GUIDE - COMPLIANCE WITH THE DATA PROTECTION ACT 2019: HOW WE CAN HELP YOU
Contents

04 Foreword
06 Introduction to the DPA
08 Our Approach to Compliance with the DPA
12 Our Firm
13 Our Footprint
14 Key Contacts
Foreword


The DPA is evidence of Kenya’s commitment to being one of the continent’s leaders in promoting innovation. It recognises the fundamental importance placed on protecting the personal data of individuals.

This guide has been compiled to assist clients to understand the requirements of the DPA and to outline our services in relation to the DPA.

Clients are encouraged to review their current data processing activities and processes and ensure that their systems comply with the new data protection regime.

If you would like to discuss the DPA or any other Kenyan data privacy matter, please contact John Syekoi, Ariana Issaia, any member of our IP and Technology Practice in Kenya, or your normal relationship partner at Bowmans Kenya.

The contents of this guide are for reference only and should not be considered to be a substitute for detailed legal advice. It is correct as at February 2020.
Introduction to the DPA

Does the DPA apply to me?

The DPA marks a significant step forward for Kenya and brings it in line with well-established international standards.

The DPA applies to all data controllers (data controllers determine the processes and means of processing personal data) and data processors (data processors are responsible for processing data on behalf of data controllers) involving the personal data of individuals (data subjects) located in Kenya.

It applies to resident and non-resident companies and individuals. The scope of the DPA is very wide and most businesses will be impacted by it.

What are some of the key provisions that I should be aware of?

The DPA has introduced certain obligations on data controllers and data processors. Companies will need to ensure that they have proper processes in place to ensure that they comply with the DPA.

Some of the salient provisions of the DPA are outlined below.

Consent required from the data subject

The DPA introduces a requirement for the data controller or data processor to obtain express, unequivocal, free, specific and informed consent prior to the processing of personal data.

Additionally, data subjects have the right to be informed of the use to which their personal data will be put and to object to the processing of their data.

It will be important for companies to review the manner in which they obtain consent from individuals.

Sensitive personal data

The definition of ‘sensitive personal data’ has been widened to include property details, marital status and family details, including names of the person’s children, parents, spouse or spouses.

As sensitive personal data is afforded a higher level of protection, the information collected from data subjects and the manner in which such information is used, should be reviewed.

The Office of the Data Commissioner

The DPA introduces a requirement for mandatory registration of data controllers and data processors with the Data Commissioner. The DPA further specifies the information required from the data controller and data processor in the application for registration.

Transfer of data outside Kenya

The DPA introduces provisions prohibiting the transfer of data outside of Kenya without adequate data protection safeguards in place and in some circumstances with the consent from the data subject.

Principles of data protection

The DPA has set out eight core data protection principles that all data controllers and data processors must adhere to. Organisations must ensure that their standard operating procedures uphold these principles in relation to the collection, processing, storage and use of personal data.

Personal data relating to children

The DPA requires that persons processing the personal data of children take steps to incorporate appropriate mechanisms for age verification and consent.

A data audit may enable companies to determine whether or not specific actions should be implemented prior to the processing of any personal data relating to children.

Breach notification

The DPA prescribes the procedure to be followed in the event of a data breach.

There are detailed requirements as to what the notice to the Data Commissioner and data subject must entail, including where applicable, the identity of the person who may have accessed or acquired the personal data and the timelines within which such breach notification must be provided.

Health data

There are new provisions that seek to protect the processing of health data and impose restrictions on who may collect such data.

Companies collecting health data, such as medical research companies and wellness clinics, must ensure that the data is collected and processed in accordance with the DPA.

Processing of this kind of data is specifically restricted to healthcare providers or to people subject to the obligation of professional secrecy.

Sanctions under the DPA

The DPA has imposed stringent sanctions for any person who contravenes the provisions of the DPA. For example, a person who contravenes the DPA may be liable, upon conviction, to a fine of KES 3 million or to imprisonment for a term not exceeding 10 years or both.
Our Approach to Compliance with the DPA

We anticipate certain difficulties with the regulatory regime until the Office of the Data Commissioner is established and the DPA is fully implemented.

We propose that persons and entities who fall under the provisions of the DPA, adopt a pragmatic, simple and commercial approach to compliance.

In the first instance, businesses should review and become familiar with their current data processing activities and processes – the role and security of data is increasingly important. The commercial interests of a company should not be hampered. However, it will be important to navigate the regulatory regime alongside these commercial interests.

Our DPA support options

We do not adopt a one-size fits all model. Data protection compliance should be bespoke to each company – different issues arise from different activities and sectors.

We recommend having an initial call (for which there would be no charge) to discuss your needs so that we can put together an appropriate support package for you.

A FEW OF OUR SERVICES ARE SUMMARISED BELOW.

DPA compliance audits
We provide data audit services to assist you in identifying the information you need to assess compliance with the DPA.

We perform an analysis to identify where changes need to be made and advise on the different approaches you could take to satisfy the DPA requirements.

Assistance in preparing your DPA programme
We can assist you to analyse your business to identify which areas you would need to change in order to be DPA compliant.

Review of your DPA programme
If you are preparing a comprehensive DPA programme in-house, we can carry out an assessment to identify if there are any areas that do not appear to have been considered, and advise on whether your proposed solutions are DPA compliant.

Retainer to answer ad hoc queries on the DPA
You may have your DPA compliance programme fully resourced in-house, but want to put in place support to advise on difficult ad hoc questions that are likely to arise along the way.

We can put in place a DPA helpline arrangement to provide this additional support as and when required.

Assistance with data breaches
Under the DPA, there is a mandatory data breach notification procedure. We can help you to prepare a response and notice to the Data Commissioner and to any affected data subject (if notice is required under the DPA).

Disputes and investigations
Data protection and privacy issues are increasingly the subject of litigation. Our expert dispute resolution team provides practical and tactical advice to address any restrictions or challenges that may be imposed.

Document analysis and use of artificial intelligence
Our artificial intelligence (AI) software, Kira, has been uniquely trained on data protection matters pertinent to Kenya. Using machine learning models our instance of Kira is able to identify, extract and group relevant provisions from contracts, materially accelerating and improving the accuracy of reviews, increasing efficiencies and reducing risk. Our lawyers then analyse those outputs together with every document and provide solution-driven, technical, legally-considered contextual and strategic advice.

One-off projects to support certain parts of DPA programmes
You may source the majority of your DPA programme internally, but know that there are areas where extra support may be required. For instance:

• You may need assistance with reviewing your consent processes in terms of how consent is obtained, the information provided, and the availability of withdrawal rights. We can review the relevant materials and provide a report on the steps you would need to take to be DPA compliant.

• We can advise on whether you need a data protection officer under the DPA and on how best to introduce this role into your organisation.

• We can assist with your application to the Data Commissioner.

• We can advise on the changes necessary to your contracts from a legal and commercial perspective (where you or your counterparty is a data processor).
Other services that we offer

We advise clients from various industries and sectors. These include banks, insurance and financial services institutions, private equity funds, manufacturing and services companies, technology and telecommunications companies, energy and resource companies, infrastructure, transport and construction companies, property development companies, agriculture and farming concerns, hotels, tourism and conservation organisations, local businesses, companies listed on the Nairobi Securities Exchange, Government and non-governmental organisations as well as private individuals. We also work with many international law firms and other consultants.

Aside from assisting our clients with their DPA compliance, we offer legal services in respect of a myriad of specialist areas and sectors including:

- Technology, media and telecommunications
- Company and commercial
- Mergers and acquisitions
- Joint ventures and business formation
- Litigation and alternative dispute resolution
- Public sector and privatisation transactions
- Large scale project finance transactions
- Insolvency and receivership
- Real Estate development and conveyancing
- Corporate re-structuring
- Intellectual property protection
- Environmental law
- Competition and regulatory law
- Equity and debt capital markets and securities
- Banking, insurance and financial services
- Legal due diligence and forensic investigations
- Infrastructure and PPP
- Conservation and tourism development law
- Tax Employment and benefits
- Oil and gas
Our Firm

We help our clients overcome legal complexity and unlock opportunity in Africa.

Our track record of providing specialist legal services in the fields of corporate law, banking and finance law and dispute resolution, spans over a century.

With nine offices in seven African countries and over 400 specialist lawyers, we draw on our unique knowledge of the business and socio-political environment to advise clients on a wide range of legal issues.

Everywhere we work, we offer clients a service that uniquely blends expertise in the law, knowledge of the local market and an understanding of their businesses. Our aim is to assist them to achieve their objectives as smoothly and efficiently as possible while minimising the legal and regulatory risks.

Our clients include corporates, multinationals and state-owned enterprises across a range of industry sectors as well as financial institutions and governments.

Our expertise is frequently recognised by independent research organisations. We received awards in three out of four categories at the DealMakers East Africa Awards for 2019: top legal adviser in the M&A Category for both deal flow and deal value, and advised on the Deal of the Year. In the DealMakers South Africa Awards for 2019, we were placed third for deal value in the M&A Category and advised on both the Deal of the Year and the BEE Deal of the Year.

We are present in seven countries in Africa: Kenya (Nairobi), Malawi (Lilongwe), Mauritius (Moka), South Africa (Cape Town, Durban, Johannesburg), Tanzania (Dar es Salaam), Uganda (Kampala) and Zambia (Lusaka).

We work closely with our alliance firms in Ethiopia (Aman Assefa & Associates Law Office) and Nigeria (Udo Udoma & Belo-Osagie). These are two of the leading corporate and commercial law firms in their jurisdictions.

We have developed a best friend relationship with one of Mozambique’s strongest law firms (Taciana Peão Lopes & Advogados Associados) and regularly work with leading law firms in other countries such as Angola, Botswana, Ghana, Ivory Coast, Namibia, Rwanda, South Sudan and Zimbabwe.

We have a comprehensive database of all the law firms we work with in the rest of Africa covering such countries as Algeria, Egypt, Morocco and French-speaking West Africa.

We are representatives of Lex Mundi, a global association with more than 160 independent law firms in all the major centres across the globe. Lex Mundi gives us the ability to connect our clients with the best law firms in each of the countries represented.
Key Contacts

JOHN SYKEI
Partner
IP & Technology
Nairobi, Kenya
T: +254 20 289 9000
E: john.syekei@bowmanslaw.com

ARIANA ISSAIAS
Senior Lawyer
IP & Technology
Nairobi, Kenya
T: +254 20 289 9000
E: ariana.issaias@bowmanslaw.com
Cape Town, South Africa
T: +27 21 480 7800
E: info-cpt@bowmanslaw.com

Dar es Salaam, Tanzania
T: +255 76 898 8640
E: info-tz@bowmanslaw.com

Durban, South Africa
T: +27 31 109 1150
E: info-dbn@bowmanslaw.com

Johannesburg, South Africa
T: +27 11 669 9000
E: info-jhb@bowmanslaw.com

Kampala, Uganda
T: +256 41 425 4540
E: info-ug@bowmanslaw.com

Lilongwe, Malawi
T: +265 99 031 8152
E: info-ml@bowmanslaw.com

Lusaka, Zambia
T: +260 96 227 5329
E: info-zb@bowmanslaw.com

Moka, Mauritius
T: +230 52 98 01 00
E: info-ma@bowmanslaw.com

Nairobi, Kenya
T: +254 20 289 9000
E: info-ke@bowmanslaw.com

Follow us on Twitter:
@Bowmans_Law

www.bowmanslaw.com

Alliance Firms:

Aman Assefa & Associates Law Office, Addis Ababa, Ethiopia
T: +251 11 470 2868
E: info@aaclo.com

Udo Udoma & Belo-Osagie, Lagos, Nigeria
T: +234 1 2774920-2, +234 1 2719811-3
E: uubo@uubo.org