

INTRODUCTION

Recently, the Nigerian Shippers Council (“NSC”) announced that it has commenced the registration of port service providers in line with the Nigerian Shippers’ Council (Port Economic) Regulations, 2015 (the “Regulations”). The Regulations were made pursuant to section 3 of the Nigerian Shippers’ Council Act, 1978. In general, the Regulations seek to create an effective regulatory regime at Nigerian Ports for the control of tariffs, rates, charges and other related commercial (as distinct from technical) services. Below, we examine the major provisions of the Regulations.

Appointment as Port Regulator:

By the Regulations, the Federal Government of Nigeria (“FGN”) constituted the NSC as the commercial regulator at Nigerian ports on interim basis. The NSC shall in the performance of its functions enjoy administrative support from the Federal Ministry of Transport. The need for an economic regulator at the ports arose following the concession of the ports and the withdrawal of the Nigerian Ports Authority (“NPA”) from the day-to-day running of the ports, resulting in a regulatory vacuum. The Regulations state that the NSC shall perform its functions with deference to applicable statutes and the relevant provisions of the Port Concession Agreements entered into between Nigerian Ports Authority as Lessor, Bureau of Public Enterprises as the Confirming Party and Concessionaries as Lessees.

In *Apapa Bulk Terminal Ltd. et al v. Nigerian Shippers Council et. al* (2018) LPELR-44802(CA), the role of the NSC as the commercial regulator of the ports was challenged by terminal operators, as a breach

of their concession agreements with the FGN. In dismissing the appeal for lack of merit and affirming the judgment of the Federal High Court, Lagos, the Court of Appeal held that the appointment of the NSC as the commercial regulator of the ports is valid and in line with statutory functions of the NSC.

Functions of the NSC

Regulation 3 provides that the NSC shall :

- (i) provide guidelines on tariff setting in order to guard against arbitrariness;
- (ii) regulate market entry and exit;
- (iii) minimise the high cost of doing business and its inflationary impact on the economy;
- (iv) promote efficiency in the provision of port services;
- (v) encourage private sector investment in the port sector; and
- (vi) monitor and ensure compliance by all parties with the provisions of Port Concession Agreements.

Regulated Service Providers

The Regulations mandate all “Regulated Service Providers” at Nigerian ports to register with the NSC, irrespective of whether the relevant port is operated by a Concessionaire or the NPA. Regulation 5 lists Regulated Service Providers to include: (a) the Nigerian Ports Authority; (b) seaport terminal operators; (c) shipping companies and agencies; (d) off-dock terminal operators; (e) cargo consolidators; (f) logistics service providers; (g) freight forwarders and clearing agents; (h) inland container depot operators; (i) stevedoring companies; and (j) any other port service

provider or user.

Power to Make Regulations:

Regulation 5 empowers the NSC to issue guidelines for the registration of Regulated Service Providers. The NSC shall make guidelines regarding tariffs, rates and charges applicable in the Nigerian port sector. To ensure conformity with local and global trends, the NSC may review tariffs, rates and charges for regulated services. It is an offence for a Regulated Service Provider to collect tariffs, rates and charges that are inconsistent with the guidelines issued by the NSC.

Other than enjoining the NSC to take into consideration, local and economic standards affecting the port industry and market, the Regulations do not set out the principles that will guide the NSC in setting tariffs. This may be problematic as it could result in lack of transparency and arbitrariness in the exercise of this power by the NSC. This lacuna appears to have been addressed by the National Transport Commission Bill 2018 (discussed below), which states that in determining tariff, the National Transport Commission (“NTC”) shall among others, consider general tariff index, the cost of production and a rate of return on assets employed.

Filing of Returns

The Regulations require Regulated Service Providers to file their operating tariffs, rates and charges with the NSC within 21 days after setting the same or on request by the NSC. The penalty for failure to make the requisite filing include suspension for not more than 3 months and if the blacklisting and de-registration in the case of continued default.

Standards of Port Services

Regulation 3 stipulates that the NSC shall be responsible for the monitoring and enforcement of standards of service delivery in the port sector. To this end, Regulation 7 empowers the NSC to monitor and report on all matters relating to costs, standards and quality of services rendered by the Regulated Service Providers at Nigerian ports and the market. For the purpose of exercising its powers, the NSC and its agents shall at all times, have access to port premises.

Request for Information:

Regulation 7 provides that the NSC may, by a written notice, direct a Regulated Service Provider to provide it with any information, records or documents that are relevant to the exercise of its regulatory functions pursuant to the Regulations. The NSC shall issue 5 working days warning to any person who fails to provide it with information or documents, failing which, the Regulated Service Provider shall be suspended for 6 months. Where there is continued default thereafter, the Regulated Service Provider shall be de-registered and blacklisted. It is also an offence to provide false or misleading information to the NSC. Further, the Regulation 9 states that upon written request, a Regulated Service Provider shall produce to the NSC evidence of compliance with the requirements of the provisions of the Regulations or any guideline issued thereunder.

Complaints Procedure

By the Regulations, the NSC may upon a written complaint by any person specifying against whom it is made, conduct an investigation into the matter in issue. The NSC may also investigate any matter relating to the Regulations, where it has a ground to believe that the Regulations have been or are

being violated. The NSC shall prior to the commencement of its investigation, inform the respondent of the investigation. The NSC may for the purposes of its investigation, obtain information from any person it deems fit and shall give the complainant or the respondent an opportunity to appear before it. The NSC shall give the parties involved an opportunity to make written submissions in relation the matter in issue within a period of 21 days, before it can make an adverse finding against a complainant or respondent.

Monitoring and Enforcement:

Regulation 13 empowers the NSC to perform its monitoring and enforcement obligations under the Regulations by itself or use external inspectors to exercise. Such external inspectors may be instructed by the NSC to investigate the activities of the Regulated Service Providers in relation to compliance with the Regulations.

Offences

Any person who fails to comply with the provisions of the Regulations or contravenes its provisions commits an offense and shall be liable to private or public warning, suspension of its operations and sealing of its premises, blacklisting and/or de-registration and revocation of its operating licence. Further, the NSC is empowered to impose further sanctions as it may deem appropriate to enforce compliance with the Regulations.

National Transport Commission

Pursuant to the National Transport Commission Act, 2018 (the “Bill”) which was passed by the National Assembly but yet to receive presidential assent, the NSC Act is to be repealed and abrogated and the NTC shall become the successor of the NSC. In essence, the NTC will when operational, assume the role of NSC as the commercial regulator of

the ports, as contemplated under the Regulations.

Conclusion

The Regulations, by constituting the NSC as the commercial regulator of Nigerian ports, has filled the regulatory vacuum that emerged from the concession of the ports. We expect that a committed implementation of the Regulations by the NSC will bring about an improvement in service offerings by port services providers, and in turn, enhance the viability and operational efficiency of Nigerian ports.



For more information or to seek further clarification on the foregoing, kindly visit www.gelias.com or contact Nosakhare Aguebor via e-mail at nosakhare.aguebor@gelias.com or Geoffrey Adonu at geoffrey.adonu@gelias.com

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