

FOUNDATION
CHAMBERS
LEGAL PRACTITIONERS

An Analysis of the Nigeria Shipping and Port Economic Regulatory Agency Bill 2023

Emmanuel Ikwuakolam



In a significant step towards modernizing and enhancing the regulation of Nigeria's ports, the House of Representatives recently passed the Nigeria Shipping and Port Economic Regulatory Agency Bill 2023 (“the Bill”). The Bill is now set to be transmitted to the Senate for passage and subsequent Presidential assent. This Bill seeks to repeal the existing Nigerian Shippers’ Council Act[2] and aims to establish a more robust and effective regulatory framework to support the growth of the shipping and port sectors while safeguarding the interests of Nigerian Shippers.

The Bill proposes the creation of the Nigeria Shipping and Port Economic Regulatory Agency ("the Agency")[3], which is tasked with achieving ambitious objectives to create a more efficient and competitive environment for both public and private stakeholders in the shipping and port sectors. One of the key provisions of the Bill is expanding the functions and powers of the Nigerian Shippers’ Council by granting the new Agency broader authority. This includes empowering the Agency to set and enforce service standards, tariffs, and licensing requirements for Public and Private Players in the sector, referred to in the Bill to as ‘Regulated Service Providers’.[4]

However, while the Bill promises substantial benefits, it also raises potential concerns about overlapping regulatory functions and possible conflicts with existing agencies. As the legislative process progresses, it is crucial to address these issues to ensure a smooth transition and effective implementation of the new regulatory framework. This article critically examines the key provisions of the bill, aiming to inform stakeholders and offer suggestions for its successful implementation.

Objectives of the Bill

A review of the Bill reveals that it primarily seeks to create an economic regulatory framework for the effective and efficient regulation of commercial

[1] Emmanuel Ikwuakolam, Counsel; Foundation Chambers; Email: e.ikwuakolam@foundationchambers.com, Tel: 2349038337974

[2] Cap N133 Laws of the Federation of Nigeria 2004

[3] Section 3 of the Bill

[4] Section 70 of the Bill

Objectives of the Bill

A review of the Bill reveals that it primarily seeks to create an economic regulatory framework for the effective and efficient regulation of commercial activities within Nigeria's ports and to monitor and ensure the compliance of government agencies and other service providers operating in the sector.

Application of the Bill

As mentioned earlier, the bill grants the Agency regulatory authority over all public and private entities operating or providing services in the shipping and port sectors. This includes stevedoring, cargo handling, freight forwarding, haulage, terminal operations, and other related services. This implies that certain functions of other government agencies operating within the port, such as the Nigerian Ports Authority ('the NPA'), the Nigerian Maritime Administration and Safety Agency ('the NIMASA'), and the Nigerian Customs Service ('the NCS'), will also fall under the purview of the new Agency, which may give rise to some areas of conflict between the Agencies. We note from the Supreme Court's decision in *National Inland Waterways Authority & 3 Ors v. Lagos State Waterways Authority & Ors*[5] that, where there is conflict between a Federal and a State Agency, the Agency deriving its power from a federal

legislation enacted in pursuance of the items on the Exclusive Legislative List, will override any Agency acting pursuant to a state enacted law. This is premised on the fact that the federal legislation is deemed to have covered the field. However, which Agency will supersede, where both conflicting powers and functions are derived from federal laws as might be the case where the function of this New Agency overlaps with that of other industry regulators such as the NPA, NIMASA and the NIWA. Section 4(3) of the Bill, seems to have provided for such cases of conflict as it states that the provisions of the Bill would prevail.

Key Provisions of the Bill

a. Mandates and Responsibilities of the Agency

A notable provision of the New Bill, is the vesting of the New Agency with the power, amongst other things to Regulate market entry and exit, implement government's economic regulatory policies on shipping and ports and amongst other things advise the government of the federation on trends and matters generally relating to trade facilitation, concession agreements, transport facilities, the structure of freight rates, availability and adequacy of shipping space, port charges, haulage rates, and other matters related thereto .

[5] (2024) LPELR-62198(SC)

The new agency will also oversee issues relating to antitrust policies. It performs this role through Section 4(1)(f) of the bill, which vests the Agency with the responsibility to promote, facilitate and encourage effective competition. The Nigerian Shippers Council has always performed this function, this provision in the Bill therefore reinforces the mandate, which is crucial in ensuring fair competition within the maritime sector as a catalyst for the stimulation of competition and reduction in the cost of doing business at the ports, thereby undoubtedly making the ports more attractive and competitive.

The above notwithstanding, it is essential to ensure that the implementation of these provisions align with broader anti-competition laws and frameworks to prevent potential conflicts. We are of the view that the New Agency's role must be carefully coordinated with existing competition authorities such as the Federal Competition and Consumer Protection Commission to avoid overlapping jurisdictions and ensure a cohesive approach to maintaining market integrity and promoting a competitive environment. Additionally, this regulatory power could potentially introduce additional compliance measures for stakeholders in the maritime industry.

Terminal Operators and Shipping lines may now face the dual challenge of adhering to regulations imposed by both the new agency and the Federal Competition and Consumer Protection Commission (FCCPC) in respect of antitrust policies. This could in turn lead to increased administrative costs which stakeholders will need to navigate. It is, however, reassuring to note that Section 4(1)(f) of the bill is explicitly made subject to other applicable competition laws. As a result, in instances of regulatory conflict, the provisions of the Federal Competition and Consumer Protection Act (FCCPA) or such other broader anti-competition laws will take precedence over the bill.

b. Power to Issue Regulations, Guidelines, and Tariffs (Sections 35 and 36): The Agency to be established by the Bill is also empowered to issue and review regulations and guidelines to implement the provisions of the bill. Consequently, in pursuance of this provision, the agency shall have the power to set standard operating procedures for regulated service providers. Such standards operating procedures, where enacted would detail the methods and procedures to be adopted by terminal operators and other stakeholders in the maritime industry on matters related to cargo clearance, decongestion of the ports and other aspects critical to the efficient functioning of ports and terminals.

These procedures aim to streamline operations, enhance regulatory compliance, and facilitate the seamless flow of goods. Additionally, the agency will seek to enhance transparency and consistency across the industry, fostering a more predictable and reliable environment for both domestic and international trade. Through these measures, the agency will address operational inefficiencies and promote global best practices within the Nigerian Ports.

Under the Bill Service providers are required to file their operating tariffs, rates, and charges with the agency within 21 days of setting them, and failure to comply can result in suspension or de-registration[6].

c. Licensing, Certification, and Permits (Section 42): The Bill also empowers the agency to set guidelines and policies for the issuance, re-issuance, suspension, cancellation, or revocation of licenses, certificates, and permits. Under the Bill, no Regulated Service Provider may operate a facility or provide services without the appropriate license, certificate, or permit issued by the agency. This applies to both existing government-owned facilities and new operators. We foresee this are some of the possible areas of conflict which may arise given that that barge operations in Nigeria are primarily regulated by the Nigeria Ports Authority (NPA) which issued a handbook of guidelines for barge operations in 2022.

[6] S. 37

[7] Section 4(1)(g)

This handbook contains international best practices for the operation of barges and provides criteria for the issuance of operational licenses, minimum safety standard qualification, operational guidelines for terminals and barge operators, and the standard procedure for barge operators and the terminals. Section 1 of the handbook even sets out the criteria for renewal and issuance of new barge operator license and permit to operators. It will therefore be tantamount to duplication of functions to have the New Agency also issue licences, certifications and permits in respect of barging operations under the Bill. Though we are aware that the Nigerian Shippers Council does currently perform some oversight functions over barge operators, we are of the view that enactment of the New Bill will indubitably lead to additional compliance requirements for barge operators and other stakeholders in the maritime industry such as the terminal operators who must of necessity commence strategies for compliance with this additional regulatory oversight, thereby leading to additional compliance cost implications.

d. Monitoring and Enforcement Powers: The Bill also confers powers on the agency to monitor, supervise and ensure compliance with the provisions of the Ports Concession Agreements, carry out periodic audit of the concessions[7], ensure compliance by all parties with the terms of the

concession agreement and cause to be reviewed the terms of any valid concession agreement or contract entered between public or private regulated service providers or facility owners for the provision of regulated services in Nigeria[8].

It is noteworthy that during the initial commencement of the concessioning of the Nigerian Ports the Nigerian Shippers Council did not play a role. As the port concessions were amongst the Terminal Operators, the Nigerian Port Authority, as well as other government agencies such as the Bureau of Public Enterprises, as the confirming party. Under the Bill, the Port Concessions will now be the subject of scrutiny of the New Agency. We note that the underlying reason for including the New Agency is to ensure that there are no terms prejudicial to the interest of Shippers in the said concessions so as to monitor excessive charges, arbitral introduction of and increase in charges, abuse of concession agreements, undue delay in cargo clearance, cumbersome cargo clearance procedures and any form of oppressive policies in the maritime industry would be checked.

This provision however raises questions as to the propriety of the New Agency scrutinizing agreements or concessions entered by other government agencies which the New Agency was not a party to.

This question arose In *Apapa Bulk Terminal Ltd & Ors V. Nigerian Shippers Council & Anor*[9], when President of Nigeria, Dr. Goodluck Ebele Jonathan GCFR, in exercise of his executive powers appointed the Nigerian Shippers Council as the Economic Regulator for the Nigerian Ports for efficiency in service delivery. This was against the backdrop of allegations that Terminal Operators had unilaterally increased the progressive storage charges and reduced the Global Best Practice of 7 days free storage period to 3 days in disobedience to the Minister of Transport's directive. Consequently, pursuant to its new powers as Economic Regulator, the Nigerian Shippers Council issued a Notice (Notice No. NSC/LNSC/2004/001) compelling the Appellants to revert to the 7 days free storage period and rates in line with the Minister of Transport's directive. The Appellants were aggrieved and approached the Federal High Court to challenge the notice on the ground that their respective lease agreements with the Nigerian Ports Authority (NPA), the Bureau of Public Enterprises (BPE) and by extension, the Federal Government only recognizes NPA as their regulator and not the Nigerian Shippers Council. The Federal High Court in a judgement delivered on 17th December 2014 dismissed the Appellants' Originating Summons in its entirety and upheld the Notice. The appellants, dissatisfied with this judgment appealed to the Court of Appeal.

[8] Section 4(1)(h)

[9] (2018) LPELR-44802(CA)

The Court of Appeal equally dismissed the appeal for lacking in merit. The matter has now been appealed to the Supreme Court of Nigeria and therefore remains sub-judice. It is, however, pertinent to point out that in the sister case of *Alraine Shipping Agencies Nig. Ltd & 12 Ors v. Nigeria Shippers Council & Anor*[10] the Court of Appeal addressed a similar situation involving major shipping line agents, under the umbrella of the Shipping Association of Nigeria (SAN). The Nigerian Shippers' Council had unilaterally issued a Notice (No. NSC/LN- SC/2014/001) to all shipping lines on new tariff to be charged by the said shipping lines. The Council purported to have issued the Notice based on its power as the Economic Regulator of Nigerian Ports pursuant to the said Presidential Order. Consequently, the shipping lines approached the Court to challenge the authority of the Council to introduce the said new tariff in a manner that is inconsistent with the provision of the Nigerian Shippers' Council Act, particularly section 3(f) which requires the Council to negotiate and enter into an agreement with conference lines, and non-Conference Lines, ship-owners, the Nigerian Ports Authority and any other bodies on matters affecting the interests of shippers before local shipping charges are introduced[11].

The Court of Appeal, whilst partly allowing the appeal, held that the

action of the Nigerian Shippers Council pursuant to the said Presidential Order was beyond its powers under the Nigerian Shippers Council Act and therefore void. The Court stated thus:

” I have earlier stated that the executive power vested on the President is not at large. The President is not above the law; the exercise of his executive powers is therefore limited by law. From the clear and unambiguous provision of section 3(b) & (k) of the NPA Act, the legislature thinks it appropriate to confer upon the Nigerian Ports Authority, the power to maintain, improve and regulate the use of ports and to carry out such other activities which are connected with or incidental to its other functions under this Act. Thus, unless and until the provision of section 3 of the NPA Act is altered or amended by an Act duly enacted by the National Assembly, the Nigerian Ports Authority remains the statutory body competent to regulate the use of ports. (P. 174 lines 37 - 45; P. 175 lines 1 - 25)”

The Court of Appeal further stated as follows:

“I am therefore in agreement with the Learned Appellants' Counsel that if there is the need to transfer Port regulatory functions to the 1st Respondent, the NPA Act and the NSC Act need to be amended and a legislation to that effect enacted as any

[10] 2017 Commercial Law Reports Nigeria, 9 CLRN, 125.

[11] S. 3(1) Nigerian Shippers Council Act

attempt to appoint another ‘Regulator’ while NPA remains one can only lead to absurdity and needless confusion. Therefore, the purported appointment of the 1st Respondent cannot be allowed to stand having been made vide subsidiary legislation which is found to be inconsistent with the provision of the NSC Act as well as the NPA Act. It follows that Exhibit AOA5, Notice no. NSC/LN-SC/2004/001 was not validly issued by the Respondent. It is thus null and void with no effect whatsoever”

This matter has equally been appealed to the Supreme Court and it would be interesting to see how the Supreme Court resolves the issue, especially in the light of potential conflict in the functions of the new agency and other existing regulators in the maritime industry.

At a recent appearance at the Annual General Conference of the Nigerian Bar Association, the Executive Secretary of the Nigerian Shippers’ Council addressed these concerns, emphasizing the importance of this legislation to the growth of Nigeria’s marine and blue economy.

It is therefore critical in the unfolding legislative exercise, to ensure that the exercise is comprehensive enough to bring about relevant amendments to other legislations in the maritime industry, particularly the enabling legislations for the NPA, NIWA and NIMASA. This would in turn lead to avoidance of conflict in the regulatory functions of the agencies of government.

Conclusion


The Nigeria Shipping and Port Economic Regulatory Agency Bill 2023 represents a significant move toward modernizing the regulatory landscape of Nigeria's maritime sector. By establishing a dedicated agency with expanded powers and responsibilities, the Bill aims to create a more efficient and competitive environment for shipping and port operations, ultimately benefiting Nigerian shippers and fostering economic growth. However, as the Bill progresses, it is essential to address potential conflicts with existing regulatory bodies to avoid overlapping functions that could lead to increased compliance costs and operational inefficiencies. A coordinated approach to regulatory oversight will be crucial for the successful implementation of the Bill and the promotion of a cohesive framework that supports the broader objectives of the Nigerian maritime industry.

CONTACT US

 www.foundationchambers.com

 info@foundationchambers.com

016306724

 08133447698
09036019864

 **Main Office:**
7th Floor Architects Place
2 Idowu Taylor Street
Victoria Island
Lagos, Nigeria.

Associate Offices

Abuja:

Suite 332

Transcorp Hilton Hotel

Abuja, Nigeria.

0810 369 8795

Port Harcourt:

Old Brooklyn Hotel Building

22 Peremabiri Street

D Line, Port Harcourt

Rivers State, Nigeria.

