



DATA PROTECTION
INSIGHTS

Frank Ijege v NDPC: Effect of The Judgment of The Federal High Court on The NDPC 2023 Guidance Notice

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1.0 Introduction

In Nigeria, the regulation of data protection and privacy has gained significant attention, particularly since the enactment of the Nigeria Data Protection Act, 2023 (NDPA or NDPA, 2023). The focus includes concerns regarding the Nigerian Data Protection Commission's ("the NDPC" or "the Commission") power to make subsidiary legislation and this has resulted in a number of Court cases seeking judicial clarification on the scope of this power.

A judgment has recently been passed in this regard by the Federal High Court in the case of *Frank Ijege v. Nigeria Data Protection Commission (NDPC)*.¹ This case essentially examined the legality of the Commission's Guidance Notice issued in 2024 on the registration of data controllers and data processors of major importance ("the Guidance Notice" or "the Notice"). The judgment of the Court has legal implications for Nigeria's data protection landscape, emphasising the need for regulatory actions to align strictly with statutory provisions to avoid overreach. This case also underscores the importance of clear and precise regulatory guidelines in the realm of data protection, ensuring that the rights of individuals are safeguarded without imposing unnecessary burdens on data controllers and processors.

2.0 NDPC's Guidance Notice on The Registration of Data Controllers and Data Processors of Major Importance

The Commission, on February 14, 2024, issued a Guidance Notice on the registration of data controllers and data processors of major importance, directing all designated data controllers or data processors of major importance ("DCDPMI") to register with the Commission. The Notice was issued in accordance with the Commission's function under **Section 5(d) of the NDPA 2023** to register data controllers and data processors of major importance; its powers to issue regulations, rules, directives and guidance under the Act,² and the obligation on DCDPMI to register with the Commission within six months after the commencement of the Act.³

Under the Guidance Notice, the Commission provided the criteria for the designation of data controller or data processor of major importance to include:

- a. A data controller or data processor shall be deemed to have "particular value or significance to the economy, society or security of Nigeria" and designated to be of major importance if it keeps or has access to a ling system (whether analogue or digital) for the processing of personal data; and where it meets any of the following conditions:⁴
 - a) Processes the personal data of more than 200 data subjects in six months; or
 - b) Carries out commercial Information Communication Technology (ICT) services on any digital device which has storage capacity and belongs to another individual; or
 - c) Processes personal data as an organisation or a service provider in any of the following sectors: (i.) Financial (ii.) Communication (iii.) Health (iv.) Education (v.) Insurance (vi.) Export and Import (vii.) Aviation (viii.) Tourism (ix.) Oil and Gas (x.) Electric Power.

¹ (unreported) Suit No: FHC/KD/CS/34/2024

² Section 6 of the NDPA, 2023.

³ Section 44 of the NDPA, 2023.

⁴ Paragraph 1(1) of the Guidance Notice



- b. A data controller or a data processor under a fiduciary relationship with a data subject and is obligated to keep confidential information on behalf of the data subject is regarded as a data controller or data processor of major importance taking into consideration the significant harm that may be done to a data subject if such data controller or processor is not under the obligations imposed on data controllers or processors of major importance.⁵

The Commission also classifies these DCDPMI into three major categories which are Major Data Processing- Ultra High Level (MDP-UHL), Major Data Processing- Extra High Level (MDP- EHL), and Major Data Processing- Ordinary High Level (MDP-OHL). Under these categories, the Guidance Notice specifies certain factors, any of which would guide the classification of DCDPMI.⁶ Our publication on the guidance notice can be accessed [here](#).

3.0 Analysis of Frank Ijege v NDPC

Following the release of the Guidance Notice by the NDPC, several controversies emerged regarding the propriety and purport of some of its provisions. Concerns centred primarily on the legality of specific paragraphs of the Guidance Notice vis-à-vis the powers of the NDPC under the Nigerian Data Protection Act, 2023, particularly as it affected the privacy rights of citizens. For instance, paragraph 1(2) of the Guidance Notice defines a DCDPMI as a data controller/processor who is in a fiduciary relationship with a data subject by reason of which it is expected to keep confidential information on behalf of a data subject. It has been contended that this definition is too expansive and vague in scope, particularly considering that 'fiduciary relationships' include personal and social relationships. Thus, all citizens could be DCDPMI.

These controversies prompted Frank Ijege, the Applicant, to institute a fundamental rights enforcement action against the NDPC, the Respondent, to seek clarification from the Court. In the suit, the Applicant challenged the implementation of the Guidance Notice, stating that it would interfere with his right to privacy guaranteed under Section 37 of the 1999 Constitution. The Applicant also argued that certain paragraphs of the Notice were void because the Respondent exceeded its powers under the NDPA, 2023, in making the provisions. Furthermore, he contended that the NDPC failed to exempt the classes of persons and organisations that are not DCDPMI which the Respondent ought to do under **Sections 44(6) and 48(3) of the NDPA, 2023**. As a result, he sought several reliefs including amongst others *(a) an order mandating the Respondent to prescribe the entities who fall under the category of controllers/processors NOT of major importance; (b) an order striking out paragraph 1(2); paragraph 2(2)(f) and (h); paragraph 2(3)(g) and (i); paragraph 3(1)(e)(i); paragraph 3(1)(e)(iv) of the Respondent's Guidance Notice.*

The Court, in its judgment ruled in favour of the Applicant and granted the reliefs sought, except for the reliefs 1 and 8 which are injunctive reliefs.

The Court declared several provisions of the NDPC's Guidance Notice as ultra vires (beyond its legal power) and, therefore, null and void.

⁵ Paragraph 1(2) of the Guidance Notice.

⁶ See generally Paragraph 2 of the Guidance Notice.

4.0 Consideration of The Issues and Rationale for The Court's Judgment

In arguing their cases, the parties joined issues for determination to wit (i) whether or not the Guidance Notice interfered with and will likely further interfere with the Applicant's right to privacy guaranteed under Section 37 of the Constitution; and (ii) whether or not paragraph 1(2); paragraph 2(2)(f) and (h); paragraph 2(3)(g) and (i); paragraph 3(1)(e)(i); paragraph 3(1)(e)(iv) of the Guidance Notice are ultra vires, null and void.

However, it appears that in delivering its judgment, the Court jettisoned the first issue formulated by the parties and formulated its 'issue one' to wit (i) the alleged failure of the Respondent to state those entities exempted from the Guidance Notice which makes all entities and individuals data controllers and processors of major importance. Our analysis of the issues and rationale of the Court will now be considered succinctly below:

- a. **Failure of the Respondent to spell out the entities exempted from the Guidance Notice:** The Court agreed with the Applicant's argument that NDPC ought to specify the entities exempted from the Guidance Notice. The Applicant relied on **Section 44(6) of the NDPA, 2023**, to contend that the Respondent has a mandate to specify exempted classes, which it failed to fulfil.

The Respondent, however, argued that having specified the categories of DCDPMI, there was no need to also state the classes that are exempted as they could be inferred to be those not included in the Notice. This argument is grounded on the established rule of interpretation, expounded in *Ecobank (Nig.) Plc v. Monye*⁷, that the “express mention of one thing implies the exclusion of others.”

The Court, however, decided this issue in the Applicant's favour and ordered NDPC to prescribe entities exempted from the Guidance Notice. In resolving this issue, the Court relied on **Section 44(6) of the NDPA, 2023**, to mandate the specification of exempted classes. For ease of reference, **Section 44(6)** provides that:

“The Commission may exempt a class of data controller or data processor of major importance from registration requirements of this Section, where it considers such requirement to be unnecessary or disproportionate.” (underlining ours for emphasis).

It is well established in law that the use of 'may' in a statute signifies a discretionary responsibility (not a mandatory one), left to the volition of the person or authority in which the context refers. The Supreme Court was emphatic on this point in *Onoh v. Lawal*.⁸ Interestingly, the Federal High Court, in its judgment, noted the discretion the NDPC enjoyed in this regard when it stated that: “In the present case, Section 44(6) of the NDPA has given discretion to the respondent to exempt a class of data controllers and data processors of major importance from the registration requirements” (underlining ours for emphasis). The Court equally stated that: “*It is trite that the provisions should be given their literal meaning*”

⁷ (2021) 12 NWLR (Pt. 1789) 1

⁸ (2023) 4 NWLR (Pt. 1873) 1

We, however, note that another interpretation of the use of the word “may” in Section 44 (6) of the NDPA, could be that the Commission is entitled to exempt certain parties from registering as DCDPMI's and not that the Commission is mandated to state the class(es) of DCDPMIs that it may choose to exempt. It is likely on this basis that the Federal High Court decided this ground against the NDPC.

- b. The validity of paragraph 1(2); paragraph 2(2)(f) and (h); paragraph 2(3)(g) and (i); paragraph 3(1)(e)(i); paragraph 3(1)(e)(iv) of the Guidance Notice in view of Section 65 of the NDPA, 2023:

The Court struck out the highlighted paragraphs of the Guidance Notice on the rationale that the paragraphs do not fall within the contemplation of **Section 65 of the NDPA, 2023**, which in its definition of DCDPMI limits the Commission's powers to classify to “*controllers or processors processing or intending to process data of a specified number of data subjects or processing data of particular value or significance to the economy, society, or security of Nigeria*”. Essentially, by the Court's interpretation, whether a data controller or processor will be determined as one of major importance rests on their value, importance, or significance.

For the purposes of clarity, the revoked paragraphs of the Guidance notice are:

- i. **Paragraph 1(2)- Fiduciary Relationship:** It defines a DCDPMI as a data controller/processor who is in a fiduciary relationship with a data subject by reason of which it is expected to keep confidential information on behalf of a data subject.
- ii. **Paragraphs 2(2)(f) and (h), 2(3)(g) and (i) – Ultra High-level and Extra High-level compliance Factors:** These sections mandated compliance as DCDPMI for controllers with the legal competence to generate revenue on a commercial scale.
- iii. **Paragraphs 3(1)(e)(i) and 3(1)(e)(iv) – Specific Types of Data Controllers/Processors:** The above paragraphs classify SMEs⁹, agents, contractors, and vendors (who engage with data subjects on behalf of other organisations that are in the Major Data Processing- Ultimate High Level and Major Data Processing- Extra High Level) as Major Data Processing- Ordinary High Level.

Section 65 of the NDPA, 2023, which in its definition of DCDPMI limits the Commission's powers to classify to “*controllers or processors processing or intending to process data of a specified number of data subjects or processing data of particular value or significance to the economy, society, or security of Nigeria*”.

5.0 Effect of The Judgment in Frank Ijege v NDPC

The Judgment of the Court, particularly the striking out the paragraphs of the Guidance Notice, has significant implications for the operation of the NDPC and the interpretation of the **NDPA, 2023**, as well as the Guidance Notice. Pending a contrary decision of a Court of higher jurisdiction, some of the implications include the following:

- a. NDPC may need to issue a revised Guidance Notice amending or revising certain provisions of the Guidance Notice.

⁹ Small and Medium Scale Enterprises.

- b. Such revised Guidance Notice will need to specify the classes of DCDP exempted from compliance under the Guidance Notice.

It is imperative to note that the NDPC has the right to appeal the decision of the Federal High Court.

6.0 Conclusion

The Court's judgment contributes to Nigeria's growing data protection jurisprudence. The pronouncement of the Court also impacts the efficacy of NDPC's Guidance Notice. In view of the judgment in *Frank Ijege v NDPC*, data controllers or processors of major importance that are yet to register with the NDPC and fall within the class now revoked under the Court, are now exempt from the registration. This is the current position of the law, pending the outcome of any appeal that may arise from this judgment.

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