

# The New Practice (TNP)

## - An Andersen Collaborating Firm



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## Examining the FCCPC's Sanction of Meta Inc. for its Alleged Data Privacy Violation

of products and services. The FCCPC is empowered to administer the FCCPA, and any other enactments focused on the protection of Nigerian consumers<sup>3</sup>.

The joint report alleged that from its thirty-eight-month long investigation, it found that WhatsApp's privacy policy and practices had:

- Failed to provide users the opportunity to withdraw consent from the privacy policy, contrary to the NDPR. The difference in the treatment meted out to Nigerian users compared to Europeans was considered "discriminatory" to Nigerian users given the NDPR was modeled after the EU's General Data Protection Regulation (the "GDPR").<sup>4</sup>
- Deprived Nigerian users of the right to consent to the use and processing of their data by "coercing" users into updating the application through repeated notifications to update the application, "threatening" to withdraw access to the application and subsequently limiting functionality for users who failed to update the application.
- Sought to obtain excessive personal data than was required for lawful processing in the provision of its service and in addition bundled consent requested from data subjects...

### Consent - the "Holy Grail" of Data Privacy

A recurring theme in the report of the investigation<sup>5</sup>, is the subject matter of consent. Under the NDPR, consent is defined as "freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, through a statement or a clear affirmative action, signifies agreement to the processing of personal data relating to him or her."<sup>6</sup>

The Nigeria Data Protection Regulation 2019: Implementation Framework (the "NDPR Implementation Framework") offers some useful guidance into what constitutes lawful consent in the Nigerian context. Section 5.2 of the NDPR Implementation Framework<sup>7</sup> states that:

The following principles shall govern the giving and obtaining of consent:

- Transparency:** There must be an explicit privacy policy stating the type of Personal Data collected, how the Personal Data is processed, who processes the Personal Data, the security standard implemented etc.
- No implied consent:** silence, pre-ticked boxes or inactivity do not constitute consent; and
- No bundled consent:** consent request from general terms and conditions should be separated from consent request. There must be consent for different types of data uses."

From the provisions of the NDPR Implementation Framework produced above, there appears to be legitimate concerns as to the way WhatsApp might have obtained consent. If as alleged, consent was bundled for all types of uses rather than provided for

each purpose as afforded to users in the European market and if transparency as to the purpose of the data collection could be established to determine excessive data collection, then these among others will be the relevant questions to be assessed and proven or disproven in any further adjudication of the matter.

It is also pertinent to point out that the allegations made by the FCCPC and NDPC against Meta are not novel. In 2019, the German Federal Cartel Office found Meta guilty of abusing its dominant position in the German market by requiring the use of Facebook to be conditioned upon the collection and utilization of user data from Facebook and other online services belonging to the Meta group affiliates e.g. Instagram, and third-party applications that embedded Facebook interfaces. Meta was found to have violated the EU General Data Protection Regulation on the grounds that user consent was not freely given; and that data collected by Meta was excessive.

### Validity of the Regulators' Power to Sanction and Impose Fines

The FCCPC, relying on the powers bestowed by Section 17(e) of the FCCPA, constituted an investigative panel to investigate Meta's potential violations. The report of the panel was released in November 2023, pursuant to which the FCCPC imposed a rather hefty fine of US\$220,000,000 (Two Hundred and Twenty Million United States Dollars). It is necessary to consider a few issues at this juncture;

one being whether the FCCPC possesses the power to impose fines?

The FCCPA authorizes the FCCPC to investigate possible violations of the FCCPA and administer any Act bordering on consumer protection but the power to impose fines is a separate matter. Although the FCCPC Administrative Regulations 2020 purports to allow the FCCPC to impose fines for the breach of the FCCPA, recent judicial decisions suggest otherwise.

In NOSDRA v Mobil Producing Nigeria Unlimited (ExxonMobil), the Court of Appeal raised the issue of fair hearing and the constitutional powers of courts to adjudicate matters; it determined that NOSDRA<sup>8</sup> being the regulator, had acted beyond its powers when it imposed a fine without giving the "defaulter" an opportunity to be heard, thereby acting as the "Judge in its own cause, the complainant as well as the Judge". The Court of Appeal also highlighted that NOSDRA lacked the powers (as contained in its enabling statute) to reach the decision that ExxonMobil had breached the provision of the NOSDRA Act, leaving the court as the only competent authority to arrive at that conclusion. This case restates the importance of fair hearing in our jurisprudence and upholds the constitutional powers of the courts to hear and determine cases, particularly where an enabling Act does not donate adjudicatory powers to a regulatory body.

It is pertinent to state that Section 18(1)(h) of the FCCPA permits the FCCPC to make regulations for the imposition of fines and administrative penalties, whether this provision can be considered an outright power to impose fines should be determined by the courts. The NDPR, however, allows the imposition of fines for any person found in breach of the Regulation but since it is only a subsidiary regulation, its provisions are subject to an enabling Act. It is noteworthy that the NDPR was issued in furtherance of the National Information Technology Development Agency (NITDA) Act 2007 which does not expressly empower the imposition of fines for such violations and even if it did, the NITDA would be the Agency empowered to do so.

### Conclusion

In the final analysis, the issues that arise from the report still leave a lot to be desired and should ideally and ultimately be determined by a court of competent jurisdiction. It is unclear from the provisions of the FCCPA whether the FCCPC is empowered to impose fines as it has in the case of Meta. In the event that the Court finds the FCCPC to lack such powers, the fines so awarded may be rescinded as has been the trend with recent court cases. Nonetheless, this however signals interesting times ahead for the advancement of data privacy within Nigeria.

**“ In the final analysis, the issues that arise from the report still leave a lot to be desired and should ideally and ultimately be determined by a court of competent jurisdiction. It is not clear from the provisions of the FCCPA whether the FCCPC is empowered to impose fines as it has in the case of Meta. ”**

<sup>1</sup> See FCCPC Release <https://fccpc.gov.ng/wp-content/uploads/2024/07/Release-in-the-Matter-of-Meta-Platforms-Inc.-and-WhatsApp-LLC.pdf>

<sup>2</sup> Section 4 of the NDPA

<sup>3</sup> Section 17 of the FCCPA

<sup>4</sup> The Updated Privacy Policy that applies to users in Europe with respect to how users exercise their rights, provides "Under applicable data protection law, you have the right to access, rectify, port and erase your information, as well as the right to restrict and object to certain processing of your information..."

<sup>5</sup> See Report <https://fccpc.gov.ng/wp-content/uploads/2024/07/Investigative-Report-FCCPC-WhatsApp-13.11.23.pdf>

<sup>6</sup> See Regulation 2.2 of the NDPR

<sup>7</sup> <https://nitda.gov.ng/wp-content/uploads/2021/01/NDPR-Implementation-Framework.pdf>

<sup>8</sup> National Oil Spill Detection and Response Agency

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