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REMEDIES FOR INFRINGEMENT OF THE DATA PROTECTION ACT 2019: Understanding Penalty Notices, Enforcement Notices, and Administrative Fines

Introduction

The Office of the Data Protection Commissioner (ODPC) recently issued **penalty notices** against three data controllers/processors in the entertainment, finance and education sectors. In the process of coverage, there has been a reference to **'fines,' 'penalties** and even **'punishment'** in relation to the actions of the ODPC in issuing the Penalty notices. However, it should be noted that the first of such penalty notices were issued by the ODPC in 2022, as can be read [here](#).

This feature provides guidance on the types of remedies anticipated under the Data Protection Act 2019 (DPA).

Filing Complaints

An aggrieved person (data subject) may lodge a complaint with the Data Commissioner, where there is an alleged violation of the DPA. The complaint is submitted online through a complaint's portal, providing particulars and evidence of infringement. The complaint must include specific details as outlined by the Data Commissioner.

The Data Commissioner upon receipt of a complaint shall proceed to follow prescribed procedures, including investigations by writing to the person or organization against whom a complaint is lodged.

These investigations shall be conducted within a maximum period of ninety days and a determination made.

Furthermore, for the purpose of investigating such complaints, the Data Commissioner possesses the authority to compel individuals to attend interviews, produce relevant documents, records, or information, and even access data stored electronically or mechanically.

Failure to comply with these investigative orders or providing false or misleading information

constitutes an offence. The following remedies are issued in the event of infringement:

A) Penalty Notices

Penalty notices are issued as a deterrent for violation of the DPA. This is the remedy invoked by the Data Commissioner recently.

Section 62 DPA:

“If the Data Commissioner is satisfied that a person has failed or is failing as described in section 58, the Data Commissioner may issue a penalty notice requiring the person to pay to the Office of the Data Commissioner an amount specified in the notice.”

The following considerations guide the Data Commissioner to determine whether to issue a penalty notice to a person. The calculation of the amount contained in the penalty notice also takes into account the same considerations below:

Consideration
1. The nature, gravity and duration of the failure.
2. The intentional or negligent character of the failure.
3. Any action taken by the data controller or data processor to mitigate the damage or distress suffered by data subjects.
4. The degree of responsibility of the data controller or data processor, taking into account technical and organizational measures.
5. Any relevant previous failures by the data controller or data processor.
6. The degree of cooperation with the Data Commissioner, in order to remedy the failure and mitigate the possible adverse effects of the failure.
7. The categories of personal data affected by the failure.
8. The manner in which the infringement became known to the Data Commissioner, including whether, and if so to what extent, the data controller or data processor notified the Data Commissioner of the failure.
9. The extent to which the data controller or data processor has complied with previous enforcement notices or penalty notices.
10. Adherence to approved codes of conduct or certification mechanisms.
11. Any other aggravating or mitigating factor applicable to the case, including financial benefits gained, or losses avoided, as a result of the failure (whether directly or indirectly).
12. Whether the penalty would be effective, proportionate and dissuasive.

The list is not closed as the Data Commissioner retains the discretion to determine the applicable amount in issuing penalty notices.

B) Administrative Fines

Section 9 of the DPA empowers the Data Commissioner to impose **administrative fines**, where a data controller or processor fails to comply with the principles and obligations relating to data protection. The maximum amount for these fines is also Ksh. 5 million or one percent of the organization's annual turnover. The purpose of administrative fines is to ensure no repetition of infringement and to foster compliance. An appeal to the High Court is an alternative for persons against whom such administrative fines are issued.

Section 63 of the DPA:

“In relation to an infringement of a provision of this Act, the maximum amount of the penalty that may be imposed by the Data Commissioner in a penalty notice is up to five million shillings, or in the case of an undertaking, up to one per centum of its annual turnover of the preceding financial year, whichever is lower.”

C) Enforcement Notices

Enforcement notices are issued to foster compliance with the DPA for data processors or controllers

alleged to have infringed the DPA. The purpose of enforcement notices is to require such data controllers or processors to remedy their non-compliance. Enforcement notices contain specific requirements such as steps to be taken to ensure compliance and the period within which to comply. If a company fails to respond positively to the requirements contained in the enforcement notices, the

ODPC can issue fines of up to KES 5 million or imprisonment or both.

Compensation to the Data Subject

Data subjects can seek redress for violation of the right to privacy, including financial loss and emotional distress. Compensation can accrue from the person or organization responsible for the infringement. After the exhaustion of the processes under the DPA, a data subject has the right to seek remedies from constitutional courts. Page 4 of 4

Conclusion

The remedies under the DPA illustrate the level of compliance required for data processing activities in Kenya. Enforcement notices serve the main purpose of compelling data controllers and data processors to comply with the provisions of the DPA. Administrative fines are deterrent and are

remedies issued after the investigative processes are completed and the data controller or processor fails to remedy infringement. The DPA provides avenues for Alternative Dispute Resolution as well as an alternative to the ODPC enforcement processes.