FHC affirms the power of the Nigerian Midstream and Downstream Petroleum Regulatory Authority to impose and collect Authority Fund and Midstream and Downstream Gas Infrastructure Fund levies from telecommunication infrastructure service companies.

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The Federal High Court (FHC or "the Court") Abuja Division has delivered judgment in the case between *IHS Nigeria Limited (IHS) and INT Towers Limited (INT) (collectively referred to as herein "the Plaintiffs") and the Nigerian Midstream and Downstream Petroleum Regulatory Authority (NMDPRA or "the Defendant").*

The judgment affirmed the NMDPRA's authority to enact regulations pertaining to the administration of midstream and downstream petroleum liquids operations, and its prerogative to prescribe additional activities to be undertaken pursuant to a licence or permit, in line with Sections 125(3) and 174 (3) of the Petroleum Industry Act 2021 (PIA).

Furthermore, the Court determined that the Regulations set forth by the NMDPRA do not contradict Sections 47(2)(c) and 52(7)(a) of the PIA which provide for the imposition of levies for the Authority Fund and the Midstream and Downstream Gas Infrastructure Fund (MDGIF) on wholesale customers[1].

Facts of the case

The Plaintiffs are affiliate companies licensed by the Nigerian Communications Commission (NCC) to provide telecommunications infrastructure services to telecommunications companies. The nature of their business requires near 100% consistency in power supply. The plaintiffs rely on Automotive Gas Oil (AGO) as the primary source of energy to power their extensive Base Transceiver Stations (BTS) and other site locations across Nigeria. Given the substantial amount of AGO required to power these stations, the Plaintiffs obtained Petroleum Products Import Permits from the NMDPRA to facilitate the importation of petroleum products into Nigeria. While IHS entered into a Throughput and Service Agreement with Chisco Limited for exclusive use of its tank farm in Apapa, Lagos, INT owns and operates its storage tank facility in Delta State having secured storage licences from the NMDPRA. The Plaintiffs store the imported AGO in the tank farms before it is distributed to the respective BTS for use.

In June 2023, the NMDPRA notified licence holders for bulk storage facilities in Apapa (where the Chisco tank farm is situated), via email, that loading programs submitted to the NMDPRA must include ex-depot price, among other requisite information. The Plaintiffs submitted their loading programmes but did not include an ex-depot price as they do not resell the AGO but only utilize it for their operational activities. The NMDPRA initially refused to approve the Plaintiffs' loading programs citing the absence of an ex-depot price but later approved same.

The Plaintiffs engaged several times with the Defendant individually and through their umbrella body - the Association of Licensed Telecoms Operators of Nigeria (ALTON) with a view to resolving the matter. The Plaintiffs' main argument was that they are the consumers of the products and do not trade or sell the AGO imported and, therefore, cannot have an ex-depot price. They further asserted that the product imported and consumed by them in Nigeria should not qualify as 'sold in Nigeria' under the PIA. Therefore, they should not be required to pay the mandatory Authority Fund and the MIDGIF levies.

The Defendant, however, insisted that the Plaintiffs were obligated to pay the Authority Fund and MDGIF levies. Their position was premised on the following:

- the terms 'permits' and 'license' are used interchangeably, implying that holders of import permits are licensed to import petroleum products and therefore qualify as wholesale petroleum liquids suppliers based on the PIA;
- the Plaintiffs, as wholesale petroleum liquids suppliers, are considered wholesale customers when they load

[1] The Midstream & Downstream Petroleum Operations Regulations, 2023 ("Operations Regulations") defines wholesale customers as *"a class of customers with respect to (a) natural gas, the right to contract for and purchase a supply of wholesale gas, with capability to connect individually and economically to a transportation pipeline or transportation network and shall include gas distributors, and (b) crude oil or petroleum products, a purchaser with annual capacity of 500 litres or its equivalent and above."*

products from each other or load from products they initially imported;

- a sale is deemed to have transpired upon the transfer of custody of imported petroleum products to a storage facility; and
- the Plaintiffs engage in commercial transactions with third parties (telecommunications companies) for petroleum products, as they charge for it amongst other cost items.

The persistent demand for the levies led the Plaintiffs to initiate a legal action at the Abuja Division of the FHC in Suit No: FHC/ABJ/CS/1029/2023 - IHS Nigeria Ltd. & Anor. v The Nigerian Midstream & Downstream Petroleum Regulatory Authority, seeking a determination on the validity of the levy demands from the Defendant. While the case was pending before the Court, the Defendant issued demand notices for the levies to the Plaintiffs. In order to ensure uninterrupted continuity of their business operations, the Plaintiffs were compelled to remit a portion of the levies, albeit under protest.

Issues for determination:

The issues submitted for the Court's determination are as follows:

IHS Nigeria Limited & INT Towers Limited:

1. Whether the Plaintiffs, as importers with express permit of the Defendant and not licensees who engage in the bulk sale of petroleum products under section174(1)(g) of the Petroleum Industry Act 2021 (PIA), are bound by the provisions of the Operations Regulations issued by the Defendant, which seek to inter-alia regulate holders of licences under the PIA who engage in the sale of petroleum products (especially given the clear provision of the Import Permits issued by the Defendant that is subject to the terms of Appendices A & B attached to the Import Permit)?
2. Whether the definition of "sold in Nigeria" in Regulation 48 of the Operations Regulations is not void – to the extent of its inconsistency or overreach of the provisions of Sections 47(2)(c) and 52(7)(a) PIA?

Or in the alternative,

3. Whether paragraph C of the definition of "sold in Nigeria" in Regulation 48 of the Operation Regulations is not void:

   3.1 to the extent that it purports to extend the definition of the phrase "sold in Nigeria", beyond the clear intent of Sections 47(2)(c) and 52(7)(a) PIA, and to cover activities which do not amount to sale of petroleum products in Nigeria within the meaning of Sections 47(2) and 52(7)(a)?

   Or in the alternative,

   3.2 to the extent that it purports to have a wider scope than the enabling statute, (or add to, or change), by way of additional conditions and expansion of terms in Sections 47(2)(c), 52(7)(a) and 52(9) of the PIA?

4. Whether any of Sections 47(2)(c), 52(7)(a) and 52(9) PIA contains charging provisions in the manner in which levies are permitted by statute to be assessed and collected?
5. Whether Regulation 13 of the Operations Regulations is not void - to the extent that it purports to impose a payment obligation that is not clearly and unambiguously charged or imposed by the provisions of Sections 47(2)(c), 52(7)(a) PIA?
6. Whether having regards to the provisions of Part V of the PIA, in particular, Sections 205-208 of the PIA, or the Operation Regulations, or the Petroleum (Transportation and Shipment) Regulations, 2023 ("PTS Regulations"), the Defendant has not acted ultra vires its statutory power by asking for or demanding from the Plaintiffs, non-trading persons or licensees, or their agents: (a) the sale or purchase prices of petroleum products the Plaintiffs consume for their business outside downstream petroleum industry; or (b) the destinations of vehicles transporting the Plaintiffs' petroleum products for consumption in their business, outside the downstream petroleum industry; or (c) contracts entered into by an end user of petroleum products with its non-downstream petroleum partners or clients, for non-downstream petroleum activities?
7. Whether having regards to the provisions of Section 208 of the PIA, the Defendant has not indulged in self-help remedy contrary to the Constitution and its enabling law by disabling or threatening to disable, in any manner whatsoever, the loading of petroleum products from non-trading, personal, storage facilities – on account of the inability or refusal of a non-trading and pure storage depot licensee, or owner, to publish its petroleum prices, as requested by the Defendant?

Or in the alternative,

8. Whether it is not an abuse of administrative powers, or outside legislative intent of the PIA, to disable, in any manner whatsoever, the loading of petroleum products from a non-trading personal sole use bulk storage facility – on account of failure to publish ex-depot prices?
9. Whether the PIA in any way (especially Sections 33, 113, 126 and 175 thereof), permit the Defendant by virtue of the PTS Regulations to regulate domestic, non-trading, end-user personal consumption of petroleum products outside midstream and downstream petroleum operations or downstream petroleum operations within the meaning of the terms in Section 318 of the PIA?
10. Whether the acts of the Defendant complained of herein do not constitute infringement of the constitutional right of the Plaintiffs against compulsory acquisition of personal property guaranteed by Section 44 of the 1999 Constitution (as amended)?
11. Whether Regulations 3 & 4(1) of the PTS Regulations apply to the loading of petroleum products from personal sole use bulk storage facilities for personal consumption?

12. Whether Regulation 5(g) of the Operation Regulations is not invalid for being outside the scope of matters provided in the PIA, or for being ultra vires, or unreasonable, or absurd, or wrongful or excessive – having regard to its requirement that the manager of a licensee must provide an operational office and accommodation for the personnel of the Defendant?

13. Whether the provisions of Regulations 3 and 4(1) of the PTS Regulations are invalid for being ultra vires in imposing impractical, unreasonable, irrelevant, and unauthorized conditions on the loading and offloading of products from a non-trading-sole domestic use of the said products?

NMDPRA:

1. Does the PIA grant the Defendant power to regulate and collect statutory levies from wholesale customers of petroleum products sold in Nigeria, and if so, do the operations of the Plaintiffs, as they have described by themselves, qualify as sale and distribution of the petroleum products in Nigeria to expose them to the said statutory levies of the Defendant?

2. Does the definition in Paragraph C of the term "sold in Nigeria" found in Section 48 of the Midstream and Downstream Petroleum Operations Regulations 2023 stretch the scope of that term beyond what was contemplated by Sections 47(2) and 52(7) of the PIA?

3. Notwithstanding that the Plaintiffs hold only Import Permits and Petroleum Depot Licences of the Defendant, are the directives and consequential enforcement acts of the Defendant in requiring the Plaintiffs, among other things, to furnish it with information relating to price, destination and end-user sales details of petroleum products handled by the Plaintiffs unreasonable and impractical or unconstitutional in all the circumstances of this case?

The FHC's decision

After considering the arguments of both parties, the FHC held, among other things, that:

i. The NMDPRA possesses broad authority, as stipulated in Sections 125(3) and 174 (3) of the PIA, to enact regulations governing the administration of midstream and downstream petroleum liquids operations, as well as mandate additional activities contingent on holding a license or permit.

ii. There is no conflict or overreach between the definition of the term "sold in Nigeria" outlined in Regulation 48 of the Midstream and Downstream Petroleum Operations Regulations 2023 (MDPOR) and Sections 47(2)(c) and 52(7)(a) of the PIA, as the PIA does not explicitly define the term. The MDPOR's definition serves to clarify and augment the provisions of the PIA regarding the Authority Fund and MDGIF levies.

iii. The PIA's definition section (Section 318) does not distinguish between 'permit' and licence', indicating that they can be used interchangeably.

iv. The Plaintiffs are deemed liable to the levy, as they implicitly consented to the terms and conditions of the licences or permits when they obtained them and commenced business activities pursuant to them.

v. The Authority Fund and Midstream and Downstream Gas Infrastructure Fund levies are not punitive measures but rather statutory contributions to foster infrastructure development.

vi. The Court, based on the issues formulated by the plaintiffs, ruled in the affirmative on questions 1,4,8,9,10 &11 and ruled negative on questions 2,3,5,6,7,12 & 13.

Commentary

The FHC's judgment, unless appealed and upturned, would have far-reaching implications for telecommunication network facility providers, licence or permit holders who import petroleum products for consumption and indeed the downstream oil and gas industry at large. This is because the decision affirms the controversial definition of 'sold in Nigeria' in Regulation 48 of the MDPOR that provides the basis for the imposition of the Authority Fund and MDGIF levies.

Section 47(2)(c) of the PIA provides that 0.5% of the wholesale price of petroleum products sold in Nigeria shall be collected from wholesale customers to the Authority Fund. Similarly, Section 52(7)(a) of the PIA provides that 0.5% of the wholesale price of petroleum products and natural gas sold in Nigeria shall be collected from wholesale customers in addition to the levy provided for under Section 47(2)(c) and paid to the MDGIF. The PIA, however, did not define the phrase 'sold in Nigeria.'

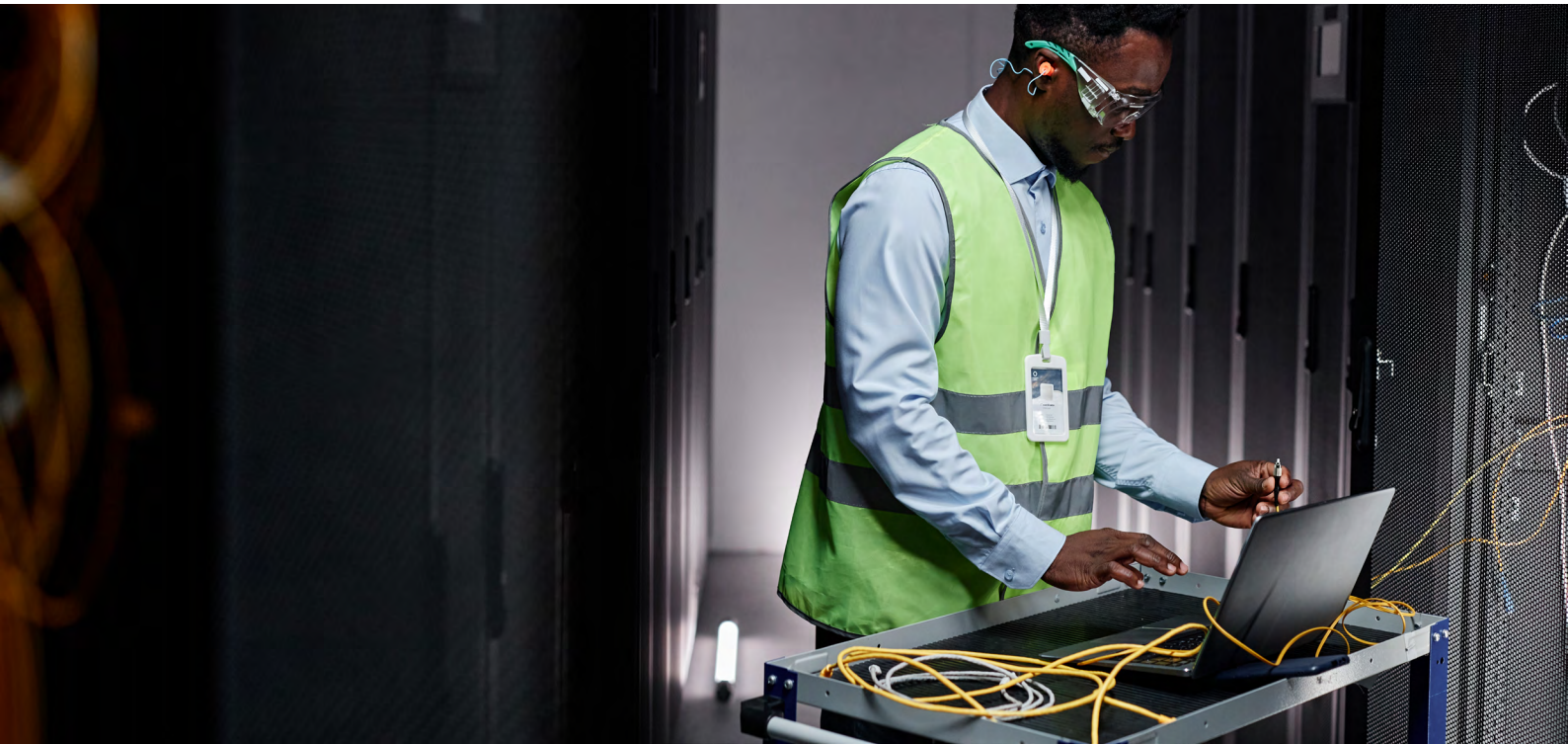
Consequently, the NMDPRA, in Regulation 48 of the MDPOR provided a definition which many players have adjudged to have extended the meaning of the phrase. The Regulation defined 'sold in Nigeria' to mean "where a petroleum product or natural gas - is sold free on board in Nigeria or its territorial waters; is loaded or offloaded for sale within a wholesale point in Nigeria; or transaction emanates, occurs or is concluded in Nigeria or within its territorial waters."

The major thrust of the FHC's decision is that holders of import permits will, on transfer of the custody of the products to a storage facility, be deemed to have sold the products to the storage facility as wholesale customers, therefore liable to the levies. The FHC also noted that, in the absence of a definition of the phrase by the PIA, the definition provided in the Regulations should suffice as it is not inconsistent with Section 52(7)(a) and 47(2)(c). Further, the FHC noted that the Regulation amplifies Sections 52(7)(a) and 47(2)(c) and makes it more understandable.

The judgement raises many fundamental questions for the downstream operations in Nigeria. For example, does the fact that one imports an item in bulk (in this case petroleum products) and transfers to a storage facility automatically qualifies one as a wholesale supplier/ customer? Would the distribution from the tank farms to the place of usage be deemed as sale? Would a service provider be deemed to have 'sold' to the service recipient all the inputs required for the service provided? Does the fact that a service vendor notifies a service recipient of an increase in price of a key input mean that the key input is sold to the customer? Would the decision of the court have been different if the cost of fuel is not shown as a line item on the billings by the plaintiffs as to be construed as commercial activities?

The judgement also draws attention to licence types and their implications. Specifically, the judge held that the licence issued to IHS and Chisco Limited are depot licences and not storage licences, and therefore, do not permit the licensees to deploy stored products for their own use but for sale. Consequently, the Plaintiffs were liable to pay the Authority and MDGI levies based on the type of licences granted to them by the NMDPRA for their operations. It is, therefore, imperative that operators understand and obtain the most appropriate licence type for their business needs.

In the meantime, it will be important to see how these issues are evaluated and resolved on appeal.



For further enquiries, please contact:

Adewale Ajayi
NG-FMTAXEnquiries@ng.kpmg.com

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Ajibola Olomola: *Ajibola.Olomola@ng.kpmg.com*
Ijeoma Uche: *Ijeoma.Uche@ng.kpmg.com*
Olatoye Akinboro: *Olatoye.Akinboro@ng.kpmg.com*

home.kpmg/ng
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