

**Analysing the Federal
High Court Ruling in
the Case of Frank Ijege
v Nigeria Data
Protection
Commission**

January 2025

Introduction

The Federal High Court of Nigeria ("FHC") in a ruling delivered on the 22nd of November 2024 nullified certain provisions of the Nigeria Data Protection Commission ("NDPC" or the "Commission") Guidance Notice on Registration of Data Controllers and Data Processors of Major Importance NDPC/HQ/GN/VOL.02/24 (the "Guidance Notice") issued in February 2024.

The Guidance Notice was released by the NDPC to provide the criteria for determining whether an organisation qualifies as a Data Controller and Data Processor of Major Importance ("DCPMI") in line with sections 5(d), 44 and 65 of the Nigeria Data Protection Act ("NDPA") and as well as the appropriate DCPMI category for organisations. You can read our publication of the Guidance Notice [here](#).

Mr. Frank Ijege (the "Applicant") instituted an action against the Commission, in the suit ***Frank Ijege v Nigeria Data Protection Commission- Suit NO: FHC/KD/CS/34/2024*** at the FHC, Kaduna State. The Applicant sought a number of reliefs, (a) a declaration that the Guidance Notice interferes and is likely to interfere with the Applicant right to privacy; (b) a declaration that the Guidance Notice is confusing and requires clarification; (c) a declaration that not every individual and entity is a data controller and processor of major importance; (d) a declaration that ***Paragraphs 1(2), 2(2)(f) and (h), 2(3)(g) and (i), and paragraphs 3(1)(e)(i) and (iv)*** of the Guidance Notice are ultra vires, null and void and therefore be struck out of the Guidance Notice; (e) a declaration that the NDPC ought to have provided clarity on the entities exempted from registering as DCPMI under the Guidance Notice ; (f) an order mandating the NDPC to prescribe entities that do not fall under the category of controllers/processors of major importance and (g) order of perpetual injunction restraining the NDPC from mandating individuals and or entities to register without first prescribing controllers who are not DCPMI in line with the NDPA. The court agreed with the arguments of the Applicant and granted the reliefs sought except for the injunctive relief, thereby creating a precedent in the data protection jurisprudence in Nigeria.

1. ANALYSIS AND COMMENTARY

A summary of the reliefs, the FHC ruling, and its implication on the Nigerian data protection ecosystem/jurisprudence are discussed below:

- A. **On the relief¹ and the declaration that the NDPC ought to indicate individuals/entities who are not DCPMI:** The trial court mandated the NDPC to specify entities who are not DCPMI despite the fact that the law makes it discretionary by using the word "***may***". The NDPC's argument ***that it has expressly stated the persons/entities which qualify as DCPMI and therefore need not list out the exempted classes, was rejected by the Court***. The Court in its analysis distinguished the term "exemption" from the term "exclusion", by relying on the case of ***Abubakar & ors v. Yar'adua & ors*** on the definition of "Exclusion" and Black's Law dictionary on the definition of "Exemption". However, a careful reading of the Black's Law dictionary² definition of "Exemption" includes "Exception" in which its meaning includes "Exclusion". The position of the NDPC narrated above aligns with the principle of interpretation that the express mention of one is to the exclusion of others. Additionally, the interpretation applied by the FHC and its decision will make the NDPC proceed on voyage of unnecessary discovery.

Whilst it is debatable whether the intention of the law in Section 44 (6) is to exempt a class of DCPMI for ***registration*** entirely or exempt a class of DCPMI from some or any of the ***registration requirements*** listed in the Section 44, the statute uses the term "may" and in the context which it was used, it should have been

¹ ((c), (e) and (f) above))

² Black's Law Dictionary Eleventh Edition

read to be discretionary. The court ought to have taken cognisance of the context of use before it orders the NDPC to prescribe entities not of major importance, given plethora of cases on the construction of the term “may” in a statute.³ There is nothing in the section which suggests a mandatory duty on the NDPC to exempt any individual or entity or list out exempted class as it has done with those classified as DCPMI.

For context, the provision of Section 44 (6) reads:

*“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.”*

Provision of Section 44 (2) lists out the relevant details/requirements (a) to (h)⁴ which must be notified to the NDPC in order for registration as a DCPMI to apply. In our view, we think it would have been more appropriate for the prayer of the Applicant to seek the interpretation of the scope of exemption envisaged in Section 44 (6) rather than an order compelling the regulator to prescribe exempted persons or an attempt to differentiate the term “Exclusion” and “Exemption” in that context.

In other sectors where the law gives the regulators power to exempt, as it has done in this instance case, the regulator may do so on its own volition or on the application of interested party. In this instance, the provision of Section 44 (6) provides clear indices as to how the NDPC should determine or apply its discretion in exempting a class of DCPMI from registration requirement.

Although an appeal may defeat the ratio of this decision based on the above considerations, however, we are not aware of any appeal against this decision, therefore, until appealed, the NDPC may have to comply with this provision and the decision will become a judicial precedent for this purpose.

B. On the relief and the declaration that **Paragraphs 1(2), 2(2)(f) and (h), 2(3)(g) and (i), paragraphs 3(1)(e)(i) and (iv)** are ultra vires, null and void:

- (i) **Fiduciary Relationship Criteria:** Paragraph 1(2) makes a *data controller or data processor who is under a fiduciary relationship with a data subject by reason of which it is expected to keep confidential information on behalf of the data subject a DCPMI*. The FHC agreed with the Applicant that the element of fiduciary relationship is not within the contemplation of the provisions of section 65 of the NDPA.
- (ii) **Classification Factors:** The FHC held that the paragraphs 2(2)(f) and (h) and 2(3)(g) and (i) which relate to the classification factors for persons/entities that would fall under Major Data Processing – Ultra High Level and Major Data Processing – Extra High Level respectively, specifically the factors are:
 - a. Legal competence to generate revenue on a commercial scale and;
 - b. The need for accountability.The FHC held that these paragraphs are not within the contemplation of the provisions of section 65 of the NDPA.
- (iii) **Specific type of data controller/processor classification:** Paragraph 3(1)(e)(i) and (iv) which provide for some category of organisations that fall within the Major Data Processing -Ordinary High Level (MDP-OHL) which are (i) “*Small and Medium Scale Enterprises (it must be such that have access to personal data which they may share, transfer, analyse, copy, compute or store in the course of carrying out their individual businesses);* and (iv): *Agents, contractors and vendors who engage with*

³ See *Okomu Oil Palm Co. v. Tajudeen* (2016) 3 NWLR (Pt. 1499) 284 (Pp.314-315, paras H-E); *F.R.N. v. Nnaji* (2024) 10 NWLR (Pt. 1947) 443

⁴ See Section 44 subsection (2) of the NDPA.

*data subjects on behalf of other organisations that are in the category of MDP-UHL and MDP-EHL)", were held not to be **within the contemplation of the provisions of section 65 of the NDPA and Paragraph 3(1)(e)(i)(iv) were declared ultra vires, null and void.***

Consequently, the court struck out the above provisions from the Guidance Notice.

2. IMPLICATIONS

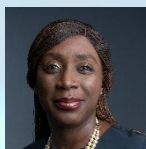
In the absence of an appeal by the NDPC to contest the direction of the court to determine the entities that will not qualify as DCPMI and the deletion of the various sections narrated in (B) above, the following are the consequences of the decision of the court striking out the above paragraphs:

- (i) All persons and entities which have not been particularly listed in the Guidance Notice but proceeded to register on the account of them having a fiduciary relationship with data subjects may need to apply to the NDPC to be deregistered on the basis of this decision.
- (ii) Entities that have registered as DCPMI on the basis of meeting factor thresholds inclusive of the above factor in B (ii) above, may need to reassess their eligibility as a DCPMI, unless they qualify considering other factors such as number of data subjects or type of entity/sector.
- (iii) The entities that register as DCPMI on the basis that they are SMEs with data processing capacity or agent of MDP-UHL and MDP EHL, may need to reassess their qualification for DCPMI registration and apply for deregistration in accordance with the provision of the NDPA.
- (iv) The NDPC is likely to come up with list of entities or class of entities which are exempted from the registration as DCPMI.
- (v) The NDPC is likely to issue an amendment to the Guidance Notice addressing the decision of the court and perhaps addressing other stakeholders' concerns following the issuance of the Guidance Notice, by providing relevant clarifications and definition of terms amongst others.

3. CONCLUSION

The NDPC still has time within which to appeal this decision and/or amend the Guidance Notice and we expect continuous evolution of the data protection legal landscape in Nigeria. As the space continues to develop, it is necessary for organisations to pay attention to the evolving data protection landscape and evaluate their processing activities in order to ensure compliance with data protection laws.

Contact Details



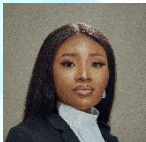
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