data Controllers to so notify Data Subjects of breaches. It is observed here, that same is problematic as it does not create a sense of wholesome protection which the GDPR provides in this regard.

## ➤ CONCLUSION AND RECOMMENDATION

The NDPR is a welcome development in view of Nigeria’s conscious efforts at being awakened to its responsibilities as regards issues of data protection. Nigeria must be applauded for imbibing universal best practices as they relate to the various principles of data protection as evidenced by the similarities existing between the NDPR and the GDPR.

However, in order to further improve on the efficacy of the legislation, a number of disparities as to efficacy have been identified between the GDPR and the NDPR in the course of this discuss. It is recommended that the Legislature and other relevant government institution take steps to amend the NDPR accordingly.

**INTERN COUNTRIBUTORS:**  
WAREKUROMO OLUWATOMISIN  
OGUNPITAN JOLADE  
UMEDINKA IFEOMA  
AJAYI FOLAJIMI

<sup>7</sup> Possible exceptions however lie in respect of court proceedings, to process the data of a person who cannot legally give consent etc. See generally Article 9(2) of the GDPR, 2016.

<sup>8</sup> Art. 2(1) GDPR, 2016.

<sup>9</sup> Art. 33 GDPR, 2016