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Client Alert

Privacy and Compliance - Federal High Court Nullifies Parts of the Nigeria Data Protection Commission's Guidance Notice for Registration

Background

For most of the year, the Nigeria Data Protection Commission's ("NDPC") Guidance Notice for Registration (the "**Guidance Notice**")¹ has been a primary compliance consideration for individuals and corporate entities that control and process personal data.

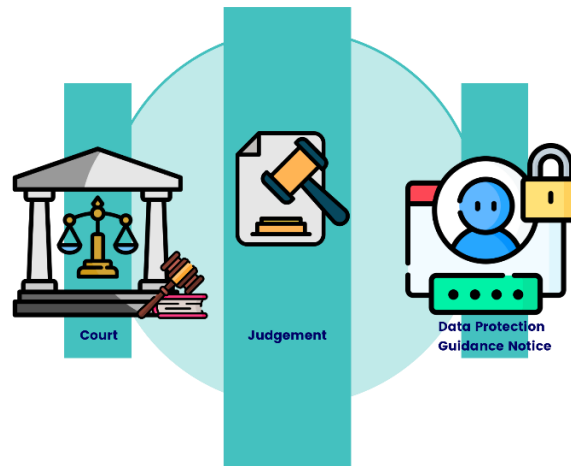
Due to certain ambiguous provisions in the Guidance Notice, local and international data controllers and processors have had to carefully evaluate the provisions of the Guidance Notice to determine the necessity of their registration with the NDPC in Nigeria.

Recently, the Federal High Court ("FHC" or the "**Court**") delivered a judgment² (the "**Judgment**") which nullified certain provisions of the Guidance Notice and has notable implications on the scope, application and implementation of the Guidance Notice.

This client alert addresses the impact of the Judgment on the Guidance Notice and its subsequent impact on registration obligations for data controllers/processors operating in Nigeria.

¹ Full name: Nigeria Data Protection Commission Guidance Notice for Registration of Data Controllers and Data Processors of Major Importance, first published on 12 February 2024.

² On 22 November 2024, in the case of **Frank Ijege** (trading under the name and style of Springfield Law Practice) v. **Nigeria Data Protection Commission** (Suit No: FHC/KD/CS/34/2024).



The Guidance Notice

The NDPC published the Guidance Notice based on powers granted under the Nigeria Data Protection Act 2023 (the “NDPA”)³.

The NDPA provides that only “*data controllers and processors of major importance*” (“DCMIs / DPMIs”) would be required to register in Nigeria and empowered the NDPC to determine the qualification criteria for these categories.

The Guidance Notice prescribed a wide range of triggers for registration, including but not limited to:

- the sector a data controller / processor may be operating in (i.e. ICT services, financial, communication, health, oil and gas, education and others);
- the data controller or processor having a fiduciary relationship with a data subject requiring confidential information to be kept; or
- the number of data subjects being controlled or processed by such controller or processor.

Satisfying any of the relevant criteria in the different cadres⁴ under the Guidance Notice requires registration with the NDPC.

There have been questions around the expansive scope of the Guidance Notice, which since its release, has resulted in a significant increase in local and foreign entity registrations with the NDPC.



³ Specifically, based on combined interpretation of Sections 5d, 6(c), 44, 45 and 65 of the NDPA.

⁴ Apart from just being a DCMI / DPMI, the Guidance Notice further broke these down into different levels (Ultra High Level, Extra High Level and Ordinary High Level) which have additional registration categories and triggers – depending on the level, the registration fees increase or reduce, as the case may be.



The Case

instituted by the data protection officer of a Nigerian law firm (the Applicant), alleging that certain aspects of the Guidance Notice interfered with his constitutional right to privacy.

The case was instituted by the data protection officer of a Nigerian law firm (the “**Applicant**”), alleging that certain aspects of the Guidance Notice interfered with his constitutional right to privacy⁵.

The Applicant also sought declarations that the provisions of certain paragraphs of the Guidance Notice are ultra vires, null, and void, as they allegedly compelled virtually all data controllers and processors to register with the NDPC and imposed unfair compliance requirements, contrary to the provisions of the NDPA.⁶ The alleged offending paragraphs or aspects of the NDPC Guidance Notice which were challenged before the court are summarized below:

- **Fiduciary Relationship Registration**⁷: Registration is required for a data controller or a data processor who is under a fiduciary relationship with a data subject, where the obligation to keep confidential information exists and significant harm could be done to the data subject if the controller or processor remains unregistered.

Court Judgment – *The Court held that the element of a fiduciary relationship is not among the factors outlined in Section 65 of the NDPA for the classification of a DCMI / DPML. The FHC held that including this in the Guidance Notice would result in an overly broad application, effectively encompassing every citizen. Paragraph 1(2) of the Guidance Notice was declared null and void.*

- **Ultra High-Level Compliance Factors**⁸: Controllers / processors that fall under the Major Data Processing-Ultra High Level (MDP-UHL) category are generally expected to abide by global and highest attainable standards of data protection taking into account, amongst other factors:
 - the legal competence to generate revenue on a commercial scale; and
 - the need for accountability.

Court Judgment – *The Court held that this does not align among the factors outlined in Section 65 of the NDPA for the classification of a DCMI / DPML. Paragraph 2(2)(f)(h) of the Guidance Notice was declared null and void.*

- **Extra High-Level Compliance Factors**⁹: Like the above, controllers / processors under the Extra High Level (MDP-EHL) were also required to account for:
 - the legal competence to generate revenue on a commercial scale; and
 - the need for accountability.

Court Judgment – *The Court held that this does not align among the factors outlined in Section 65 of the NDPA for the classification of a DCMI / DPML. Paragraph 2(3)(g)(i) of the Guidance Notice was declared null and void.*

- **Third Party Agent / Contractor / Vendor Registration**¹⁰: This provision requires agents, contractors or vendors engaging with data subjects (on behalf of MDP-UHL or MDP-EHL DCMI / DPMLs) to register with the NDPC.

Court Judgment – *The Court held that this does not align among the factors outlined in Section 65 of the NDPA for the classification of a DCMI / DPML. Paragraph 3(1)(e)(i) of the Guidance Notice was declared null and void.*

⁵ Guaranteed under Section 37 of the Constitution of the Federal Republic of Nigeria (CFRN)

⁶ Section 44(6) of the NDPA.

⁷ Paragraph 1(2) of the Guidance Notice.

⁸ Paragraph 2(2)(f)(h) of the Guidance Notice.

⁹ Paragraph 2(3)(g)(i) of the Guidance Notice.

¹⁰ Paragraph 3(1)(e)(i) of the Guidance Notice.



Possible Appeal

It is possible that the NDPC may challenge the judgment by appealing to the Court of Appeal, potentially seeking a reinterpretation of the NDPA's provisions and the validity of the nullified provisions of the Guidance Notice.

- **No Specified Exemptions to the Guidance Notice:** The Applicant argued that the NDPA¹¹ required the NDPC to expressly specify which entities are not covered under the Guidance Notice, but the Guidance Notice failed to do so. The NDPC countered that the explicit mention of certain organizations in the Guidance Notice implied the exclusion of others not listed.

Court Judgment – The Court held that “exemption” as contemplated under Section 44(6) required explicit clarification and could not be conflated with exclusion, and that it is the NDPC’s responsibility to clarify the confusion. The NDPC must specify in the Guidance Notice, which entities or classes of entities are exempt from the Guidance Notice.

Impact of the Judgment

Assuming the NDPC does not appeal the judgment, we anticipate the following outcomes:

1. The NDPC may issue a revised Guidance Notice which does not contain the specific invalidated sections¹²;
2. The NDPC may further prescribe the entities or classes of entities which are exempt from the application of the Guidance Notice (i.e. controller/processors NOT of major importance) and if it deems necessary, define clear criteria for determining such exemptions;
3. No data controller or processor would be required to register merely by having a fiduciary relationship with a data subject that requires confidentiality – this is important to certain individuals or entities, such as law firms, or corporate entities that enter into non-disclosure agreements in the course of business (assuming such entities do not fall within another category requiring registration); and
4. Third party agents, vendors or contractors that engage with data subjects (on behalf of organisations that are in the MDP – UHL or MDP – EHL category) would no longer be required to register with the NDPC merely by reason of such engagement.

It is possible that the NDPC may challenge the judgment by appealing to the Court of Appeal, potentially seeking a reinterpretation of the NDPA’s provisions and the validity of the nullified provisions of the Guidance Notice.

Regardless of whether the NDPC files an appeal, the current position as determined by the FHC is that the invalidated provisions of the Guidance Notice are no longer enforceable. Further, the NDPC is expected to prescribe the entities who fall under the category of controller/processors that are not of major importance, as contemplated under section 48(3)(b) of the NDPA.

Conclusion

The Judgement is unique in that it is the first successful judicial challenge to the NDPC Guidance Notice. However, notwithstanding the court’s ruling, significant portions of the Guidance Notice remain valid, and a substantial number of data controllers / processors are still within its registration scope.

Nonetheless, the Judgment offers more clarity regarding the registration criteria for data controllers / processors.

For now, we cannot tell if this could lead to additional challenges to other provisions of the Guidance Notice, or if the NDPC will pre-empt this by updating and clarifying any ambiguities within the Guidance Notice. It is important to continue to monitor the developments here as the NDPC continues its drive to ensure data protection compliance in Nigeria.¹³

¹¹ Under Section 44(6) of the NDPA.

¹² Paragraphs 1(2); 2(2)(f) and (h); Paragraph 2(3)(g) and (i); and Paragraph 3(1)(e)(f) and (iv).

¹³ The deadline for registration was initially 30 June 2024. The deadline was thereafter extended to 30 September 2024 and most recently to 31 October 2024