



REPUBLIC OF KENYA
MINISTRY OF ICT, INNOVATION AND YOUTH AFFAIRS

REGULATORY IMPACT STATEMENT

ON

**THE DATA PROTECTION (REGISTRATION OF DATA CONTROLLERS AND DATA
PROCESSORS) REGULATIONS, 2021**

This Regulatory Impact Assessment (RIA) has been prepared by the Office of the Data Protection Commissioner pursuant to Section 6 and 7 of the Statutory Instruments Act (No. 23 of 2013)

May, 2021.

Table of Contents

1. BACKGROUND 3

2. REGULATORY IMPACT ASSESSMENT 4

3. THE REGULATIONS..... 5

4. PURPOSE, OBJECTS AND OVERVIEW OF PROPOSED REGULATIONS..... 6

5. CONSULTATIONS ON THE DRAFT INSTRUMENT. 7

6. IMPACT STATEMENT 9

 6.2. Impact on Fundamental Rights and Freedoms, Environment and administrative actions 9

 6.3. Economic Impact on the Private Sector 9

 6.4. Impact on the Public Sector10

7. OPTIONS TO REGULATIONS11

 (a) Policy guidelines.....11

 (b) Self-regulation.....11

 (c) Co-regulation11

 (d) Procedural guidance notes:.....11

8. EVALUATING THE OPTIONS12

9. COST BENEFITS MODELLING.....13

 9.4 MODEL13

 9.5 Table 1.....14

10 CONCLUSION.....17

11 RECOMMENDATION.....17

For Stakeholder Views

1. BACKGROUND

- 1.1. The right to privacy is enshrined under Article 31 of the Constitution of Kenya 2010. The Data Protection Act No. 24 of 2019, enacted on 24th September 2019, gives effect to some aspects of the right to privacy. More particularly, the Act seeks to regulate the processing of personal data, protect the privacy of individuals as well as to establishing the legal and institutional mechanisms to protect the processing of personal data.
- 1.2. The enactment of this Act was a big milestone in appreciating the need to protect personal data in the age of digital evolution. Further, there have been concerted efforts by governments all over the world to regulate the processing activities that rely on personal data purposely to ensure safeguard privacy of their citizens.
- 1.3. To ensure full operationalization of the Data Protection Act, on 15th January 2021, the Cabinet Secretary in the Ministry ICT, Innovation and Youth Affairs established the Taskforce on Development of the Data Protection Regulations, to among others, develop the necessary draft regulations under this Act. The Taskforce has generated the draft Regulations to implement various provisions of the Act and subjected them for public input.

2. REGULATORY IMPACT ASSESSMENT

2.1 A regulatory impact assessment (RIA) is an evaluation conducted before a new regulation is introduced. It provides a detailed and systematic appraisal of the potential impact of a new regulation in order to assess whether the regulation is likely to achieve the desired objectives. RIAs promote evidence-based policy-making as new regulations typically lead to numerous impacts that are often difficult to foresee.

2.2 The central purpose of RIA is to ensure that regulation is welfare-enhancing from the societal viewpoint, in that, the benefits will surpass costs. RIA therefore has objectives of improving understanding of the real-world impact of regulatory action, including both the benefits and the costs of action, integrating multiple policy objectives, improving transparency and consultation and enhancing governmental accountability. The conduct of RIA involves a range of methods aimed at systematically assessing the negative and positive impacts of proposed and existing regulations.

2.3 The Statutory Instruments Act, No. 23 of 2013 provides the legal framework for the conduct of RIA in Kenya. Particularly, Sections 6 and 7 of this Act require that if a proposed statutory instrument is likely to impose significant costs on the community or a part of the community, the regulation-making authority shall, prior to making the statutory instrument, prepare a regulatory impact statement about the instrument. Additionally, the Statutory Instruments Act sets out certain key elements that must be contained in the RIA. These include:

- (a) a statement of the objectives of the proposed legislation and the reasons;
- (b) a statement explaining the effect of the proposed legislation;
- (c) a statement of other practicable means of achieving those objectives, including other regulatory as well as non-regulatory options
- (d) an assessment of the costs and benefits of the proposed statutory rule and of any other practicable means of achieving the same objectives; and
- (e) the reasons why the other means are not appropriate.

2.4 This Regulatory Impact Statement has been made to fulfil the requirement of section 6 of the Statutory Instruments Act, 2013.

3. THE REGULATIONS

3.1 The Act delegates rule making powers to both the Cabinet Secretary and the Data Commissioner. Pursuant to the Act, the following three draft statutory instrument have been made, namely:

- (a) The Data Protection (General) Regulations 2021,
- (b) The Data Protection (Registration of Data Controllers and Processors) Regulations, 2021; and
- (c) The Data Protection (Compliance and Enforcement) Regulations 2021.

3.2 The draft Data Protection (General) Regulations 2020 and the Data Protection (Compliance and Enforcement) Regulations 2021 contain regulatory matters that do not impose any significant cost on the community or a part of the community and fall under the matters where regulatory impact statements may be unnecessary outlined under section 9 of the Statutory Instrument Act.

3.3 However, the Data Protection (Registration of Data Controllers and Data Processors) Regulations, 2021 that seeks to provide a framework for the registration of Data Controllers and Data Processors is likely to result in the imposition of a significant cost on the private and the public sector as contemplated under section 6 of the Statutory Instrument Act.

3.4 An impact assessment has been made specifically on this proposed instrument.

4. PURPOSE, OBJECTS AND OVERVIEW OF PROPOSED REGULATIONS

- 4.1 The draft Data Protection (Registration of Data Controllers and Data Processors) Regulations, 2021 seek to provide a framework through which the registration processes will be carried out as required by the Data Protection Act.
- 4.2 Section 18 (2) of the Data Protection Act requires the Data Commissioner to prescribe thresholds for mandatory registration of the data controllers and data processors. This provides the rule making authority for the Data Commissioner to make these regulations.
- 4.3 By way of an overview, the draft Regulations provides for the procedure for registration of data controllers and data processors in compliance with section 18 of the Data Protection Act. Further, they provide the modality for the determination of data controllers and data processors required to register, the manner for lodging the application for registration, verification, renewal and cancellation of the registration by the Office of the Data Commissioner.
- 4.4 In addition, the Regulations provide for the fees chargeable by the Office of the Data Commissioner in executing the registration of the data controller and data processor and further make certain exemption of names sectors from mandatory registration. The Regulations require the maintaining of a register of registered data controllers and data processors.
- 4.5 Lastly, the draft regulations provide for the processes of applying for a certified copy of the registration certificate as well as the replacement of a lost certificate of registration. Various offences for failure of compliance with the various provisions are outlined.

5. CONSULTATIONS ON THE DRAFT INSTRUMENT.

- 5.1 Public consultation is required as a constitutional prerogative in making any statutory instrument. It avails all the interested or affected parties with an opportunity to present their views. This because the regulations ought to be developed in an open and transparent fashion, with appropriate procedures for effective and timely input from interested parties such as affected businesses, interest groups and other government ministries, departments and agencies.
- 5.2 With regard to the subsidiary legislation making process, the Statutory Instruments Act requires that the regulatory making authority shall make consultations before making statutory instruments (Regulations), and in particular, where the proposed regulations are likely to have a direct or a substantial indirect effect on business or restrict competition.
- 5.3 The Statutory Instrument Act further provides that in determining whether any consultation that was undertaken is appropriate, the regulation making authority shall have regard to all relevant matters, including the extent to which the consultation: drew on the knowledge of persons having expertise in fields relevant to the proposed statutory instrument; and ensured that persons likely to be affected by the proposed statutory instrument had an adequate opportunity to comment on its proposed content.
- 5.4 The persons to be consulted are alerted of the draft instrument either directly or by advertisement and invited to make submissions by a specified date, or be invited to participate in public hearings concerning the proposed instrument.
- 5.5 In line with section 5 of the Statutory Instruments Act, the Taskforce that generated the draft Regulation identified and engaged key stakeholders and members of the public for consultations. These stakeholders included professional and specialist institutions and the general public who were directly or indirectly likely to be affected by the proposed statutory instruments.

5.6 Some of the institutions consulted include Telecommunication Companies, Mobile Lending Applications, Schools and Hospitals, Civil registration entities, Insurance and Pension Management Companies, Financial Sector Players, Statutory Regulators, ICT professional, and data protection enthusiasts.

5.7 Taking into consideration the prevailing COVID-19 global pandemic, and the attendant health protocols, the following methodology was adopted for public consultations:

- (a) A draft of the Regulation was published on the Ministry's website;
- (b) A call for comment was published in newspapers of national circulation inviting submissions and the same was circulated through social media platforms;
- (c) Direct letters and emails were written to select stakeholders inviting them to make their submissions on the draft Regulation within the outlined period;
- (d) A supplement of advertisement extending the period for making submission was made and the same was circulated through other electronic media and social platforms;
- (e) Extensive virtual/online meetings were held with select stakeholders and members of the public.

5.8 In this regard therefore, it is summed that the proposed Regulation has been exposed through an extensive public participation program and attains the public participation threshold as required by the Statutory Instrument Act. Annexed to this Statement is a detail public participation report including an analysis of the comments received.

6. IMPACT STATEMENT

6.1. The impact assessment considers the likely impact of the draft regulations including the general positive or negative externalities, impact on the fundamental rights of the people, the impact on the economy and the public sector, economic impact on individuals and environmental considerations. The summary of the key findings is as follows:

6.2. Impact on Fundamental Rights and Freedoms, Environment and administrative actions

- (a) The draft Regulation is not expected to have a negative impact on fundamental rights of persons or institutions that are subject to it. The Regulations seeks to ensure actualization of the Bill of Rights, particularly on the right to privacy under Article 31 of the Constitution.
- (b) The draft Regulation is not expected to have any possible negative impact on the environment or environmental rights of the people.
- (c) The draft Regulation does not contain any provisions that are likely to impair or prejudice the right to any fair administrative action of an individual.

6.3. Economic Impact on the Private Sector

- (a) The Regulation imposes additional costs on the private sector by requiring registration and the renew fees in registering as data controllers or data processors. The fees payable in this account are set out under the schedule to the draft regulation.
- (b) However, despite these additional costs, it is expected the registration of data controllers and data processors would motivate the legal compliance of all entities that are processing personal data. This will consequently enhance the business management aspect of processing personal data by behooving a better management and storage of personal data, leading to better business practices.

- (c) The requirement to register, which attracts this cost, would equally enhance customer security given that all persons processing personal data would register. As such, the requirement to display the registration certificate will instill faith in data subjects. This would ensure personal data of citizens is handled in accordance with the Law.

6.4. Impact on the Public Sector

- (a) The Regulation imposes additional costs on the public sector by requiring entities within the public sector to register either as data controllers or data processors and this registration and the renewal of registration attracts fees set out under the schedule. These costs are additional compliance costs that would be borne by the public sector.
- (b) However, the anticipated benefit for the public sector is assurance to the general public and business community that the public sector entities have committed to handling personal data of data subjects in compliance with the Data Protection Act specifically in adherence to the principles of data protection.
- (c) A positive externality will flow from this imposition to extent that it would directly create demand for more business, hence contributing to the growth of the gross domestic product (GDP). Additionally, simplified provisions of registration reduce the compliance costs.

7. OPTIONS TO REGULATIONS

7.1. This Part considers the question whether the proposed regulation is the best form of government action. The Statutory Instruments Act requires a regulator to carry out, early in the regulatory process, an informed comparison of a variety of regulatory and non-regulatory policy measures, considering relevant issues such as costs, benefits, distributional effects and administrative requirements. Thus, the regulation should be the last resort in realizing policy objectives.

7.2. Certainly, there are alternatives to these regulations. For the draft regulation is not the only means of realizing policy objectives intended in overseeing the conduct of data controllers and data processors. There alternatives that could come in handy in dealing with certain aspects of personal data protection that were considered include:

- (a) **Policy guidelines:** In this option, the Government ensures that policies decided are communicated to the persons to apply them and ensure they are adhered to without making any regulations.
- (b) **Self-regulation:** This is where the industry regulates itself with minimal role of Government and norms from a regulator. Various actors in the sector set the standards and the need for prescriptive legislation is lessened.
- (c) **Co-regulation:** In this option, the Government deals with some aspects of regulating a sector while other aspects are left to be handled by players in the industry, in this case the actors in the data protection ecosystem;
- (d) **Procedural guidance notes:** These is where guidance is issued by a government regulator to guide those tasked with making decision in the data protection ecosystem, such as those who license data processors to consider certain factors in granting or refusing permit. The need for bespoke regulation is dispensed.

8. EVALUATING THE OPTIONS

8.1 This part of the impact assessment involved evaluating the costs and benefits on implementing the regulations based on the policy options outlined above.

8.2 Generally, a policy change is a Pareto improvement if upon implementing the requirement on the registration of data controllers or data processors, they are better off and no one is worse off after the policy change. It is noted from general practice that some policy changes benefit some at the cost of others. However, an exchange could have those who benefit compensate those who suffer, and thus make everyone better off.

8.3 Secondly, a policy change is a potential Pareto improvement if an exchange could be made among data controllers or data processors that would make it a Pareto improvement, even if that exchange never occurs.

8.4 In view of this context, a policy change is considered desirable if it is a real or potential Pareto improvement. This is determined by accumulating the direct and indirect benefits and the attendant costs.

8.5 Based on this philosophical modeling, the four policy options present strengths and weaknesses on their application towards implementation of the Act on the aspects under consideration in the draft regulation.

8.6 One, issuing policy guidelines without binding regulations would certainly occasion a suboptimal result because of limited options for enforcement.

8.7 Second, the Self-regulation option would require a body that would set standards for the persons processing personal data. This option would still require some players in the sector might adopt certain regulations that would serve as a guide and to be employed for self-regulation and that. The Self-regulation option would work well in a mature sector, which is not the case with the data protection in Kenya.

8.8 Thirdly, the co-regulation option may not be effective since data protection is an emerging concept that needs clear guidelines in terms of regulations.

8.9 Lastly, providing procedural guidance note option is a practical option could be equally effective. However, these options put on a scale and considered, it is concluded that having prescriptive regulations to guide the registration of data controllers and data processors is the most effective option for the purpose of implementing section 18(2) of the Data Protection Act.

9. COST BENEFITS MODELLING

9.1 As an explanatory note, a data controller or data processor who commits an offence under this Act for which no specific penalty is provided or who otherwise contravenes this Act shall, on conviction, be liable to a fine not exceeding three million shillings or to an imprisonment term not exceeding ten years, or to both

9.2 The regulations provide that the Data Commissioner make an order for the payment by a data controller or data processor, of a sum not exceeding two-thirds of the maximum fine that would otherwise have been imposed upon conviction;

9.3 From the above provisions of the Data Protection Act of 2019, the Penalties for violating a provision of the Act or attendant Regulations may be up to Kshs. 3,000,000. For purposes of this analysis, this will be the benefit associated with compliance with the Data Protection Act. Similarly, the Regulations propose payable fees for registrations calculated depending on three variables.

9.4 MODEL:

Net Benefit is derived from total Cost deducted from Benefit (Net Benefit= Benefit-Cost)

If Benefits outweighs Costs, it is recommended to proceed for implementation
(Benefits \geq Costs = Proceed)

9.5 Table 1 illustrates Benefits and Costs attached to the registration of Data Controllers and Data Processors.

Table 1: Cost -benefit Analysis

S/N	Pay Determinants	Pay(Cost) (Kshs.)	Maximum Penalty (Benefit)	Maximum Net Benefit
	Number of Employees			
	for organization with 1-9 employees	2,000	3,000,000	2,998,000
	for organization with 10-49 employees	6,000	3,000,000	2,994,000
	or organization with 50-99 employee	10,000	3,000,000	2,990,000
	for organization with more than 99 employees	15,000	3,000,000	2,985,000
	Annual Turnover			
	if organization has less than KES 2,000,000 annual turnover	2,000	3,000,000	2,998,000
	if organization has between KES 2,000,001 and 5,000,000 annual turnover	6,000	3,000,000	2,994,000
	if organization has between KES 5,000,001- 10,000,000 annual turnover	10,000	3,000,000	2,990,000

S/N	Pay Determinants	Pay(Cost) (Kshs.)	Maximum Penalty (Benefit)	Maximum Net Benefit
	if organization has between KES 10,000,001-50,000,000 annual turnover	15,000	3,000,000	2,985,000
	KES 25,000 for organization with more than KES 50,000,000 annual turnover	20,000	3,000,000	2,980,000
	Risk of Exposure			
	Personal Data intensive sectors	25,000	3,000,000	2,975,000

9.6 The analysis further indicates that small enterprises stand to gain a lot from the draft regulations. The regulations exempt data controllers and data processors with less than 10 employees and a turnover/revenue less than KES 5 Million from registration. This is expected to create a positive impact in terms of providing incentives to the small enterprises.

9.7 It is also expected that the net benefit will further increase even when data controllers and data processors are making renewal of their registrations. The cost of renewal is lower than the cost of registration. In addition, there are other numerous non-monetary benefits that registered data controllers and processors stand to gain including improving their reputation and trust with clients and funders.

9.8 It is noted that the Benefits as presented by (Maximum Penalty) which is the benefit that Data Controllers and Data Processors will realize by ensuring compliance with the Data Protection Regulations is Positive (greater than Kshs. 2,900,000 Payable Costs determined by the 3 categories). The Policy in this case, the Data Protection Registration of Data

Controllers and Data Processors Regulations will positively impact on Data Controllers or Processors directly or indirectly.

9.9 Overall, it is expected that newer industries in the data protection ecosystem will be created thus creating jobs and improving the growth of Kenyan economy. Finally, the regulations are expected to boost the international trade because trading partners are expecting countries to adopt data protection measures.

For Stakeholder Views

10 CONCLUSION

- 10.1 A conclusion is made that the proposed Regulations are necessary in the operationalization of the Data Protection Act, 2019 and is therefore the preferred option.
- 10.2 Although it is not capable of providing monetary cost of the other options, it is clear that the benefits and impact of developing these Regulations by far outweigh any estimated cost of its implementation. The other two options have little or no impact in addressing the problem.
- 10.3 It also apparent that the draft regulations are made in accordance with the Data Protection Act and there have been compliance with the provisions of the Statutory Instrument's Act in making of the draft regulation.
- 10.4 The proposed Data Protection (Registration of Data Controllers and Data Processors) Regulation, 2021, facilitates the implementation of the Data Protection Act, 2019 and is the most viable regulatory option.

11 RECOMMENDATION

It is recommended that the proposed Statutory Instrument, namely the draft Data Protection (Registration of Data Controllers and Data Processors) Regulation, 2021 be adopted as proposed and published.

MAY 2021