RECENT JUDICIAL DECISIONS ON THE RIGHT OF REGULATORY AUTHORITIES TO IMPOSE FINES

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It is commonplace for regulatory institutions to impose fines and penalties (penalties) on companies operating in the industries they oversee (operators), for alleged infraction of the rules. These penalties are sometimes so humongous that they threaten the viability of the companies fined. For example, the 'much talked about' $5.2bn fine imposed by NCC against MTN Nigeria in 2015;[3] CBN fines totalling N5.8bn against Stanbic IBTC, Standard Chartered Bank, Citibank and Diamond Bank;[4] other times, these penalties are relatively lower sums which however continuously bite at the heels of business profitability. Penalties are tools in a regulatory framework design, used to deter future breach by demanding a monetary sum from the operator, which is significant enough to act as a commercial incentive for operators to comply with the rules. The value of the penalties is typically prescribed in the provisions of the applicable laws, in which case they are statutory penalties.[5] In some instances, regulators impose penalties arbitrarily to punish non-compliance and the value of such penalties depend on the circumstances and severity of the alleged breach.

One question that arises whenever regulators impose penalties on operators, is whether the regulators have the unilateral authority to impose penalties without recourse to the courts. The recent conflicting decisions of the Courts in **NOSDRA v. MPNU**[6] (MPNU case) and **SNEPCO v. NOSDRA**[7] (SNEPCO case), which were both delivered in 2018 on this same question, in respect of the same regulator, has once again highlighted this question and we attempt to briefly address it in this paper.

In the MPNU case, there was an oil spill at MPNU's Qua Iboe facility in Akwa Ibom State and after the clean-up, NOSDRA issued a letter notifying MPNU of its violations of the NOSDRA Act and demanding payment of a N10m fine pursuant to Sections 6(2) and (3) of the NOSDRA Act, which prescribe penalties to punish oil spillers. MPNU successfully argued at the Court of Appeal that only a court of competent

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3 News report of All Africa, Nigeria: Can MTN survive multiple fines? <https://allafrica.com/stories/201809040027.html accessed November 26, 2018.

4 Ibid.

5 Black's Law Dictionary, 8th Edition, page 1168, quoted in **Moses Ediru v F.R.S.C.** (2016) 4 NWLR (Pt. 1502) Pg 245 D-E.

6 **NOSDRA v. Mobil Prod. (Nig.) Unltd** (2018) 13 NWLR (Pt.1636) 334.

7 **Shell Nigeria Exploration and Production Company v. NOSDRA** (Unreported) delivered on May 24, 2018, < https://royaldutchshellgroup.com/2018/06/21/nigeria-court-orders-shell-to-pay-3-6-billion-fine-over-oil-spill/> accessed November 26, 2018.

jurisdiction could impose penalties and that NOSDRA being an administrative agency, lacks the inherent powers in itself or from the provision of NOSDRA Act, to impose a penalty on MPNU. The Court of Appeal in agreeing with MPNU's argument noted further that NOSDRA's letter demanding payment of the fine without giving MPNU the opportunity to be heard, amounted to NOSDRA constituting itself as the prosecutor, judge and jury in the matter, contrary to the principles of fair hearing as guaranteed by Section 36(1) of the Constitution.[8] Furthermore, the Court held that the NOSDRA Act did not expressly grant NOSDRA the power to impose penalties.

Conversely, the Federal High Court in a subsequent judgment – **SNEPCO v. NOSDRA** (SNEPCO case),[9] when presented with similar arguments in MPNU's case, upheld NOSDRA's authority to impose penalties pursuant to Section 5, 6 & 7 of the NOSDRA Act and held that the exercise of these powers was not in conflict with the Constitution. The court held that the demand letters from NOSDRA requiring payment of the penalties were not in breach of SNEPCO's constitutional rights to fair hearing as SNEPCO was at liberty to seek redress from the courts if it felt its rights were being infringed upon.

Our Perspective

The answer to this question on regulators' authority to impose penalties in our view, flows from the nature of statutory penalties themselves. Statutory penalties can either be criminal or civil in nature,[10] and at the risk of oversimplification, it is this distinction that determines the scope of the authority of regulators to impose penalties.

Section 36(1) & (4) of the Constitution lay down the rules on the forum for determining criminal and civil liability. Subsection (4) makes it clear that criminal liability must be established in court or a tribunal established by law, and the same forum is prescribed in Subsection (1) for determining civil rights of citizens. However for the determination of civil suits, Section 36(2) recognises an exception to this rule that a law may validly direct a regulator to act in a judicial capacity by determining questions arising in the administration of the law without recourse to court or tribunal, subject to 2 conditions:[11] (a) the offending operator is given an opportunity to make representations before the regulator makes a decision affecting such an operator; (b) the regulator's decision is not stated as being final.

We consider the imposition of penalties by regulators on operators as a determination as to the liability of an operator, which surely affects the civil rights and obligations of operators and as such qualifies for this Section 36(2) exception. This consideration is reinforced by Section 13(3) & 35 of the Interpretation Act,[12] which contemplates that a regulator may by law be vested with the authority to impose fines directly and enforce them as though they were imposed by a court. It therefore follows that while criminal penalties can only be determined by a court or tribunal, civil penalties can be imposed by courts, tribunals, including regulators (provided such regulators meet the above 2 conditions). It is important to also point out that the power to impose a penalty must be expressly vested in the regulator by its enabling legislation, for example such powers granted to the NCC,[13] SEC,[14] NERC,[15] CBN,[16] etc. This also

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8 Constitution of the Federal Republic of Nigeria Cap C21, LFN 2004.

9 Shell Nigeria Exploration and Production Company v. NOSDRA (Unreported) delivered on May 24, 2018, <https://royaldutchshellgroup.com/2018/06/21/nigeria-court-orders-shell-to-pay-3-6-billion-fine-over-oil-spill/> accessed November 26, 2018.

10 The Court in **Bartholomew Bassey Ebong V. Securities And Exchange Commission** (2017) LPELR-43547(CA) 36, differentiated between offences which ought to be referred to the prosecuting authorities and penalties which the SEC was empowered to impose as provided by Section 305 of the Investment and Securities Act (2007). See also **CAC v. Seven-up Bottling Co.** (2017) 5 NWLR (Pt.1558) at pg. 258 B & 259 B-C.

11 See. **Rt. Hon. Uduimo Itsueli & Anor. V. Securities and exchange commission & Anor** (2011) LPELR-4343(CA) per Rita Pemu JCA.

12 Interpretation Act, Cap I23, LFN 2004.

13 Nigerian Communication Commission, see Section 111 of the Nigerian Communications Act, 2003.

14 Securities Exchange Commission, see Section 305(3)(c) of the Investment and Securities Act, 2007.

15 Nigerian Electricity Regulatory Commission, see Section 75 of the Electric Power Sector Reform Act, 2005.

16 Central Bank of Nigeria, see Section 64(1) Banks and Other Financial Institutions Act, Cap B3 LFN, 2004

applies to invalidate penalties imposed by regulators which the enabling act does not stipulate such authority.

In the MPNU case, the Court of Appeal seemed to consider the penalties in subsections 6(2) & (3) of the NOSDRA Act to be criminal penalties, on the basis of which it opined that a conviction by a court of competent jurisdiction was a precondition to issuing the penalties. We note however that the said subsections do not have the essential ingredients of a criminal offence as prescribed by Section 36(12) of the Constitution, which requires that a criminal offence must be expressly created/defined in the law and the punishment indicated thereunder. Sub-sections 6(2) & (3) of the NOSDRA Act do not define the failure to report an oil spill or failure to clean up an oil spill and remediate the environment as offences, they merely state that failure to comply with these provisions attract liability to pay specific sums as fines. Note the difference between fines created in Section 6(2) & (3) and Section 25 of the NOSDRA Act; in the latter, an offence is created for breach of secrecy by NOSDRA. Nonetheless, even though one could consider the statutory penalties prescribed in Sub-sections 6(2) & (3) NOSDRA Act as civil in nature, the way and manner NOSDRA imposed the fine in the MPNU case did not meet the condition prescribed by Section 36(2)(a) of the Constitution, for exercise of such authority. NOSDRA reached the decision to impose the penalty and issued a demand notice without giving MPNU the opportunity to make representations, which was therefore in breach of MPNU's right to a fair hearing.

In the SNEPCO case the Court's finding that SNEPCO was granted fair hearing as it had the opportunity to make recourse to the courts after it was served with the notification of sanction by NOSDRA, was in our view incorrect as it only met the condition in Section 36(2)(b) of the Constitution but failed to meet the condition in Section 36(2)(a) thereof. SNEPCO ought to have been given the opportunity to make representations to the regulator before the demand letter for the penalty was issued by NOSDRA. Furthermore, contrary to the finding of the Court, Sections 5, 6, & 7 of the NOSDRA Act do not vest NOSDRA with the authority to impose penalties on spillers or generally regulate oil and gas operators, rather NOSDRA's principal mandate is to implement the national plan in response to oil spills.

In sum therefore, we are of the view that a regulator can impose penalties, where its enabling act empowers it to do so expressly and provided it affords the offending operator its rights to fair hearing. We note that the Court of Appeal in its previous decisions in **CAC v. Seven-up Bottling Co. (2017)**,[17] **Moses Ediru v F.R.S.C. (2016)**,[18] and **Ebong V. Securities And Exchange Commission (2017)** LPELR-43547(CA) 36, had held that the CAC, FRSC and SEC respectively, have the authority to impose civil penalties without recourse to the Courts. The Court of Appeal in **Moses Ediru v F.R.S.C. (2016)**,[19] opined thus:

> *"These anatomised provisions, amply, demonstrate that the respondents are within the four walls of the law to enforce the penalties relative to the alleged offences. The point must be made that the respondents (FRSC) are not the imposers of the penalties. It is the statute promulgated by the legislature. They are quintessence of statutory penalty...Put the other way round, there is no confluence point where the powers of the respondents and the court meet. The powers of both are not coterminous. They are mutually exclusive such that the respondent's power of enforcement is not an usurpation of the judicial power of the court…The foregoing settles the other issue, id est, the fines must not be imposed on conviction at all event."*

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17 (2017) 5 NWLR (Pt.1558) at pg. 258 B & 259 B-C
18 (2016) 4 NWLR (Pt. 1502) pg 245 A-H.
19 Ibid at pg 245 D-H.

The decision in MPNU's case takes precedence over the decision in SNEPCO's case, because MPNU's case was decided by the Court of Appeal, a higher court in the hierarchy of Nigerian courts, than the Federal High Court, which decided SNEPCO's case. We expect both cases to ultimately end up in the Supreme Court, where the inquisition into NOSDRA's right to impose penalties will afford the Supreme Court an opportunity settle the general question whether regulatory authorities can impose penalties.

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