A CRITICAL REVIEW OF THE LEGAL REGIME FOR TELECOMMUNICATIONS IN NIGERIA

ORJI, UCHENNA JEROME

2011377017F

FACULTY OF LAW,

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APPROVAL

THIS DISSERTATION ENTITLED: 'A CRITICAL REVIEW OF THE LEGAL REGIME FOR TELECOMMUNICATIONS IN NIGERIA' HAS BEEN APPROVED FOR THE FACULTY OF LAW, NNAMDI AZIKIWE UNIVERSITY, AWKA.

By

…… …….

Prof. Greg Nwakoby

(Supervisor) Date

…… ……... ……

Prof. Godwin Okeke Date

(Dean, Faculty of Law)

…… ……

External Examiner Date

…… ……

Prof. Harry Ike Odimegwu

(Dean, School of Postgraduate Studies) Date

CERTIFICATION

Be it certified that this dissertation is an original work of the postgraduate student, ORJI UCHENNA JEROME, with Registration Number 2011377017F. Be it further certified that this work has not been submitted, in part or whole, for any degree or examination in any other university or academic institution, and that all the sources used had been indicated and appropriately acknowledged by complete references.

…….. ……

Orji, Uchenna Jerome Date

(Student)

DEDICATION

To Sir & Lady Moses Orji (KSJ). To my siblings: Ify, Ngozi, Tobechukwu, and; Ugochukwu. To Emmanuel Orji; and; to the living memory of Orji Jerome Arochukwu *Esq*.

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ABSTRACT

For over a decade, the Nigerian telecommunications industry has continued to grow in phenomenal proportions. Recent statistics from the Nigerian Communications Commission indicate that Nigeria grew from having one of the world's lowest teledensity rates with about 400,000 lines in 2000 to having over 150 million telecommunications active subscribers by February 2016. Nigeria currently has the largest population of telecommunications subscribers in Africa and also one of the largest in the world. This phenomenal growth has been linked to the implementation of market liberalization reforms that were initiated in the 1990's and the availability of mobile communications systems. The industry is also regarded as the fourth pillar of the Nigerian economy in terms of GDP contribution and the fastest growing at a rate of 24 percent. Hence, telecommunications is now seen not only as a critical economic sector, but also a facilitator of social and economic development. However, in several areas, the rapid growth of the industry appears not to have been matched with adequate legal and regulatory measures to address emerging challenges in the industry. This state of affairs to a large extent has contributed in hindering the development potential of the industry while also raising several concerns for consumers and service providers. Against this background this dissertation seeks to undertake a critical review of the legal and regulatory regime for the governance of the Nigerian telecommunications industry. The dissertation mainly applies the analytical method of legal research with a view to assessing the legal and regulatory regime for the governance of the Nigerian telecommunications industry and also identifying areas where there are deficiencies in that regime. In order to address these objectives, the dissertation sets out seven chapters that deal with issues including: the industry's core legal and policy frameworks; the installation of network infrastructure; consumer protection; competition and interconnection regulation; dispute resolution. Within the above contexts, the dissertation identifies several areas where legal regulation has not kept up with developments in the industry and argues that regulatory failure has generally increased negative market effects on consumers, while also hindering the development of the industry. Accordingly, the dissertation proposes several responses including regulatory reforms to address the identified regulatory gaps. The dissertation concludes that the effect of regulatory failure in responding to the identified challenges of the industry are interlinked since regulatory failure in one aspect of the industry will either produce negative effects on consumers or impede service providers from effectively delivering reliable and affordable services to consumers. Also the fact that some of the regulatory gaps that have been identified in Nigeria's telecommunications regime could create potential for the violation of the human right to privacy in a democratic society further underscores the need for timely responses.

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TABLE OF INTERNATIONAL INSTRUMENTS

LIST OF ABBREVIATIONS

AU	African Union
CPA	Consumer Protection Act
CPC	Consumer Protection Council
CCPR	Consumer Code of Practice Regulations
ChD	Chancery Division
ECOWAS	Economic Community of West African States
edn	Edition
EIA	Environmental Impact Assessment
EU	European Union
GATS	General Agreement on Trade in Services
GSM	Global System for Mobile Communications
GSMA	GSM Association
ICT	Information Communications Technology
IMF	International Monetary Fund
ISP	Internet Service Provider
ITU	International Telecommunications Union
KPI	Key Performance Indicators
LPELR	Law Pavilion Electronic Law Reports
₦	Naira
NCA	Nigerian Communications Act

NCC	Nigerian Communications Commission
NITDA	National Information Technology Development Agency
NWLR	Nigerian Weekly Law Reports
NZLR	New Zealand Law Reports
QoS	Quality of Service
RTSR	Registration of Telephone Subscribers Regulations
SIM	Subscriber Identification Module
SON	Standard Organization of Nigeria
USD	United States Dollars
WTO	World Trade Organization

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CHAPTER ONE

INTRODUCTION

1.1 Background To The Study

The Nigerian telecommunications industry has continued to grow in phenomenal proportions following the implementation of market liberalization reforms that were initiated in the 1990's. Consequently, Nigeria has grown from having one of the world's lowest teledensity rates with about 400,000 lines in 2000 to having over 150 million telecommunications subscribers by February 2016.[1] Recent statistics from the Nigerian Communications Commission (NCC) indicate that Nigeria achieved a teledensity of 106.16 percent[2] by the beginning of 2016 from 0.38 percent in 2000.[3] The NCC arrived at this recent teledensity data on the basis of the last national population census of 2006 which placed Nigeria's population at 140 million people.[4] Currently, Nigeria has the largest population of telecommunications subscribers in Africa[5] and also one of the largest in the world. The National Bureau of Statistics estimates that the telecommunications industry contributed about 8.69 percent to Nigeria's GDP in 2013

[1] Nigerian Communications Commission, *Subscriber Statistics* (22 March, 2016) at<http:// www.ncc.gov.ng/index.php?option=com_content&view=article&id= 125&itemid=73> accessed on 30 March, 2016.

[2] NCC, 'Subscriber Statistics – February 2016', (7 March, 2016), <http://www.ncc.gov.ng/ index.php?option=com_content&view=article&id=125itemid=73> accessed on 30 March, 2016.

[3] ITU Statistics (May 2001), available at <http://www.itu.int/itudoc/itu-t/com3/focus/72404-fr.html>. *See also* E Ndukwe (Executive Vice Chairman, NCC) 'Telecommunications as a Vehicle for Socio-Economic Development', p.3, available at <http://www.ncc.gov.ng/archive/speechs_presentations /EVC's%20presentation/2009/socio.pdf> accessed on 30 March, 2016.

[4] *Ibid.*

[5] National Bureau of Statistics, *Nigerian Telecommunications Sector (2010 – 2014) – Summary Report on Telecommunication for National and International Regions* (Abuja: National Bureau of Statistics, February 2015) pp.1 and 11.

according to the recently rebased national GDP data.[6] The industry is also regarded as the fourth pillar of the Nigerian economy in terms of GDP contribution and the fastest growing at a rate of 24 percent.[7] Hence, telecommunications is now seen not only as a critical economic sector, but also a tool for sustainable social and economic development.

However, in several areas, the rapid growth of the industry appears not to have been matched with adequate legal and regulatory responses to address emerging issues in the industry. Areas of concern include: consumer protection, the installation and protection network infrastructure, multiple regulation and taxation, the regulation of competition and interconnection, dispute resolution and the political neutrality of the industry regulator. Thus, in the above areas, there appears either to be gaps in the existing legal regime for the governance of the industry or regulatory failure in terms of enforcement. This state of affairs to a large extent has contributed in hindering the development potential of the industry while also raising several concerns for consumer and service providers. For example, due to challenges related to installation of telecommunications infrastructure such as multiple taxation and regulation, both the cost of deploying telecommunications infrastructure and the cost of services to consumers in Nigeria appears exorbitant when compared with other developing countries. In Nigeria the average cost of deploying a telecommunications base station is noted to about 150,000 USD, while it costs half the amount in India.[8] On the average it also costs a consumer in

[6] National Bureau of Statistics, *Measuring Better: Frequently Asked Questions on the Rebasing /Re-Benchmarking of Nigeria's Gross Domestic Product (GDP)* (National Bureau of Statistics: Abuja, 2014) p.14.

[7] Federal Ministry of Communication Technology, *Connected for Growth – Progress Report on Projects and Programme Implementation, July 2011- February 2014* (Federal Ministry of Communication Technology: Abuja, 2014) p.8.

[8] E Okonji, 'Bajaj: Telecoms Service Quality Must Be Addressed Through Collective Responsibility' (Interview), *ThisDay*, 20 March, 2014.

Nigeria seven times more to make voice calls or access data services, when compared to a consumer in a developing country like India.[9] The average cost of telecommunications in Nigeria is noted to be currently twice to thrice higher the average cost in most African States.[10] Consumers also face several other peculiar challenges in terms of access to justice for poor quality of services and other infractions by service providers. In addition, several consumer rights such as the right to the privacy of communications and personal data appears not to have been adequately protected under the existing legal regime for telecommunications in Nigeria. On the other hand, the existing legal regime does not protect service providers from multiple taxation and multiple regulation, thereby imposing heavy compliance burdens on service providers which are eventually transferred to consumers through high costs of access to telecommunications services and poor quality of service.

The existing legal regime also appears not to have provided adequate protection for telecommunications infrastructure and thereby raising investment concerns over the security of telecommunications infrastructure. For example, research studies indicate that MTN, a service provider loses an average of two power generators at its base stations every week due to either theft or vandalism.[11] It is also estimated that about 2 to 3 percent of the Nigeria's base stations are shut down at any point in time due to vandalism and

[9] *Ibid*.

[10] Editorial, 'Nigerian Telcos Spend N10 Billion Yearly on Diesel to Power Base Stations – Airtel Boss', *Daily Independent*, February, 2014, available at <http://www.dailyindependentng.com/2014/02/nigerian-telcos-spend-n-10b-yearly-on-diesel-to-power-base-stations-airtel-boss/> last accessed on 30 March, 2016.

[11] A B Ola and Y Y Adewale, 'Infrastructural Vandalism in Nigerian Cities: The Case of Osogbo, Osun State', (2014) 4 (3) *Research on Humanities and Social Sciences*, 49, 52. *See also* E Okwuke, 'Making ICT Facilities Critical National Security Infrastructure', *Daily Independent*, September, 2013, available at <http://dailyindependentnig.com/2013/09/making-ict-facilities-critical-national-security-infrastructure/ > last accessed on 30 March, 2016. *See also* R Johnson, *African Mobile Fact Book 2012* (England: Blycroft Publishing, March 2012) p.102.

resulting in a revenue loss of about 50 to 100 million USD every year.[12] This state of affairs generally increase the costs of maintaining telecommunications facilities, while also reducing the quality of service that is available to consumers, and also increasing the cost of services. Another implication of the above challenges is that they limit the entrance and survival of small operators in the Nigerian telecommunications industry, thus reducing the prospects of effective and sustainable competition in the industry.[13] In addition, there also appears to have been a poor enforcement of competition rules with respect to the access of smaller service providers to terrestrial backbone infrastructure owned by dominant service providers thereby reducing prospects of effective and sustainable competition in broadband service delivery.

1.2 Statement of Problem

The National Bureau of Statistics estimates that the telecommunications industry contributed about 8.69 percent to Nigeria's GDP in 2013 according to the recently rebased national GDP data.[14] The industry is also regarded as the fourth pillar of the Nigerian economy in terms GDP contribution and the fastest growing at a rate of 24 percent.[15] Hence, telecommunications is now seen not only as a critical economic sector, but also a tool for sustainable social and economic development. However, while there is no doubt that the telecommunications industry is a strategic sector of the Nigerian

[12] B Uzor, '$39 Billion Telecom Investment in Danger as Nigeria Fails to Pass Critical National Infrastructure Bill', *Business Day*, 29 October, 2014, available at <http://www.asokinsight.com/news/39-billion-telecom-investment-danger-nigeria-fails-pass-critical-infrastructure-bill> last accessed on 30 March, 2016.

[13] C Okereocha, 'Saving the Small Telecoms Players', (18 April, 2011) 15 *Broad Street Journal*, 33-35.

[14] National Bureau of Statistics, *Measuring Better: Frequently Asked Questions on the Rebasing /Re-Benchmarking of Nigeria's Gross Domestic Product (GDP)* (National Bureau of Statistics: Abuja, 2014) p.14.

[15] Federal Ministry of Communication Technology, *Connected for Growth – Progress Report on Projects and Programme Implementation, July 2011- February 2014* (Federal Ministry of Communication Technology: Abuja, 2014) p.8.

economy, there is still much potential for growth especially with the decline in oil prices which is the major source of revenue for the Nigerian government and quest for the diversification of the economy. However, in order for the industry to be maximized to achieve economic development and diversification, it is imperative that the legal and regulatory frameworks for the governance of the industry are responsive to emerging challenges.

Accordingly, this dissertation posits that the existing legal and regulatory regime for the governance of the Nigerian telecommunications industry has not been responsive to emerging challenges in many aspects of the industry. Areas where there are apparent gaps in the existing legal regime for the governance of the industry or regulatory failure in terms of enforcement include: the installation and protection network infrastructure, multiple regulation and taxation, consumer protection, the regulation of competition and interconnection, dispute resolution and the political neutrality of the industry regulator. For example, due to challenges related to installation of telecommunications infrastructure such as multiple taxation and regulation, both the cost of deploying telecommunications infrastructure and the cost of services to consumers in Nigeria appears exorbitant when compared with other developing countries. In Nigeria the average cost of deploying a telecommunications base station is noted to about 150,000 USD, while it costs half the amount in India.[16] On the average it also costs a consumer in Nigeria seven times more to make voice calls or access data services, when compared to a consumer in a developing country like India.[17] The average cost of telecommunications

[16] E Okonji, 'Bajaj: Telecoms Service Quality Must Be Addressed Through Collective Responsibility' (Interview), *ThisDay*, 20 March, 2014.
[17] E Okonji, *Ibid*.

in Nigeria is noted to be currently twice to thrice higher the average cost in most African States.[18] The problem of multiple regulation and multiple taxation has also given rise to severe disruptions in the provision of telecommunications services with attendant poor quality of service concerns while also heightening concerns over regulatory uncertainty in the industry, and further discouraging operators from deploying new infrastructure to meet increasing consumer demand. Consumers also face several other peculiar challenges in terms of access to justice for poor quality of services and other infractions by service providers. In addition, several consumer rights such as the right to the privacy of communications and personal data appears not to have been adequately protected under the existing legal regime for telecommunications in Nigeria. Poor enforcement of competition rules industry has also impeded the ability of small service providers to access terrestrial backbone networks that are owned by dominant service providers thereby hindering sustainable competition with respect to the delivery of broadband to consumers.

1.3 Purpose/Objectives of Study

This dissertation seeks to undertake a comprehensive critical review of the legal and regulatory regime for the governance of the Nigerian telecommunications industry. In this regard, the dissertation applies the analytical method of legal research with a view to addressing the following core research objectives:

(a) to discuss the development of the legal and regulatory regime governing telecommunications industry in Nigeria;

[18] 'Nigerian Telcos Spend N10 Billion Yearly on Diesel to Power Base Stations – Airtel Boss', *Daily Independent*, February, 2014, available at <http://www.dailyindependentng.com/2014/02/nigerian-telcos-spend-n-10b-yearly-on-diesel-to-power-base-stations-airtel-boss/> last accessed on 30 March, 2016.

(b) to ascertain areas where there are deficiencies in the legal and regulatory regime governing telecommunications in Nigeria;

(c) to ascertain the impact of the perceived regime deficiencies on consumers and operators in the telecommunications industry;

(d) to ascertain the impact of the perceived regime deficiencies on the development of the telecommunications industry;

(e) to undertake comparative studies where necessary with a view to ascertaining the position in some foreign jurisdictions in order to derive some solutions towards addressing the highlighted deficiencies, and;

(f) to make proposals for reforms and responses that would address the highlighted deficiencies in Nigeria's telecommunications regime.

In accordance with the core research objectives that will be addressed, the purpose of this study is to provide to a critical and informative analysis of the legal and regulatory regime governing the Nigerian telecommunications industry with a view to identifying deficiencies or gaps in the regime or its enforcement and also proposing necessary remedial responses. In so doing the research goes further to identify the impact of the identified regime deficiencies on consumers and operators in the telecommunications industry and also on the development of the telecommunications industry. Another purpose of the research is to contribute in promoting a better regulation of the industry in line with the Nigeria's current economic and development aspirations and also in line with the country's status as a constitutional democracy where human rights are sacrosanct.

1.4 Scope of Study

The dissertation attempts to undertake a review of the legal, regulatory and policy frameworks for the governance of the Nigerian telecommunications industry. In order to provide for a broad understanding of the subject matter of research, the dissertation provides a background discussion on the meaning of telecommunications, the history of telecommunications and its regulation. This sets the background for a critical and informative analysis of the policy and legal/regulatory regime for the governance of the industry in subsequent parts of the dissertation. In particular, a very special attention was given the provisions of the Nigerian Communications Act of 2003 and its subsidiary Regulations and Guidelines. Issues that were critically examined within that context include: the functions and powers of the Nigerian Communications Commission (NCC) and the Minister of Communications under the Act; the legal basis for the regulatory independence of the NCC as well as the mechanisms for ensuring the NCC's accountability in the exercise of its regulatory mandate; the political neutrality of the NCC; the installation of the telecommunications network infrastructure in Nigeria and challenges affecting the installation of telecommunications network infrastructure in Nigeria, including: multiple and conflicting regulation by state actors and multiple taxation; the protection of consumers in the telecommunications industry; the regulation of competition and interconnection; and the resolution of disputes in the industry. However, the scope of the research does not extend the discussion of universal access and service and number portability. The research does not also extend to a broad discussion of public health and environmental protection law within the telecommunications context.

1.5 Significance of Study

The core theme of the research which is covered with the scope of this dissertation is interlinked because regulatory failure in one aspect of the telecommunications industry will always produce negative effects on consumers and also limit the overall economic and development potential of the industry. Accordingly, the core significance of the research is premised on the urgent importance of addressing the identified regulatory gaps and challenges in the industry in order to effectively protect consumers and service providers while also harnessing the industry as a tool for national development. Currently, there has not been any published work that has undertaken a comprehensive critical analysis of the legal/regulatory regime for the governance of the telecommunications industry as embodied in the Nigerian Communications Act of 2003 and its subsidiary Regulations and Guidelines. In addition, the telecommunications industry remains a highly technical and naturally dynamic industry that has also not been a usual area for legal research in developing countries including Nigeria. Also, to a large extent across the world legal research and practice with respect to the telecommunications industry is considered an 'emerging' and also dynamic area of law due to the rapid pace of technological innovations in the industry. Consequently, there has been little legal research on telecommunications regulation in many countries including Nigeria. Hence, within the above context, it is hoped that this research will contribute significantly in bridging this knowledge gap by elucidating the legal/regulatory regime for the governance of the Nigerian telecommunications industry while also providing a basis for further regulatory reforms in the industry in a manner that will ensure the promotion of the public interest.

1.6 Research Methodology

The research in this dissertation mainly applies the legal - analytical method of research in addressing its core objectives. The critical analysis of the provisions of the Nigerian Communications Act of 2003 and its relevant subsidiary Regulations and Guidelines as well as other relevant legal frameworks and case laws provided the point for departure in terms of identifying regulatory gaps in the current regime or regulatory failure in terms of enforcement and also provided a basis for advancing recommendations to a large extent. However, considering the interdisciplinary nature of the telecommunications industry and the need to provide a proper context for the research, hybrid approaches were adopted. In particular, the need to draw examples of best practices from foreign jurisdictions and international legal instruments where necessary also underscored the need for a comparative legal inquiry to some extents.

Research materials that are referred to in this dissertation are mainly based on primary and secondary sources. The primary sources include: the Nigerian Constitution; the Nigerian Communications Act of 2003 and relevant subsidiary Regulations and Guidelines; other relevant legal frameworks such as the Consumer Protection Council Act of 1992; the Cybercrimes (Prohibition, Prevention etc) Act of 2015; relevant case laws, and; the data published by the NCC on the performance of the telecommunications industry. The secondary sources include information from: books, journals, magazines and published studies undertaken by non governmental organizations. The application of legal analysis was guided by a measure of the legal import and effect of each source in the Nigerian legal system. The research also benefited from interesting academic

interactions with experts in several foreign jurisdictions during attendance at international conferences in various parts of the world.

1.7 Literature Review

The literature review in this dissertation considered some major works in the field of telecommunications law which were written by Nigerian and foreign authors as well as some other legal works that were not specific to the telecommunications industry which were written by Nigerian authors. The need to consider other works that were not specific to telecommunications arose from the dearth of published legal research that focused on issues in the Nigerian telecommunications industry. Works that were reviewed comprise of textbooks, journal articles, an LL.M thesis, and a research report.

The dissertation reviewed the: *Theory and Practice of Telecommunications Regulation in Nigeria through the Development Question* by P. C Obutte.[19] The work is a doctrinal research that applies a socio-legal methodology to examine the appropriateness of 'less' regulation principle of the free-market in the regulation of Nigeria telecommunications sector given the country's development questions. In particular, the work examines whether the light regulation or laissez-faire strategy adopted at the commencement of Nigeria's telecommunications sector liberalization constitutes an appropriate first-line market response. Thus, the work focuses on the market regulation approach following the full liberalization of the telecommunications industry in the early years of the last decade. However, the work does not undertake a study into the areas covered within the scope of this dissertation. For example, the work does not undertake a legal analysis of issues such

[19] P C Obutte, *Theory and Practice of Telecommunications Regulation in Nigeria through the Development Question* (Saarbrucken, Germany: VDM Verlag Dr. Muller, 2007).

as: the installation of telecommunications network; the protection of consumers; recent developments in competition and interconnection regulation, and; dispute resolution. Also having been written over nine years ago, the work cannot be said to reflect current developments in the Nigerian telecommunications industry.

The dissertation also reviewed *Telecommunications Law and Regulation* edited by I. Walden (3rd and 4th editions).[20] Both editions were written from a contribution of over 20 experts in the field of telecommunications law from the United Kingdom and the United States. The work provides a basic understanding of telecommunications law and regulation in developed countries. However, the work does not address developments in Nigeria. The dissertation also reviewed the *Telecommunications Regulation Handbook* edited by C. Blackman and L. Srivastava.[21] The work which is a regulatory toolkit was developed by the International Telecommunications Union and the World Bank provides a general understanding of telecommunications regulation. However, the work does not include a discussion on the legal aspects of telecommunications and neither does it address related legal developments in Nigeria. The dissertation also reviewed *Cybersecurity Law and Regulation* by U.J Orji.[22] This work broadly discusses the protection of critical information infrastructure within the context of cybersecurity regulation. In broad terms, cybersecurity is also classified as an aspect of telecommunications regulation, however the work does not undertake a legal analysis of

[20] I Walden (ed), *Telecommunications Law and Regulation* (3rd edn, New York: Oxford University Press, 2009); I Walden (ed) *Telecommunications Law and Regulation* (4th edn, Oxford, United Kingdom: Oxford University Press, 2012).
[21] C Blackman and L Srivastava (eds) *Telecommunications Regulation Handbook* (Washington D.C: The World Bank and ITU, 2011).
[22] U J Orji, *Cybersecurity Law and Regulation* (Nijmegen, The Netherlands: Wolf Legal Publishers, 2012).

Cybercrime Act of 2015 and its implications for the protection of telecommunications facilities as critical national information infrastructure.

The dissertation also reviewed the *Law of Consumer Protection* by F. Monye.[23] This work broadly discusses Nigeria's consumer protection regimes. However, the work does not address consumer protection issues in the telecommunications industry. The dissertation also reviewed *The Law of Arbitration in Nigeria* by G. Ezejiofor,[24] the *Law and Practice of Arbitration and Conciliation in Nigeria* by J.O Orojo and M.A Ajomo[25] and *The Law and Practice of Commercial Arbitration in Nigeria* by G.C Nwakoby,[26] however these works do not address the arbitration and alternative dispute resolution regimes in the Nigerian telecommunications industry.

The dissertation also reviewed 'Legal Remedies for Consumers of Telecommunications Services in Nigeria' by F.O Ukwueze.[27] The article examines the remedies available to a consumer who suffered loss or damage as a result of poor quality services and argues that there is an adequate mechanism for redressing consumer issues in the Nigerian telecommunications industry. However, the article does not consider the peculiar challenges that impede the effective redress of consumer complaints in the industry such as lack of access to justice. In 'Enforcement of Consumer Protection Laws

[23] F Monye, *Law of Consumer Protection* (Ibadan: Spectrum Books Ltd, 2003).
[24] G Ezejiofor, *The Law of Arbitration in Nigeria* (Lagos, Nigeria: Longman Publishers, 1997).
[25] J O Orojo and M A Ajomo, *Law and Practice of Arbitration and Conciliation in Nigeria* (Lagos: Mbeyi & Associates, 1991).
[26] Nwakoby, G, C, *The Law and Practice of Commercial Arbitration in Nigeria* (2nd edn, Enugu: Snap Press, 2014).
[27] F O, 'Legal Remedies for Consumers of Telecommunications Services in Nigeria', (2011-2012) 10 *The Nigerian Juridical Review*, 143-150.

in Nigeria',[28] by F.Monye, the author examines the legal regime for the enforcement of consumer protection laws in Nigeria. However, the article does not explicitly address the legal regime for the enforcement of consumer rights in the telecommunications industry. The dissertation also reviewed a *Research Report on the State of Consumer Protection in Nigeria: A Review of Consumer Protection in the Telecommunications Sector in Nigeria* by F. Monye, *et al*.[29] The report examines the implications of the Consumer Protection Act with respect to the protection of consumers in the telecommunications industry. However, the Report does not undertake a comprehensive discussion and analysis of the consumer redress regime under the NCA and its subsidiary instruments. The dissertation also reviewed 'Consumer Protection under the Communications Act 2003: A Critical Appraisal', by C. J Mgbeokwere.[30] The work which is an LL.M thesis examines the legal regime for consumer protection in the Nigerian telecommunications industry while also making comparative study with position in the United Kingdom. However, the work does not undertake a study of consumer protection issues such as unsolicited communications, and telecommunications interception.

Hailiru, M, in 'the Development of Consumerism in Nigeria: Prospects and Challenges',[31] examines the development of consumer protection regimes across several commercial sectors including the telecommunications industry. However, the article does

[28] Monye, F, 'Enforcement of Consumer Protection Laws in Nigeria', (2007) 3 (1) *Delta State University Law Review*, 74- 90.

[29] F Monye, *et al*, *Research Report on the State of Consumer Protection in Nigeria: A Review of Consumer Protection in the Telecommunications Sector in Nigeria* (Consumer International: January, 2014) pp.16-17, available at <http://www.consumersinternational.org/media/1532727/consumer-protection-in-nigeria-research-report-eng.pdf> last accessed on 30 March, 2016.

[30] C J Mgbeokwere, 'Consumer Protection under the Communications Act 2003: A Critical Appraisal', A Master of Laws (LL.M) Thesis Submitted at the Faculty of Law, University of Ibadan, March 2009.

[31] M Hailiru, 'The Development of Consumerism in Nigeria: Prospects and Challenges', (2012) 1 (4) *International Journal of Arts and Commerce*, 284-289.

not undertake an in-depth analysis of consumer protection regimes under the Nigerian Communications Act of 2003. In 'A Comparative Review of the ECOWAS Data Protection Regime', U.J Orji[32] undertakes a comparative analysis of the ECOWAS Data Protection Act alongside European data protection regimes. However, the article does not address data protection concerns affecting consumers in the Nigerian telecommunications industry.

The dissertation also reviewed 'Regulatory Convergence: Reflections from Nigeria', by C. B Opata.[33] The article briefly examines the draft National ICT Policy within the context of telecommunications convergence. However, the article does not undertake a comprehensive review of the draft policy. P C Obutte, in 'Telecommunications and the Regulatory Regime in Nigeria',[34] examined the provisions of the Wireless Telegraphy Act and the powers of the Minister of Communications to manage the national radio frequency spectrum and grant licenses for services and frequencies. However, the work does not undertake a comprehensive analysis of the powers of the Minister of Communications under Nigerian Communications Act of 2003. In C B Opata,'s 'Transplantation and Evolution of Legal Regulation of Interconnection Arrangements in the Nigerian Telecommunications Sector',[35] the author examines the legal history of Nigeria's interconnection regimes including their origins. However, the article does not

[32] U J Orji, 'A Comparative Review of the ECOWAS Data Protection Regime', (August 2016) 4 *Computer Law Review International*, 108-118.

[33] C B Opata, 'Regulatory Convergence: Reflections from Nigeria', (2013) 19 *Computer and Telecommunications Law Review*, 156-160.

[34] P C Obutte, 'Telecommunications and the Regulatory Regime in Nigeria', in G P Krog and A G B Bekken (eds) *Yulex* (Oslo, Norway: Norwegian Research Center for Computers and Law, University of Oslo, 2004) p.100.

[35] C B Opata, 'Transplantation and Evolution of Legal Regulation of Interconnection Arrangements in the Nigerian Telecommunications Sector', (2011) 14 *International Journal of Communications Law & Policy*, 25-39.

discuss related interconnection issues such as collocation and infrastructure sharing and neither does it undertake a comprehensive analysis of the NCC's Guidelines on Collocation and Infrastructure Sharing.

The dissertation also reviewed 'The Growth and Challenges of Information in Law Practice in Nigeria', by B. Udotai[36] which discusses the establishment of Nigeria's National Information Technology Policy in March 2001, and the National Information Technology Development Agency **(**NITDA). However, the article does not discuss the implications of the NITDA Act and its subsidiary regulations in the Nigerian telecommunications industry. In 'Multiplicity of Taxes in Nigeria: Issues, Problems and Solutions' by A. Sanni,[37] the author discusses issues of multiple taxation in Nigeria. However, the article does not elaborately discuss regulatory issues of multiple taxation in the Nigerian telecommunications industry and its implications for operators and consumers in the industry. In 'Impact of Multiple Taxation on Competitiveness in Nigeria',[38] by M. Pitigala, and M. Hope, the authors generally discuss the economic implications of multiple taxation businesses competitiveness in Nigeria. However, the article does not focus on multiple taxation in the telecommunications industry and neither does it discuss a legal perspective to the issue. In 'Infrastructural Vandalism in Nigerian Cities: The Case of Osogbo, Osun State',[39] A.B Ola and Y.Y Adewale discuss the insecurity of critical infrastructure including telecommunications facilities, however it

[36] B Udotai, 'The Growth and Challenges of Information in Law Practice in Nigeria', in N N. Kelvin (ed) *Legal Practices Skills and Ethics in Nigeria* (Lagos: DCON Consulting, 2004) p.231-340.
[37] A Sanni, 'Multiplicity of Taxes in Nigeria: Issues, Problems and Solutions', (September, 2012) 3 (17) *International Journal of Business and Social Science*, 232-236.
[38] M Pitigala, and M Hope, 'Impact of Multiple Taxation on Competitiveness in Nigeria', 16 (March, 2011) *Africa Trade Policy*, 1-9.
[39] A B, Ola, and Y Y, Adewale, 'Infrastructural Vandalism in Nigerian Cities: The Case of Osogbo, Osun State', (2014) 4 (3) *Research on Humanities and Social Sciences*, 49- 52.

does not discuss the legal protection of telecommunications facilities in Nigeria. In 'Online Surveillance: Public Concerns Ignored in Nigeria', J. Dada and T. Tafida, 'Online Surveillance: Public Concerns Ignored in Nigeria',[40] the authors briefly discussed communications surveillance issues in Nigeria, however the authors do not engage in an elaborate legal analysis of communications surveillance powers within the context of existing legal instruments and privacy rights.

1.8 Organizational Layout

In order to effectively address its research objectives, the dissertation develops seven chapters. Chapter one which includes the introduction sets out the general context of the dissertation. It also discusses the meaning of telecommunications, the history of telecommunications and its regulation and provides an overview of the Nigerian telecommunications industry. Chapter two examines the legal basis for the regulation of the telecommunications in Nigeria as well as the policies, and regulatory frameworks that govern the telecommunications industry. Chapter three examines the legal regime for the installation of the telecommunications network infrastructure in Nigeria and its challenges. Chapter four examines the legal regime for the protection of consumers in the industry. The chapter also examines the regulatory frameworks for consumer redress and the challenges to effective consumer protection in the industry. Chapter five examines the legal regime for the regulation of competition and interconnection in the industry. Chapter six examines the legal and regulatory regime for the resolution of disputes in the industry. Chapter seven concludes the dissertation and sets out its recommendations.

[40] J Dada and T Tafida, 'Online Surveillance: Public Concerns Ignored in Nigeria', *Global Information Society Watch 2014 -Communications Surveillance in the Digital Age* (Johannesburg, South Africa: Association for Progressive Communications, 2014) pp.183-184.

1.9. Defining Telecommunications

"*The essence of all communications systems is that a message is exchanged between a sender and one or more receivers*." [41]

The term 'telecommunication' is derived from a compound of the Greek word *tele* (τηλε-) which means 'distant' or 'far off' and the Latin word *commūnicāre* which means 'to share'.[42] However, the term was first coined as a French word - *télécommunication* in 1904 by Edouard Estaunié.[43] Generally, 'telecommunication' is used to refer to communications involving the electronic transmission of information over long distances.[44] According to the *Newton's Telecom Dictionary* 'telecommunication' refers to "the art and science of communicating over a distance by telephone, telegraph and radio [which includes] the transmission, reception and switching of signals, such as electrical or optical, by wire, fiber or electromagnetic means".[45] The International Telecommunication Union (ITU) has also proffered a broader and more technical definition of 'telecommunication'. Thus, the Constitution of the ITU defines 'telecommunication' as:

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[41] A Sharpe, 'Communications Technologies Services, and Markets' in I Walden (ed), *Telecommunications Law and Regulation* (3rd edn, New York: Oxford University Press, 2009) p.23.

[42] H Douglas, 'Communication', *Online Etymology Dictionary*, available at <http://www.etymonline.com/index.php?term=communication> last accessed on 30 March, 2016.

[43] The French word 'télécommunication' was first invented in the French Grande Ecole 'Telecom ParisTech' formerly known as "Ecole nationale supérieure des telecommunications" in 1904 by the French engineer and novelist Édouard Estaunié. *See* J-M Dilhac, 'From *tele*-communicare to Telecommunications' available at<http://www.ieeeghn.org/wiki/images/8c/Dihac-2004.pdf> last accessed on 30 March, 2016.

[44] *The Oxford Advanced Learner's Dictionary* (6th edn) p.1231.

[45] H Newton's *Telecom Dictionary*, (18th edn 2002) p. 733.

> any transmission, emission or reception of signs, signals, writing, images and sounds or intelligence of any nature by wire, radio, optical or other electromagnetic systems.[46]

The above definition by the ITU attempts to broadly cover all critical elements of any activity that may be classified within the scope of telecommunications. Accordingly, the ITU's definition of telecommunications can be classified into the following elements:

(a) the *transmission* of signs, signals, writing, images, sounds or intelligence of any nature by wire, radio, visual or other electronic – magnetic systems;

(b) the *emission* of signs, signals, writing, images, sounds or intelligence of any nature by wire, radio, visual or other electro-magnetic systems or;

(c) the *reception* of signs, signals, writing, images, sounds, or intelligence of any nature by wire, radio, visual or other electro-magnetic systems.

One significant feature of the ITU's definition is that it does not attempt to restrict objects or communications that can be transmitted, emitted or received through telecommunication. In this regard, the definition creates a broad scope wherein "signals, writings, images, sounds, or intelligence of any nature" can constitute the object being transmitted or emitted or received during a telecommunications activity. By the use of the phrase "intelligence of any nature", the ITU creates a broad definitional scope wherein any transmission or emission or reception of any communications, digital data or signals by wire, radio, visual or other electromagnetic systems would constitute a telecommunications activity. Also, the ITU definition of telecommunication appears not to restrict the means or apparatus through which objects signs, signals writing, images,

[46] Paragraph 1012 Annex to the Constitution of the International Telecommunication Union (ITU*)* published in ITU, *Collection of the Basic Texts of the International Telecommunication Union* (Geneva: ITU, 2011), p.56.

sounds, data, communications can be transmitted, emitted or received during a telecommunications activity. In this regard, the ITU definition adopts a *technology neutral*[47] language to achieve this through the use of the phrase "other electromagnetic systems". Thus, the phrase creates a broad scope wherein any transmission, emission or reception of any communication through an electromagnetic system would be considered a telecommunications activity.

The ITU's definition of telecommunication appears to be the universal standard for defining the term. Accordingly, several countries including Nigeria have transplanted elements of the ITU's definition into their telecommunications laws.[48] For the purpose of this work, the reoccurring elements of the above definitions of telecommunication shall be used to broadly classify the term as referring to the 'transmission', or 'reception', or 'emission' of any form of communication (including but not limited to signs, signals, writing, images, sounds or data of any nature) from one location to another through a technological means such as electricity, wire, radio or electromagnetic systems and technologies.

1.10. The Historical Origins and Evolution of Telecommunications

The concept of tele-communicating appears to be as old as the history of mankind. Prior to the emergence of modern telecommunications technologies, human beings

[47] 'Technological neutrality' is a regulatory principle that implies that legislation should define the objectives to be achieved and should neither impose, nor discriminate in favour of, the use of a particular type of technology to achieve those objectives. *See* European Commission, 'Towards a New Framework for Electronic Communications Infrastructure and Associated Services, The 1999 Communications Review', European Commission, COM (1999) p. 539. *See also* C Reed, 'The Law of Unintended Consequences – Embedded Business Models in IT Regulation', (2007) 2 *Journal of Information Law and Technology*, 2; A Sharpe, 'Communications Technologies Services, and Markets' in I Walden (ed), *Telecommunications Law and Regulation* (3rd edn, New York: Oxford University Press, 2009) p.53.

[48] The Nigerian Communications Act 2003 s. 157. *See also* The Electronic Communications Act of the Republic of Ghana 2008 s. 101; Telecommunications Act of South Africa 1996 (as amended) s.1.

employed several means to convey messages over long distances. Some of the prominent means of *tele-communicating* in ancient societies were through smoke signals and talking drums. However, only a very limited range of pre-determined messages could be conveyed through these means. For example, in some ancient African societies a smoke signal could only be used to indicate the location of a camp or to send out a distress (SOS) signal.[49] The talking drum was usually deployed to summon the gathering of the members of a community.[50] In the ancient Greek society, there were remarkable attempts to develop an advanced system of telecommunicating through the invention of the Greek hydraulic semaphore systems around the 4th Century B.C. The Greek hydraulic semaphore systems functioned as optical telegraphs which worked with water filled vessels and visual signs.[51] Another notable attempt at the development of advanced telecommunications systems took place during the middle ages in Europe. During that period, chains of beacons were constructed on hilltops and used as a means of transmitting signals. However, this system of telecommunication like the Greek hydraulic semaphore systems and could only transmit a signal whose meanings have earlier been agreed to by both the parties transmitting the signal and the one receiving it.[52] The last decade of the 18th Century A.D also recorded a significant milestone in the development of advanced telecommunications systems following the development of optical telegraph

[49] History World, 'History of Communication', available at <http://www.historyworld.net/wrldhis/plaintexthistoris.asp?historyid=aa93> last accessed on 30 March, 2016.

[50] A I Good, 'Drum Talk Is the African's "Wireless"', *Natural History*, (September 1942),available at <http://www.naturalhistorymag.com/htmlsite/editors_pick/ 1942_09_ pick.html> last accessed on 30 March, 2016.

[51] 'Morse Code & the Telegraph' available at <http://www.history.com/topics/inventions/telegraph> last accessed on 30 March, 2016.

[52] 'The hydraulic telegraph of Aeneas – long-distance communication of antiquity' available at <http://www.ancient-origins.net/ancient-technology/hydraulic-telegraph-aeneas-long-distance-communication-antiquity-002185#sthash.A7pX1GE1.dpuf> last accessed on 30 March, 2016.

systems or semaphore lines in Europe by Claude Chappe a French engineer around 1792.[53]

The 19th Century can be described as the turning point in the development of advanced telecommunications systems. Around 1837, two Englishmen Sir Charles Wheatstone and Sir William Cooke made a breakthrough in the development of the electrical telegraph technology for which they received a patent in the same year.[54] The Great Western Railway subsequently used the system to introduce a public telegram service between London and West Drayton (13 miles west of London) in 1839. One of the major challenges of the system was that it proved to be expansive as it required five wires to transmit a single signal.[55] In 1837, an American painter Samuel P.B. Morse also developed and patented another version of the electric telegraph. Samuel Morse's invention used a simple and highly efficient system of universal digital codes known as the 'Morse Code' for the transmission and reception of signals over electric telegraph cables. The invention provided a faster means of communication as experienced telegraph operators could pass messages at around 40-50 words per minute.[56] The invention revolutionalized telecommunications and marked the beginnings of the modern information revolution.[57] The efficiency and cost effective nature of the Morse Code naturally gave it a competitive advantage over earlier telegraph inventions and following its commercialization, the first commercially successful trans–Atlantic telegraph cable

[53] 'Morse Code & the Telegraph' available at <http://www.history.com/topics/inventions/telegraph> last accessed on 30 March, 2016.
[54] A Sharpe, 'Communications Technologies Services, and Markets' in I Walden (ed), *Telecommunications Law and Regulation* (3rd edn, New York: Oxford University Press, 2009) p.33.
[55] A Sharpe, *Ibid*.
[56] A Sharpe, 'Communications Technologies Services, and Markets' in I Walden (ed), *Telecommunications Law and Regulation* (3rd edn, New York: Oxford University Press, 2009) p.33.
[57] U J Orji, *Cybersecurity Law and Regulation* (Nijmegen, The Netherlands: Wolf Legal Publishers, 2012) p.1.

was completed on 27 July, 1866, and trans- Atlantic telecommunications became possible for the first time.[58]

Following the developments in telegraphy was the invention of the voice telephony technology around the 1870's. The first patent of the telephone was granted to Alexander Graham Bell a Scottish scientist on 7 March, 1876 by the United States Patent Office.[59] The invention of the telephone was followed by the development of the wireless telegraphy system which is also known as radiotelegraphy or the radio communications by Gulielmo Marconi an Italian scientist in 1901.[60] The development of wireless telegraphy also gave rise to the emergence of widespread radio broadcasting also known as mass communication.

The 20th Century witnessed several milestones in the development of telecommunications technologies. Following the development of radiography a Scottish inventor John Logie Baird developed a radio system for transmitting moving pictures from location to another in 1925.[61] Another notable milestone in the history of telecommunications was the development and deployment of communications satellites in the 1950s.[62] Other notable milestones in the history of the evolution telecommunications include: the development of the mobile telephony system by the

[58] Telephonetribute.com, 'Timeline of Telecommunications', available at <http://www.telephonetribute.com/timeline.html>.

[59] 'Alexander Graham Bell' available at <http://www.history.com/topics/inventions/alexander-graham-bell> last accessed on 30 March, 2016.

[60] 'Guglielmo Marconi', available at <http://www.history.com/topics/inventions/guglielmo-marconi> last accessed on 30 March, 2016.

[61] 'John Logie Baird: Biography Engineer, Inventor (1888–1946)' available at <http://www.biography.com/people/john-logie-baird-9195738> last accessed on 30 March, 2016.

[62] NASA, 'The Early Satellites' (2 April, 2004) available at <http://www.nasa.gov/missions/science/f-satellites.html> last accessed on 30 March, 2016.

American Telephone & Telegraph Corporation (AT&T) in 1947[63]; the development of the first generation of electronic computers[64]; and the development of packet switching technology which allows packets of electronic data to be sent between different computers without first passing through a centralized mainframe computer. [65] The further development of the packet switching technology by the United States Department of Defense Advanced Research Projects Agency Network (ARPANET) a military telecommunications network[66] enabled different computer systems to be connected for the purpose of transmitting communications between the computer systems of academic and military institutions in the United States. The ARPANET communications system laid the foundations for the emergence of the Internet.[67]

The 20th century also witnessed several other important technological advancements that brought about the increasing convergence of telecommunications and computer technologies.[68] These developments in telecommunications have created a state of affairs that has been described as the "techno crescendo of information revolution dreams"[69] and also marks beginnings of a modern era known as the *Information age*.[70] This era has also continued to evolve with several technological advances in the 21st century. A very distinctive feature of the present information age is the continuous convergence of telecommunications and computer technologies and the widespread integration of those

[63] 'Mile Stones in AT&T History' available at<http://www.thocp.net/companies/att/att_company.htm
[64] U J Orji, *Cybersecurity Law and Regulation* (The Netherlands: Wolf Legal Publishers, 2012) p.4.
[65] L G Roberts 'The Evolution of Packet Switching' available at <http://www.packet.cc/files/ev-packet-sw.html> last accessed on 30 March, 2016.
[66] B M Leiner, *et al*, 'Brief History of the Internet', <http://www.internetsociety.org/internet/what-internet/history-internet/brief-history-internet> last accessed on 30 March, 2016.
[67] B M Leiner, *et al*, *Ibid*.
[68] U J Orji, *Cybersecurity Law and Regulation* (The Netherlands: Wolf Legal Publishers, 2012) pp.1-7.
[69] M Dunn, *A Comparative Analysis of Cybersecurity Initiatives Worldwide*, World Summit on Information Society (WSIS) Thematic Meeting on Cybersecurity (Geneva: ITU, June 2005) p.5.
[70] U J Orji, *Ibid,* p.2.

technologies into most products, services and facilities that are basic necessities in modern human societies. This is also seen in the widespread integration of telecommunications technologies in most critical services in the public and private sectors of modern societies. There has also been an increasing deployment of telecommunications technologies to tackle pressing development challenges and create channels for effective service delivery through several applications such as E-Government, E-Education, Tele-medicine and E-health. Hence, telecommunications technologies have evolved from their very modest beginnings to become a vital component of every modern society.

The widespread deployment of telecommunications technologies and infrastructure in most aspects of modern life has given rise to the concept of the *Information Society* or *Global Information Society*. The information society exists universally due to the transnational and global spread of modern telecommunications networks which arises from the interconnectedness of networks in countries into one global network society.[71] This has effectively brought about the *death of distance* as the world today is simply seen as a *global village* or single community connected by electronic and telecommunications systems sometimes called the 'global information infrastructure'.[72]

Telecommunications provide the backbone of the information society. Thus, telecommunications networks connect all forms of electronic communications devices ranging from fixed telephones, mobile phones, smart phones, personal data assistants, tracking devices to computer systems. Telecommunications networks also provide the

[71] U J Orji, *Cybersecurity Law and Regulation* (The Netherlands: Wolf Legal Publishers, 2012) p.8.
[72] OECD, 'Global Information Infrastructure and Global Information Society (GII-GIS): Statement of Policy Recommendations Made by the ICCP Committee', (1996) 18 *OECD Digital Economy Papers*.

linkage for the connection of computers, computer systems and electronic databases located all over the world, thus creating the global information infrastructure that is known as the Internet. As such, telecommunications networks create the backbone infrastructure for the exchange of information or communications between electronic devices which may either be computers or other telecommunications devices.[73]

1.11 An Overview of Major Telecommunications Systems

1.11.1 Fixed Telephony Systems

Fixed telephony systems refer to telephone systems that rely on fixed telecommunications lines such as coaxial cables to transmit or receive communications. This form of telecommunication is known as "point to point communication" because it oscillates between one transmitter and one receiver. This system was originally designed for the carriage of voice telephony.[74] However, fixed telephony systems may be used to transmit or receive data traffic through fax, and telex machines or the dial-up Internet access.[75] The fixed telephony system is the oldest technological system of the modern telecommunications era.

1.11.2 Mobile Telecommunications Network Systems

Mobile telecommunications network systems are commonly known as cellular networks or mobile telephony systems. This system of telecommunications is "made up of a tessellation of cells[76], designed in a way that enables the network to use its allocated

[73] U J Orji, *Ibid*, p.22.
[74] A Sharpe, 'Communications Technologies Services, and Markets' in I Walden (ed), *Telecommunications Law and Regulation* (3rd edn, New York: Oxford University Press, 2009) p.38.
[75] A Sharpe, *Ibid*, p.40.
[76] A Cell is defined as the area of coverage of a Mobile Telecommunication Base Station. Adjacent cells use different frequencies to ensure that there is no channel interference, but the frequencies are reused in the tessellation pattern. A Sharpe, 'Communications Technologies Services, and Markets' in I Walden

frequency spectrum in the most efficient way possible".[77] Mobile network systems enable *mobility* and *flexibility* in the use of telecommunications and information technology services. Examples of mobile communications network systems include: GSM networks, CDMA networks, and Satellite network systems. Mobile telecommunications networks have spread across developing countries and most parts of the world at a very fast pace. Some of the reasons for the rapid spread of digital mobile telecommunications network systems can be traced to some inherent advantages such as the low cost of establishing mobile communications infrastructure when compared to fixed telephony, the timely deployment of such infrastructure, the interoperability of mobile networks and the portability of mobile telephony devices.

1.12 The Role of Law and Regulation in the Telecommunications Industry

Law is the fundamental basis for the regulation of conduct in modern societies. According to the Black's Law Dictionary, 'law' refers to the following:

> The regime that orders human activities and relations through systematic application of the force of politically organized society or through social pressure backed by force in such a society.[78]
>
> The aggregate of legislative, judicial precedents and accepted legal principles.[79]
>
> The body of authoritative grounds of judicial and administrative action especially the body of rules, standards and principles that the courts of a

(ed), *Telecommunications Law and Regulation* (3rd edn, New York: Oxford University Press, 2009), p.43.

[77] A Sharpe, *Ibid*, p.43.

[78] B A. Garner, *The Black's Law Dictionary* (9th edn, St Paul MN, United States: West Publishing Co, 2009) p.962.

[79] *Ibid*.

particular jurisdiction apply in deciding controversies brought before them.[80]

The set of rules or principles dealing with a specific area of a legal system.[81]

Thus, 'law' is a concept or term that is used to classify a system of rules, standards or guidelines established by the state or its institutions to govern behavior in a society or within a particular aspect of a society such as trade and commerce. On the other hand, 'regulation' is defined as "the act or process of controlling by rule or restriction"[82]; or "a rule or order, having legal force, usually by an administrative agency"[83]; or "an official rule made by a government but or some other authority".[84] Accordingly, regulation is a concept that refers to the application or enforcement of laws, rules or guidelines by the government or its institutions to direct or govern conduct within a society. Thus, the concept of regulation basically implies the application of enforceable legal and policy instruments to address specified issues within a society in order to achieve desired objectives and prevent undesired conduct and outcomes. The application of the concepts of law and regulation in the telecommunications industry implies the establishment and application of laws, rules or guidelines, policies or other legal principles by the state or its institutions to direct activities in the industry with a view to serving interests which may include the interest of the state, the public interest, or the interest of consumers or the service providers.

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[80] *Ibid*.
[81] *Ibid*.
[82] B A. Garner, *The Black's Law Dictionary* (9th edn, St Paul MN, United States: West Publishing Co, 2009) p.1389.
[83] *The Black's Law Dictionary*, (8th edn, 2004), p.1311.
[84] *Oxford Advanced Learners Dictionary* (6th edn), p.986.

One of the first attempts to regulate the communications industry began in England long before the invention of the telegraph and the emergence of modern telecommunications systems. In 1660, King Charles II was restored to the throne of England and Scotland after spending 9 years in exile. His father, King Charles I had been executed at Whitehall in 1649 at the height of England's Civil War, and England had entered the period known as the *English Interregnum* or the *English Commonwealth* during which the country had been a *de facto* republic led by Oliver Cromwell a Member of the English Parliament. The death of Cromwell had brought about a political crisis that caused a reverse to the monarchical system of government and the restoration of Charles II to the throne of England and Scotland.[85] The young King was very mindful of his late father's mistakes in handling the rebellion that gave rise to the civil war, and did not want to suffer the same fate. Hence, to succeed as a King, he needed to prevent another great rebellion that could cause another civil war. "He decided that he needed to know who was writing letters to whom, what people were saying about events, and what people were saying about him". [86] Consequently, the King nationalized the postal service system and created a state monopoly for the conveyance and delivery of letters all over England. The nationalized postal system was operated by an institution known as the General Post Office (GPO) which was also established under a Royal Prerogative in 1660.[87]

Following the invention of the telegraph in 1837, private commercial actors began rendering telegraph services. In order to regulate the activities of those private actors, the

[85] Encyclopedia.com, 'English Civil War and Interregnum', available at <http://www.encyclopedia.com/doc/1G2-3404900344.html

[86] H Kemmitt and J Angel, 'The Telecommunication Regime in the United Kingdom', in I Walden, *Telecommunications Law and Regulation*, (3rd edn, Oxford University Press: New York, 2009) p.121.

[87] *Ibid*.

UK government enacted the Telegraph Act of 1863. Subsequently, Telegraph Acts of 1868 and 1869 nationalized telegraph services originally provided by private companies.[88] With the invention of the telephone in 1876, the GPO did not initially consider the telephone system as a threat to their national telegraph network since, the telegraph was regarded as being technically different from the telephone. However, this position changed in 1880 when the Queens Bench held in *AG v Edison Telephone Company of London*[89] that a telephone conversation was a form of telegraph and constituted a telegram and therefore all telephone companies were required to have licenses from the Post Master General under the Telegraph Act.[90] The Post Master General then issued licenses to existing telephone companies such as the National Telephone Company (NTC) to operate telephone systems under certain conditions and restricted their sphere of operation/service provision to areas where they were already operating. In 1882, the Post Master General, decided to liberalize the grant of licenses for the operation of telephones, "on the ground that it would not be in the interest of the public to create a monopoly in relation to the supply of telephone communication."[91] Late in 1892, the government completely monopolized the telephone trunk line systems and then tool over the trunk lines of the NTC. By January 1912, the NTC had transferred all its undertakings to the GPO which then became the monopoly supplier of telephone services throughout the most of Britain except in the City of Hull.[92]

[88] H Kemmitt and J Angel, *Ibid*, pp.122-123.
[89] *AG v Edison Telephone Company of London* [1880] 6 QBD 244.
[90] H Kemmitt and J Angel, 'The Telecommunication Regime in the United Kingdom', in I Walden, *Telecommunications Law and Regulation*, (3rd edn, Oxford University Press: New York, 2009) p.124.
[91] Henry Fawett, Postmaster-General, 17, July 1882, *cited* in H Kemmitt and John Angel, *lbid*.
[92] H Kemmitt and J Angel, *Ibid*, p.125.

In the United States, the federal government began the regulation of the early telecommunications industry in 1866. In that year, the United States Congress granted telegraph service providers rights of way along post roads and public lands, on the condition that the service providers agreed to the principle of common carrier regulation which meant that they would provide services to any customer without discrimination.[93] Following the invention and patenting of the telephone by Alexander Graham Bell in 1876, the patent gave the Bell Company complete monopoly over the provision of telephone services in the United States. The expiration of Bell's telephone patent in the mid 1890's opened the industry to competition as other telephone companies also began to provide telephone services.[94] In 1900, the telegraph and telephone were formally subjected to United States federal regulation through the establishment of the Mann-Elkins Act of 1910.[95] The Act established the powers of the United States Interstate Commerce Commission to regulate the telecommunications industry and further designated telegraph and telephone companies as common carriers. Later in 1934, the United States government enacted the Communications Act[96] which established the Federal Communication Commission (FCC) as the primary regulator in the telecommunications industry and created the legal basis for modern federal communications regulation. The Communications Act confers the FCC with broad powers to regulate the United States telecommunications industry on the basis of "public interest, convenience and necessity".[97]

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[93] K Lee and J Prime, 'US Telecommunications Law', in I Walden, *Telecommunications Law and Regulation*, (3rd Edition) (Oxford University Press: New York, 2009) p .213.
[94] K Lee and J Prime, *Ibid*.
[95] Mann-Elkins Act, 61st Congress, 2nd Session, Ch. 309, 36 Stat 539, enacted June 18, 1910.
[96] United States Communications Act of 1934 (47 U.S.C. 151).
[97] K Lee and J Prime, *Ibid*, pp.213-214.

A brief comparison of development of legal regimes for the regulation of the early telecommunications industry in the United Kingdom and the United States shows that legal regime development in the United Kingdom was mainly influenced by the objectives of establishing complete state control over all aspects of the telecommunications industry as a critical public utility provided by the state. This was based on the idea that it was the duty of the government to provide telecommunications in order to ensure universal accesses and affordable access. On the other hand, the development of the legal regime for the early telecommunications industry in the United States appears to have been mainly influenced by the objectives of promoting competition in the industry while also protecting consumer and public interests.

Following the spread of telecommunications across the world several unique factors have further influenced the regulation of the industry in each country. Such unique factors include the different social, cultural and economic backgrounds of countries as well as their different legal traditions and systems. However, some major factors that have generally influenced telecommunications regulation in most countries before and after the liberalization of the industry include: social objectives, economic objectives[98] and national objectives such as the regulation of the allocation Radio frequency spectrum and numbering resources. Other objectives of telecommunications regulation include: to promote national security objectives; to ensure a successful transition from a monopolistic telecommunications market to a competition driven market; to protect

[98] L Thornton 'Telecommunications Law – An Overview', in L Thornton, *et al* (eds), *Telecommunications Law in South Africa* (Johannesburg, South Africa: STE Publishers, 2006) p.18.

consumers[99]; to fulfill international commitments embedded in telecommunications treaties; to regulate prices; and to promote the sustainable development of the industry including the promotion of innovation and investments in the industry.[100]

It is widely accepted that the effective regulation of the telecommunications industry has usually resulted to many benefits such as increased innovation and technological growth, increased investment, better quality of services, lower prices for consumers, increased consumer protection, higher telecommunications penetration rates and the growth of new services.[101] In particular, regulation is imperative in telecommunications markets where it is inevitable that leaving the market to regulate itself would result to market failure and produce undesirable consequences on consumers and also hinder sustainable market development. Thus, the concept of regulation in the telecommunications industry seeks to prevent 'socially undesirable outcomes' by directing market activity towards desired outcomes.[102] The desired outcomes are usually the objectives of regulation such as the promotion of competition, the protection of consumers, the promotion of universal access and service and the improvement of the quality of services. [103]

[99] For *e.g*., Nigerian Communications Act 2003, s. 1(g).

[100] InfoDev and ITU, *Legal and Institutional Framework: Module 6- ICT Regulation Toolkit* (Geneva: InfoDev and ITU, 2012) at paragraph 1. *See also* L Thornton, 'Telecommunications Law – An Overview', in L Thornton, *et al* (eds), *Telecommunications Law in South Africa* (Johannesburg, South Africa: STE Publishers, 2006) p.18.

[101] InfoDev and ITU, *Legal and Institutional Framework: Module 6- ICT Regulation Toolkit* (Geneva: InfoDev and ITU, 2012) at paragraphs 1 & 24.

[102] C Blackman and L Srivastava (eds) *Telecommunications Regulation Handbook* (Washington D.C: The World Bank and ITU, 2011), p.30.

[103] J Hodge and K Weeks, 'The Economics of Telecommunications and its Regulations', in L Thornton, *et al* (eds), *Telecommunications Law in South Africa* (Johannesburg, South Africa: STE Publishers, 2006) pp.88-89.

However, some writers have criticized the use of state regulation to direct the telecommunications industry with the argument that the telecommunications industry should rather regulate itself through market competition. In this context, it has been argued that:

> Regulation has potentially high costs. The regulatory process is inherently time consuming to administer and requires considerable expenditure of resources. In addition, regulation can have unintended consequences which may be detrimental to customers and the 'public interest'. No matter how capable and well intentioned regulations are, they will never be to produce outcomes as efficient as a well functioning market.[104]

Critics of regulation further argue that:

> Regulation should only focus on those parts of the ICT sector where there is a clear need for regulation (that is where effective competition is not feasible) and should only be a temporary measure. Over time regulators should aim to establish or restore the conditions that provide for effective competition on a sustained basis. This entails, for example, removing or reducing barriers to entry and exit. It also involves enabling the market itself to prevent the incumbent from abusing its market power, for example, through the entry of additional competitors. [105]

In furtherance of the above position, the argument has also been made that where telecommunications markets become competitive that there would be more reliance on

[104] C Blackman and L Srivastava, *Telecommunications Regulation Handbook* (Washington D.C: The World Bank and ITU, 2011), p.31.
[105] C Blackman and L Srivastava, *Ibid*, p.31.

general competition law and regulation for regulating the markets and thereby lessening the need for the development and application of specific telecommunications legislations.[106] Apparently, the above position is based on the idea that since telecommunications industry provides services to consumers, that efficient market competition will be an effective tool for the self regulation of the industry, as consumers will tend to demand more services from service providers that protect their interests such as affordable access and better quality of service.

However, the idea of allowing the telecommunications industry to self regulate itself on basis of competition law may not effectively address most contemporary challenges of the industry such as the promotion of universal access and service, consumer protection, and environmental protection concerns. Relying only on market competition to regulate the telecommunications could result to market failure and abuse especially in developing countries with weak legal systems. Also, in countries where a culture of self regulation has not being entrenched in the telecommunications industry, sole reliance on market competition principles would result to market abuse, more especially where there is a low level of consumer rights awareness and weak consumer rights enforcement mechanisms. There are also other issues that competition cannot efficiently address such as the provision of universal access and service, the environmental regulation of telecommunications infrastructures, public health and safety matters and the protection of personal data and privacy. Hence, while competition has enormous prospects to enhance market development and improve service delivery, there

[106] T Gilberston, 'Telecommunications-Specific Competition Regulation in Australia: What Next?' (30 March 2001) available at <http://www.gtlaw.com.au/binaries/pdf/publications/telecomspecific.pdf> last accessed on 30 March, 2016.

are several critical non-competition issues that cannot be addressed by competition alone but through regulation.

To a large extent, the introduction of competition in the telecommunications industry has usually been accompanied with a regulatory intervention in order to ensure the smooth transition of the industry from monopoly to competition. This has been the case in most countries with the exception of New Zealand which introduced competition in its telecommunications industry without establishing a sector specific regulatory framework, but later had to establish a regulatory authority to oversee the telecommunications industry. Thus, New Zealand removed all state imposed restrictions on the supply of telecommunications services by 1989. This had the effect of liberalizing the country's telecommunications industry and the country then relied solely on the application of general competition law to govern the liberalization of the industry. However, it has been widely accepted that the approach failed to effectively address related competition issues,[107] but rather "led to delays in the process of liberalization through the need for the lengthy and ineffective recourse to judicial intervention".[108] Subsequently, New Zealand enacted a Telecommunications Act in 2001. The Act established the Office of the Telecommunications Commissioner within the New Zealand Commerce Commission to regulate the telecommunications sector, and in 2006 further

[107] D Geradin and M Kerf, *Controlling Market Power in Telecommunications* (New York: Oxford University Press, 2003) p.12. *See also* D Geradin and M Karf, 'Controlling Market Power in Telecommunications: Antitrust vs Sector Specific Regulation: An Assessment of the United States, New Zealand and Australia Experiences', (1999) 14 (3) *Berkeley Technology Law Journal*, 965-988.

[108] I Walden, 'Telecommunications Law and Regulation: An Introduction', in I Walden (ed) *Telecommunications Law and Regulation* (4th edn, Oxford, United Kingdom: Oxford University Press, 2012) p.20. *Telecom Corporation of New Zealand Ltd v Clear Communications Ltd* (1992) 4 NZBLC *cited* in I Walden, *Ibid*.

regulatory and enforcement powers were granted to the Commissioner including powers to resolve disputes relating to telecommunications services.[109]

The example of New Zealand goes to show that the introduction of competition in the telecommunications industry does not extinguish the need for regulation. Accordingly, it has been noted that: "the role of the regulator actually increases once governments authorize competition, particularly during the early stages of transition from the former model of monopoly provision to one of effective competition".[110] However, although there may be need for less regulation in the telecommunications industry in situations where effective and sustainable competition has been achieved, nevertheless, law and regulation would still play a critical role in balancing public interests and the interests of service providers, since market forces may not effectively balance those interests. In particular, the dynamic nature of technological innovations in the industry usually throws up issues that can only be addressed by regulation. The dynamic nature of the telecommunications industry also implies that the substance of telecommunications regulation has to evolve rapidly in order to keep up with emerging innovations in the industry. This requires the constant and timely updating of regulatory frameworks to keep pace with technological innovations and emerging challenges in the industry. For example, in Europe, the evolutionary nature of telecommunications regulation is seen in the "moving target" of European Union (EU) regulation which has successfully developed a series of regulatory 'packages' to update the EU telecommunications

[109] New Zealand Telecommunications Act (2001) amended by Telecommunications Amendment Act (No.2) 2006 (2006 No.83) s. 9A. *See also* I Walden, *Ibid.*

[110] InfoDev and ITU, *Legal and Institutional Framework: Module 6- ICT Regulation Toolkit* (Geneva: InfoDev and ITU, 2012) at paragraph 2.2.

regulatory framework in order to adequately regulate new developments in the industry.[111]

1.13 Background on Nigeria

The Federal Republic of Nigeria is located in the West African sub-region. It shares land borders with the Republics of Cameroon in the East, Chad in the North-East, Niger in the North and Benin in the West. On its coast in the South lies the Gulf of Guinea in the North Atlantic Ocean.[112] Nigeria has a terrestrial mass of 923,768 square kilometers and about 13,000 square kilometers of water, while its coastline along the Gulf of Guinea is measured at about 853 kilometers.[113] Recent estimates indicate that Nigeria has a human population of over 174, 507, 539 million people and is also classified as the 7th most populous country in the world and the most populous country in Africa.[114] Nigeria also has over 250 ethnic groups and languages and most of the country's population is split between the Christian and Islamic religions, with the Christians constituting the majority in the southern part of the country and the Muslims constituting the majority in the northern part. Nigeria was colonized by Britain and obtained political independence on 1 October, 1960. The country operates a constitutional democracy and a federal system of government comprising of the federal, state and local tiers of government. The federation comprises of 36 States, the Federal Capital Territory and 774 Local Government Councils.[115] The country also operates a bicameral federal legislature

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[111] C Blackman and L Srivastava (eds) *Telecommunications Regulation Handbook* (Washington D.C: The World Bank and ITU, 2011), p.5.

[112] Library of Congress (Federal Research Division), *Country Profile: Nigeria*, (July, 2008) p.7, available at <http://www.lcweb2.loc.gov/frd/cs/profiles/Nigeria.pdf> last accessed on 30 March, 2016.

[113] *Ibid*.

[114] Index Mundi, 'Nigeria Demographics Profile 2014', available at <http://www.indexmundi.com/nigeria/demographics_profile.html> last accessed on 30 March, 2016.

[115] Constitution of the Federal Republic of Nigeria 1999, First Schedule, s.3, Part 1.

(National Assembly). The National Assembly is responsible for exercising the legislative powers of the federation.[116] While the State Houses of Assembly are responsible for exercising the legislative powers of States in the federation.[117] According to the rebased GDP statistics released by Nigeria's National Bureau of Statistics in 2014, the economic sectors that contribute the major portions of the national GDP include: agriculture (21.97%), oil and gas (14.40%), trade (17.02%), telecommunications and information services (8.69%), real estate (8.02%) and manufacturing (6.83%).[118] Nigeria is classified as a 'low-income developing country'[119] with very low human index levels and high poverty rates.[120]

1.14 A Brief Overview of the Nigerian Telecommunications Industry

By the beginning of 2016, statistics from the NCC indicated that Nigeria had achieved a teledensity of 106.16 percent[121] from 0.38 percent in 2000.[122]According to the NCC, Nigeria's current teledensity data is based on a total figure of 214,234,052 million 'connected' telephone lines (including mobile and fixed wired/wireless lines) out of

[116] *Ibid*, s. 4 (1).
[117] *Ibid*, s. 4 (6).
[118] National Bureau of Statistics, *Measuring Better: Frequently Asked Questions on the Rebasing /Re-Benchmarking of Nigeria's Gross Domestic Product (GDP)* (Abuja: National Bureau of Statistics, 2014) pp.13-14.
[119] International Monetary Fund (IMF), *World Economic Outlook* (Washington DC: IMF, October 2014) p.92.
[120] United Nations Development Programme (UNDP), *Human Development Report 2011 – Sustainability and Equity: A Better Future for All* (Geneva: United Nations, 2011) p. 5.
[121] NCC, 'Subscriber Statistics – February 2016', (7 March, 2016), available at <http://www.ncc.gov.ng/index.php?option=com_content&view=article&id=125itemid=73> last accessed on 30 March, 2016.
[122] ITU Statistics (May 2001), available at <http://www.itu.int/itudoc/itu-t/com3/focus/72404-fr.html>. *See also* E Ndukwe (Executive Vice Chairman, NCC) 'Telecommunications as a Vehicle for Socio-Economic Development', p.3, available at <http://www.ncc.gov.ng/archive/speechs_presentations /EVC's%20presentation/2009/socio.pdf> last accessed on 30 March, 2016.

which 148,620,359 million lines are classified as 'active lines'.[123] (*See* table 1 below) However, the NCC's calculation of Nigeria's teledensity is based on the last national population census of 2006 which placed Nigeria's population at 140 million people.[124] As such, the NCC's current calculation of Nigeria's teledensity is not based on the country's current population estimates of over 170 million people.[125] Nevertheless, Nigeria's current teledensity is also ranked as the highest in Africa by the National Bureau of Statistics.[126] Also by 2016, Nigeria's Internet population had grown to over 92 million Internet subscribers[127]from a population of about 17,000 Internet users in 2000.[128] Nigeria's Internet user population is also the largest in Africa.[129] The National Bureau of Statistics estimates that the telecommunications industry contributed about 8.69 percent to Nigeria's GDP in 2013 according to the recently rebased national GDP data.[130] The industry is regarded as the fourth pillar of the Nigerian economy in terms of GDP contribution and the fastest growing at a rate of 24 percent.[131]

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[123] NCC, Subscriber Statistics – February 2016, (7 March, 2016) available at <http://www.ncc.gov.ng/index.php?option=com_content&view=article&id=125itemid=73> last accessed on 30 March, 2016.

[124] *Ibid*.

[125] Index Mundi, 'Nigeria Demographics Profile 2014', available at <http://www.indexmundi.com/nigeria/demographics_profile.html> last accessed on 30 March, 2016.

[126] National Bureau of Statistics, *Nigerian Telecommunications Sector (2010 – 2014) – Summary Report on Telecommunication for National and International Regions* (National Bureau of Statistics: Abuja, February 2015) pp.1 and 11.

[127] Internet World Stats, 'Nigeria Internet Usage and Telecommunications Reports' (June, 2015) available at<http://www.internetworldstats.com/af/ng.htm> last accessed on 30 March, 2016.

[128] National Policy on Telecommunications (May, 2000).

[129] Internet World Stats, 'Internet Usage and Population Statistics', (November 2015) available at <http://www.Internetworldstats.com/stats1.htm> last accessed on 30 March, 2016.

[130] National Bureau of Statistics, *Measuring Better: Frequently Asked Questions on the Rebasing /Re-Benchmarking of Nigeria's Gross Domestic Product (GDP)* (National Bureau of Statistics: Abuja, 2014) p.14.

[131] Federal Ministry of Communication Technology, *Connected for Growth – Progress Report on Projects and Programme Implementation, July 2011- February 2014* (Federal Ministry of Communication Technology: Abuja, 2014) p.8.

There are currently four major GSM operators in Nigeria: MTN Nigeria Communication Ltd, Globacom, Etisalat and Airtel. (*Se*e table 2 below) The GSM technology occupies a 98.44 percent share of the Nigerian telecommunications market, while the CDMA technology occupies 1.44 percent of the market.[132] (*Se*e table 3 below) In addition, four international submarine cable systems (SAT3, MainOne, Glo-1 and WACS) have landing points in Nigeria, thus giving the country an international bandwidth capacity of 10 Terabytes (Tbits) (*Se*e table 4 below).

Table 1: Nigeria's Telecommunications Subscriber Data (February 2016)

Technology	*Connected Lines*	*Active Lines*
Mobile (GSM)	210, 202,453	149,288,370
Mobile (CDMA)	3,677,676	2,147,323
Fixed wired/wireless	353,923	184,666
Total	214,234,052	148, 620,359

Source: NCC[133]

Table 2: Percentage of Market Share by GSM Operators (February 2016)

Operator	*Number of Subscribers*	*Percentage of Market*
MTN	59,848,516	39%
Globacom	34,003,841	23%
Airtel	33,595,561	23%
Etisalat	21,840,452	15%

Source: NCC[134]

[132] NCC, 'Industry Overview' (February, 2016), available at <http://www.ncc.gov.ng/index .php?option2com-content&view=article&id=68&?itemid =70> last accessed on 30 March, 2016.

[133] NCC, Industry Overview (February, 2016) available at <http://www.ncc.gov.ng/index.php?option2com-content&view=article&id=68&?itemid =70> last accessed on 30 March, 2016.

[134] NCC, Industry Overview (February, 2016) available at <http://www.ncc.gov.ng/index.php?option2com-content&view=article&id=68&?itemid =70> last accessed on 30 March, 2016.

Table 3: Percentage of Market Share by Technology (February 2016)

Technology	*Market Share*
Mobile (GSM)	98.44%
Mobile (CDMA)	1.44%
Fixed (Wired/Wireless)	0.12%

Source: NCC[135]

Table 4: Submarine Cables with Landing Points in Nigeria[136]

Submarine Cable	*Route*	*Year of Launch*	*Owner*	*Capacity*
SAT3	South Africa to Spain	2001	Telkom South Africa/NITEL	340Gbps
MainOne	Nigeria to Portugal	2010	Mainstreet Technologies	1.92Tbps
Glo-1	United Kingdom to Nigeria	2010	Globacom	2.5Tbps
WACS	South Africa to United Kingdom	2012	MTN	5.12Tbps

However, despite the phenomenal growth of the Nigerian telecommunications industry between 2001 and 2016, the industry appears not have achieved its full potential in many respects. The International Telecommunications Union still classifies Nigeria as one of the 'least connected countries' with a low ICT development index and telecommunications access being mainly characterized by the predominant usage of basic voice telephony services and low speed data services due to very low broadband Internet

[135]NCC, Industry Overview (February, 2016) available at <http://www.ncc.gov.ng/index.php?option2com-content&view=article&id=68&?itemid =70> last accessed on 30 March, 2016.

[136] F Odufuwa, *Understanding What is Happening in ICT in Nigeria: A Supply – and Demand Side Analysis of the ICT Sector* (South Africa: Research ICT Africa, 2012) p.19.

access.[137] Thus, access to the Internet and ICTs still appears limited for many Nigerians.[138] To some extent, access to ICTs and the Internet appears to be characterized by an urban-rural divide, with a concentration of ICT and Internet user populations in urban areas.[139] This implies the existence of a digital divide between urban and rural areas, and is also evidenced by some level of disparity in the location of telecommunications facilities between urban and rural areas.[140]

There is also the challenge of inadequate telecommunications infrastructure including broadband infrastructure and inefficient power supply to operate telecommunications facilities. For example, Nigerian telecommunications operators generally depend on diesel powered generators to maintain constant service due epileptic supplies from the national power grid. In 2012, it was estimated that operators annually spent over 177 billion Naira representing about (1.14 billion USD at that time) on diesel for the generators needed to provide backup power supply to over 22,000 base stations in Nigeria.[141] MTN, a major telecommunications service provider is reported to monthly spend about 660 million Naira on fuelling its diesel generators.[142] In 2015, it was estimated that telecommunications base stations in Nigeria are powered by generators for

[137] ITU, *Measuring the Information Society* (Geneva: ITU, 2013) pp. 24, 42, 46, 50 and 54.

[138] Freedom House, *Nigeria: Freedom on the Net 2013*, p.2, available at <https://freedomhouse.org/report/freedom-net/2013/nigeria> last accessed on 30 March, 2016.

[139] Broadcasting Board of Governors, *New BBG Gallup Data Shows Dramatic Rise in Mobile Use in Nigeria*, available at <http://www.bbgogov/press-release/new-bbg-gallup-data-shows-dramatic-rise-in-mobile-use-in-nigeria/>. *See also* Freedom House, *Nigeria: Freedom on the NET 2013*, p.4, *Ibid.*

[140] E Ndukwe (Executive Vice Chairman, NCC) 'Telecommunications as a Vehicle for Socio-Economic Development', p.11, available at <http://www.ncc.gov.ng/archive/speechs_presentations/EVC's%20presentation/2009/socio.pdf> last accessed on 30 March, 2016.

[141] A Eze, 'Base Stations Gulp 178 Billion Naira Worth of Diesel Annually', *ThisDay*, 27 August, 2012, available at <http://www.thisdaylive.com/articles/base-stations-gulp-n178bn-worth-of-diesel-annually/123273/> last accessed on 30 March, 2016.

[142] Balancing Act, 'MTN Spends N660 Million on Diesel Monthly in Nigeria', *Balancing Act*, Issue No.383, available at <http:www.balancingact-africa.com/news/en/issue-no-383/money/mtn-spends-n660-mill/en> last accessed on 30 March, 2016.

an average of 20 hours a day.[143] There is also the challenge of the theft and vandalization of telecommunications facilities. For example, research studies indicate that MTN loses an average of two power generators every week due to either theft or vandalism.[144] It is also estimated that about 2 to 3 percent of the Nigeria's base stations are shut down at any point in time due to vandalism and resulting in a revenue loss of about 50 to 100 million USD every year.[145]

The above challenges generally increase the costs of maintaining telecommunications facilities, while also reducing the quality of service that is available to consumers, and also increasing the cost of telecommunications services. Consequently, the average cost of telecommunications in Nigeria is noted to be currently twice to thrice higher than the average cost in most African States.[146] Another implication of the above challenges is that they limit the entrance and survival of small operators in the Nigerian telecommunications industry, thus reducing the prospects of effective and sustainable competition in the industry.[147]

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[143] C Onwuegbuchi, 'Operators Use 1.4M Liters of Diesel Daily to Power BTS', *Nigeria Communications Week*, 02 February, 2015, available at<http://www.communicationsweek.com.ng/ telecom/operators-use-14m-litres-of-diesel-daily-to-power-bts>. *See also* GSMA, *Powering Telecoms: West Africa Market Analysis – Sizing the Potential for Green Telecoms in Nigeria and Ghana* (London, GSMA, 2013) pp.1-28. D U. Ike, *et al*, 'Analysis of Telecom Base Stations Powered by Solar Energy', (April 2014) 3(4) *International Journal of Scientific Technology Research*, 369.

[144] A B Ola and Y Y Adewale, 'Infrastructural Vandalism in Nigerian Cities: The Case of Osogbo, Osun State', (2014) 4 (3) *Research on Humanities and Social Sciences*, 49, 52. *See also* R Johnson, *African Mobile Fact Book 2012* (England: Blycroft Publishing, March 2012) p.102.

[145] B Uzor, '$39 Billion Telecom Investment in Danger as Nigeria Fails to Pass Critical National Infrastructure Bill', *Business Day*, 29 October, 2014, available at <http://www.asokinsight.com/news/39-billion-telecom-investment-danger-nigeria-fails-pass-critical-infrastructure-bill> last accessed on 30 March, 2016.

[146] Editorial, 'Nigerian Telcos Spend N10 Billion Yearly on Diesel to Power Base Stations – Airtel Boss', *Daily Independent*, February, 2014, available at <http://www.dailyindependentng.com/2014/02/nigerian-telcos-spend-n-10b-yearly-on-diesel-to-power-base-stations-airtel-boss/> last accessed on 30 March, 2016.

[147] C Okereocha, 'Saving the Small Telecoms Players', (18 April, 2011) 15 *Broad Street Journal*, 33-35.

CHAPTER TWO

REGULATORY AND POLICY FRAMEWORKS FOR THE GOVERNANCE OF THE NIGERIAN TELECOMMUNICATIONS INDUSTRY

2.1 The Legal Basis for the Regulation of the Nigerian Telecommunications Industry

Nigeria operates a constitutional democracy and the Nigerian Constitution explicitly establishes its supremacy over all authorities, persons and laws in Nigeria.[148] Thus, all Nigerian laws derive their validity from the Constitution.[149] Accordingly, the Nigerian Constitution establishes the fundamental legal basis for the regulation of the telecommunications industry. Nigeria operates a federal system of government where powers of the State are shared between the Federal Government and the other tiers of government (States and Local Governments) in accordance with the Constitution. The Constitution explicitly grants the Federal Government the powers to administer items in the Exclusive Legislative List that is established in Part I of the Second Schedule to the Constitution. Accordingly, section 4 (2) of the Constitution provides that: "the National Assembly shall have the power to make laws for the peace order and good government of the Federation or any part thereof with respect to any matter included in the Exclusive Legislative List set out in Part I of the Second Schedule of this Constitution".[150] The Constitution also provides that the powers of the National Assembly to legislate on

[148] S. 1(1) of the Constitution of the Federal Republic of Nigeria (1999) declares that: "This Constitution is supreme and its provisions shall binding force on all authorities and persons throughout the Federal Republic of Nigeria". *See also* s. 1(3) of the Constitution which declares that "If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall to the extent of the inconsistency be void."

[149] C A Obiozor, 'The Constitutional Vesting of Judicial Powers in the Judicature In Nigeria – The Problem With Section 6(6)(D) of the Constitution of 1999', (2010) *NIALS Law and Development Journal*, 218, 220.

[150] Constitution of the Federal Republic of Nigeria 1999, s. 4(2).

matters in the Exclusive Legislative List "shall...be to the exclusion of the Houses of Assembly of States" except where the Constitution provides otherwise.[151] On the other hand, the House of Assembly of every State in the Federal Republic of Nigeria has powers to legislate on items on the Concurrent Legislative List that is established in Part II of the Second Schedule of the 1999 Constitution.[152] However, the powers of a State House of Assembly to legislate on items in the Concurrent Legislative List are not 'exclusive' as the National Assembly also has the powers to legislate on such items "to the extent prescribed" in the Constitution.[153]

Matters relating to telecommunications are provided for in the Exclusive Legislative List of the 1999 Constitution. Thus, the National Assembly has the exclusive powers to legislate on matters relating to 'telegraphs and telephones',[154] wireless broadcasting and the allocation of wave lengths for wireless, broadcasting and television transmission.[155] Accordingly, the legislative powers in the Exclusive List have provided the basis for the National Assembly to enact laws that regulate the telecommunications industry. Also, the executive powers of the federation which are vested in the President of Nigeria and the executive arm of government by virtue of section 5(1) of the 1999 Constitution have also provided the basis for the establishment of telecommunications policies and other measures to promote the development of the telecommunications

[151] *Ibid*, s. 4(3).
[152] *Ibid*, s. 4(7).
[153] *Ibid*, s. 4(4) (9).
[154] Item 46, Exclusive Legislative List, Part I, Second Schedule to the Constitution of the Federal Republic of Nigeria 1999.
[155] Item 66, Exclusive Legislative List, Part 1, Second Schedule to the 1999 Constitution. However, within the context, the legislative powers of the National Assembly does not extend to "broadcasting and television provided by the Government of a State". *See also* Item 66, Exclusive Legislative List, *Ibid*.

industry. The subsequent sections of this chapter will be discussing the regulatory and policy frameworks that govern the telecommunications industry.

2.2 The Wireless Telegraphy Act[156]

The Wireless Telegraphy Act was originally enacted in 1961 to repeal the Wireless Telegraphy Ordinance of the British colonial government.[157] The Act subsequently entered into force on 1 July, 1966, and was later amended in 1968 and 1998. Up till 1992, the Act served as the principal legislation for both the operation of telecommunications services during the era of NITEL's monopoly and also for the regulation of broadcasting services in Nigeria. The Act empowered the Ministry of Communications to manage the national radio frequency spectrum and also granted the Minister of Communications the powers to grant licenses for services and frequencies.[158] However, the Act explicitly forbade the grant of licenses for the private operation of communication services. Later, the establishment of the NCC Act and NBC Act in 1992 led to a transfer of the regulatory control for the telecommunications and broadcasting sectors from the framework of the Wireless Telegraphy Act to NCC and NBC respectively.[159]

The Wireless Telegraphy Act as amended in 1998 establishes a framework for the regulation of wireless telegraphy in Nigeria. The Act prohibits the establishment or operation of a wireless telegraphy apparatus except where a license has been obtained

[156] The Wireless Telegraphy Act 1998, No.31.
[157] The Wireless Telegraphy Ordinance, Cap.233 Laws of Nigeria, 1948.
[158] P C Obutte, 'Telecommunications and the Regulatory Regime in Nigeria', in G P Krog and A G B Bekken (eds) *Yulex* (Oslo, Norway: Norwegian Research Center for Computers and Law, University of Oslo, 2004) p.100.
[159] F Odufuwa, *Understanding What is Happening in ICT in Nigeria: A Supply – and Demand Side Analysis of the ICT Sector* (South Africa: Research ICT Africa, 2012) p.12. *See also*, F Odufuwa, *Open Spectrum for Development: Nigeria Case Study* (South Africa: Association for Progressive Communications, November 2010) p.7.

from the NCC.[160] The Act also empowers the NCC to establish regulations to govern wireless telegraphy.[161] However, it has been observed that the 1998 amendment of the Wireless Telegraphy Act did not sufficiently reflect modern technological trends and neither did it define the government's policy direction.[162] This state of affairs may be traced to the fact that the Act predated the National Telecommunications Policy and the implementation of the full liberalization reforms in the sector. This nevertheless, has not extinguished the relevance of the Act in the post liberalization era of the Nigerian telecommunications industry as the Act continues to be cited with respect to spectrum assignment under the Nigerian Communications Act.[163]

2.3 The National Information Technology Development Agency (NITDA) Act [164]

Following the establishment of Nigeria's National Information Technology Policy in March 2001, the Federal Government established the National Information Technology Development Agency **(**NITDA) to implement the policy and promote the development and use of information technology in Nigeria.[165] Later in 2007, the Nigerian Government established the NITDA Act which mainly provides for the governance and promotion of the development of information technologies. The Act establishes a National Information Technology Development Fund[166] and imposes obligations on GSM service providers and all telecommunications companies including cyber companies and Internet service

[160] Wireless Telegraphy Act, s.4 & 6.
[161] Wireless Telegraphy Act, s. 8.
[162] P C Obutte, *Theory and Practice of Telecommunications Regulation in Nigeria Through The Development Question* (Saarbruken, Germany: VDM Verlag Dr. Muller, 2007) p.126.
[163] Nigerian Communication Act 2003, s. 121 (2) & (3).
[164] The National Information Technology Development Agency (NITDA) Act 2007.
[165] B Udotai, 'The Growth and Challenges of Information in Law Practice in Nigeria', in N N. Kelvin (ed) *Legal Practices Skills and Ethics in Nigeria* (Lagos: DCON Consulting, 2004) p.231.
[166] NITDA Act 2007 s. 12.

providers[167] with an annual turnover of one hundred million Naira (₦100,000,000) to pay one percent of their annual profits before tax into the Fund.[168]

While the establishment of the National Information Technology Development Fund is laudable, however, the NITDA Act does not explicitly provide that the Fund shall be solely utilized for the development of information technology in Nigeria. For example, section 21 of the NITDA Act provides that NITDA may apply the proceeds of the Fund for purposes including: (i) the costs of administering the Agency; (ii) the payment of the emoluments, allowances and benefits of members of the Board of the Agency as well as that of the employees of the Agency, and; (iii) the development and maintenance of any property vested in or owned by the Agency.[169] These objectives clearly deviate from the core purpose of information technology research and development for which the Fund is supposed to be applied in order to achieve Nigeria's national information technology development objectives. Also, the purposes for which the Fund may be utilized under the Act appears to be different from the purposes for establishing the Fund under the National Policy for Information Technology (2001). For example, the policy sought the establishment of the Fund with a view to providing venture capital finance for the start-up of small and medium scale enterprises in the information technology sector.[170] Hence, there is need to ensure that the Fund is mainly applied towards facilitating research and development activities and the promotion indigenous investments in the information technology sector in order to enhance Nigeria's information technology capacities. The operation of the fund has also been practically hindered by lack of funds to facilitate its

[167] Third Schedule to the NITDA Act 2007.
[168] S.12 (2) *Ibid*.
[169] S. 21(1).
[170]The Nigerian National Policy for Information Technology 2001, Paragraph 10.3 (iv).

actual take off. For example, the National Information Technology Policy required the Federal Government to allocate two percent of the national budget to the Fund until the vision of the policy is achieved and also provide the Fund with a start up grant of 150 million USD;[171] however, these policy mandates were not implemented.[172]

2.4 The Nigerian Communications Act[173]

The Nigerian Communications Act (NCA) was enacted by the National Assembly on 30 June, 2003 and received the assent of the President on the 8 July, 2003. The NCA serves as the principal legislation for the regulation of Nigeria's telecommunications industry,[174] and its scope of application covers "the provision and use of all [tele] communications services and networks…within Nigeria or on a ship or aircraft registered in Nigeria".[175] More specifically, the NCA aims to promote the implementation of the National Telecommunications Policy and establishes the regulatory framework for the industry.[176] The core objectives of the NCA include:

(a) promoting the provision of modern, universal, efficient, reliable, affordable and easily accessible communications services throughout Nigeria;[177]

(b) ensuring fair competition practices in all segments of the Nigerian telecommunications industry;[178]

[171]Nigerian National Policy for Information Technology 2001, Paragraph 5 (xx).
[172]H T Hassan, 'Information Technology Policy in Nigeria: An Implementation Assessment', (September 2012) 4 *Journal of Social Science and Policy Review*, 50.
[173] Nigerian Communications Act 2003, *Official Gazette of the Federal Republic of Nigeria* (19 August, 2003) Vol.90, No.62, Government Notice No.115. [Hereafter, NCA 2003].
[174] The NCA 2003 repeals the NCA of 1992, No.75 and its amendments. It also repeals the Telecommunications and Postal Offences Decree No.21 of 1995 and its amendments. NCA 2003 s. 150.
[175]NCA 2003, s. 2.
[176] S. 1(a) & (b) *Ibid*.
[177] S. 1(c) *Ibid*.
[178] NCA 2003, s. 1(e) *Ibid*.

(c) promoting the participation of Nigerians in the ownership, control and management of telecommunications companies and organizations;[179]

(d) encouraging local and foreign investments in the Nigerian telecommunications industry and the introduction of innovative services and practices in accordance with international best practices and trends;[180]

(e) protecting the rights and interest of service providers and consumers within Nigeria;[181]

(f) encouraging the development of the Nigerian telecommunications manufacturing and supply sector and encouraging research and development efforts by all stakeholders in the industry;[182]

(g) ensuring that the needs of disabled and elderly persons are taken into consideration in the provision of telecommunications services,[183] and;

(h) ensuring an efficient management and utilization of resources such as radio frequency spectrum, numbers and electronic addresses, while also safeguarding national interests and security in the use of such resources.[184]

The NCA establishes the Nigerian Communications Commission (NCC) as the independent regulatory authority with a mandate for the enforcing the NCA, and also sets out the NCC's functions, powers, governance structure and sources of funding.[185] In addition, the NCC establishes an advisory framework known as the National Frequency

[179] S. 1(e) *Ibid*.
[180] S. 1(d) *Ibid*.
[181] S. 1(g) *Ibid*.
[182] S. 1(f) *Ibid*.
[183] S. 1(h) *Ibid*.
[184] S. 1(i) *Ibid*.
[185]NCA 2003, s. 3-22.

Management Council[186] and sets out the functions of the Minister of Communication (now known as the Minister of Communications Technology) in the telecommunications sector.[187] The NCA also establishes the legal framework for the governance of: telecommunications licensing;[188] market competition;[189] interconnection;[190] consumer protection and quality of service;[191] universal service provision;[192] the administration radio frequency spectrum and numbering resources;[193] the installation of network facilities;[194] technical standards for telecommunications equipment;[195] tariff regulation;[196] and, the resolution of telecommunications disputes.[197] Accordingly the NCA's framework on the above areas will be analyzed in the subsequent chapters of this work. However, the remaining sections of this chapter will examine the structure and regulatory mandate of the NCC and its accountability as well as the functions and powers of the Minister of Communications Technology and the National Frequency Management Council.

2.5 The Nigerian Communications Commission (NCC)

2.5.1 The Structure of the NCC

The NCA establishes the NCC as an independent corporate body with the core responsibility of regulating the Nigerian telecommunications industry and enforcing the

[186] S. 26 *Ibid*.
[187] S. 23-25 *Ibid*.
[188] S. 31-52 *Ibid*.
[189] S. 90-95 *Ibid*.
[190] S. 96-103 *Ibid*.
[191] S. 104 -111 *Ibid*.
[192] S. 112 -120 *Ibid*.
[193] S. 121 -129 *Ibid*.
[194] S. 135 -137 *Ibid*.
[195] S. 130 -134 *Ibid*.
[196] S. 108 -111 *Ibid*.
[197] S. 73 -78 *Ibid*.

NCA.[198] The NCC is administered by a Governing Board appointed by the President of the Federal Republic of Nigeria.[199] The Governing Board is comprised of nine Commissioners consisting of: a Chairman; an Executive Vice Chairman who also serves as the Chief Executive Officer of the NCC;[200] two Executive Commissioners, and, 5 non-executive Commissioners[201] who are meant to hold office on a part time basis.[202] The Executive Vice-chairman and the two Executive Commissioners are meant to hold office on a full-time basis, while the two non-executive Commissioners are meant to hold office on a part-time basis.[203] However, the Governing Board is deemed to be duly constituted where it is constituted by a minimum of six Commissioners comprising of the Executive Vice Chairman of NCC, two Executive Commissioners and three non-executive Commissions.[204]

The NCA stipulates that the Commissioners shall be appointed by the President "from the six geo-political zones of Nigeria subject to confirmation by the Senate".[205] This requirement serves to promote the application of Nigeria's federal character principle in the constitution of the NCC's Governing Board. The application of the federal character principle is underscored by the need to ensure an even distribution of government appointments amongst the geo-political units that constitute the Nigerian federation in order to promote national integration.[206] The NCA also establishes the

[198] NCA 2003, s. 3.
[199] S. 5(1) *Ibid*.
[200] S. 12 *Ibid*.
[201] S. 5(2) *Ibid*.
[202] S. 8(3) *Ibid*.
[203] S. 8(3) *Ibid*.
[204] S. 5(3) *Ibid*.
[205] S. 8(1) *Ibid*.
[206] Regarding Nigeria's federal character principle, *see* s. 7, Third Schedule to the Constitution of the Federal Republic of Nigeria 1999.

professional composition of the Board. In this respect, section 7(1) of the NCA provides that the "Commissioners shall be persons of recognized standing, qualification and experience in one or more of the followings fields: (a) finance or accounting; (b) law; (c) consumer affairs; (d) telecommunications engineering; (e) information technology; (f) engineering generally; (g) economics, and; (h) public administration".[207] The broad and multidisciplinary composition of the Board reflects the multidimensional nature of telecommunications regulation and serves to promote the production of balanced and well informed regulatory decisions.

Each Commissioner of the Board as well as the Executive Vice Chairman is required to serve for a term of five years; however at the expiration of the term of appointment, the President may renew the appointment for a further period of five years and no more.[208] A person would not be qualified to be appointed as a Commissioner under the following instances:

(a) where he/she is not a Nigerian citizen;

(b) where he/she is not ordinarily resident in Nigeria;

(c) where he/she is a serving Member of the National Assembly, a State House of Assembly or any Local Government Council;

(d) where he/she has been certified to be of an unsound mind;

(e) where he/she is an un-discharged bankrupt;

(f) where he/she has been convicted in Nigeria or elsewhere of a criminal offence such as a misdemeanor or felony, or;

[207] NCA 2003, s. 7(1).
[208] S. 8(4), 12(2) & 13 *Ibid*.

(g) where he/she has at any time been removed from a public office on the account of misconduct.[209]

The President also retains the powers to suspend or remove a Commissioner from office where:

(a) he/she is found to have been unqualified for appointment in the first place;

(b) he/she has demonstrated an inability to effectively perform his/her official duties;

(c) he/she has been absent from five consecutive meetings of the Board without the consent of the Chairman except he/she shows good reason for such absence;

(d) he/she is guilty of a serious misconduct in relation to his/her official duties;

(e) he/she has been disqualified or suspended from practicing his/her profession in any part of the world by an order of a competent authority, or;

(f) he/she is in breach of the Conflict of Interest Rules established under the Second Schedule of the NCA.[210]

However, the powers of the President to suspend or remove a Commissioner from office appears to be absolute without any provisions for checks by the National Assembly or the judiciary. This to some extent may create challenges in terms of guarantying the political independence of the NCC's Governing Board to act in the best interests of the public and the telecommunications industry. This state of affairs is also compounded by the fact that the NCA does not explicitly establish any provisions to guarantee the political neutrality of the NCC's board. Such guarantees could help in enhancing the political neutrality and acceptability of the NCC's decisions.

[209] NCA 2003, s. 7(2).
[210] S. 10(1) *Ibid*.

In the United States for example, the Communications Act of 1934 establishes the Federal Communications Commission (FCC) as the regulator of the telecommunications industry and also establishes the powers of the United States President to appoint the five Commissioners of the FCC with the advice and consent of the Senate.[211] The President also has the powers to designate one of the five Commissioners as the Chairman of FCC.[212] However, given the status of the FCC as an 'independent agency', the President cannot legally remove any of the FCC Commissioners including the Chairman during their fixed five year tenure in the same way that he can remove any of the heads of non-independent agencies and departments such as the CIA, the State Department or the Department of Defense.[213] Nevertheless, the President can change the FCC Chairman since FCC Commissioners including the Chairman have fixed terms as Commissioners and not as Chairs.[214] Although, the United States Communications Act does not guarantee the political neutrality of the FCC's Commissioners, however, it does not allow the FCC to be entirely constituted by Commissioners from the same political party. In this respect, section 4 (5) of the Communications Act provides that "the maximum number of Commissioners who may be members of the same political party shall be a number equal to the least number of Commissioners which constitutes a majority of the full membership of the Commission".[215] To some extent, these guarantees help in insulating FCC Commissioners from undue political influence from the President.

[211] S. 4(a) [47 U.S.C. 154] United States Communications Act 1934.
[212] *Ibid*.
[213] T Zephyr, 'Obama Should Fire His FCC Chairman', *Politico*, 19 May, 2014, available at < http://www.politico.com/magazine/story/2014/05/obama-should-fire-his-fcc-chairman-tom-wheeler-106846> last accessed on 30 March, 2016.
[214] T Zephyr, *Ibid*.
[215] S. 4(5) [47. U.S.C 154] United States Communications Act 1934.

The need for similar guarantees in the Nigerian context appears imperative in the light of the facts of the case in *The All Progressive Congress (APC) v NCC & Others*[216] which arose during the run-up to the 2015 General Elections. On 19 January, 2015 during the campaigns for the General Elections, the NCC issued a Directive to telecommunications service providers "to avoid running political advertisements that will portray them as being partisan". This directive made five telecommunications service providers namely: Etislalat, MTN, Globacom, Airtel and Visafone to shutdown an SMS platform that was created to enable members of the public to donate small amounts of money to the Presidential campaign of the APC which was the leading opposition party in the country at that time. The party claimed to have established the participatory fund raising platform as a way of getting members of the public to contribute N100 to the APC's Presidential campaign fund each time they texted 'APC to 35350' using the network of any of the service providers. Consequently the APC instituted a legal action in the Federal High Court challenging the legality of the NCC's Directive and also joined the service providers as defendants. The APC also claimed a sum of N25 billion as damages arising from the implementation of the NCC Directive by the service providers. The APC alleged that the NCC's Directive to shut down its fund raising platform was discriminatory and also constituted an infringement of its fundamental right to freedom of expression as guaranteed under section 39 of the 1999 Constitution and Article 9 of the African Charter on Human and People's Rights (Ratification and Enforcement) Act[217] as

[216]*The All Progressive Congress (APC) v NCC & Others* [2015] (Unreported Suit) Ruling delivered by Justice Ibrahim Buba on March 24, 2015. *See also* D Iriekpena, 'Court Orders NCC, Telcos to Pay APC N500m for Closing Fund Raising Platform', *ThisDay*, 25 March, 2015, available at <http://www.thisdaylive.com/articles/court-orders-ncc-telecos-to-pay-apc-n500m-for-closing-fundraising-platform/205001/> last accessed on 30 March, 2016.

[217]African Charter on Human and People's Rights (Ratification and Enforcement) Act, Cap.A9 LFN 2004.

well as the fundamental right to equality as guaranteed under article 19 of the Charter. The APC argued that political parties in Nigeria have been freely using several media platforms to advertise without any hindrance or sanctions from industry regulators. It also argued that the NCC's Directive was 'discriminatory' because the NCC had earlier approved an SMS fund raising platform for the Presidential campaign fund of the People's Democratic Party (PDP) during the campaign for the 2011 General Elections. Accordingly, the APC alleged that the suspension of its SMS fund raising platform 'incapacitated' its members and supporters and other members of the public that wished to donate to the party's presidential campaign fund and that the situation inhibited the party's financial capacity to effectively prosecute its presidential campaign.

The Court declared the NCC Directive null and void and awarded N500 million damages against the defendants. The Court held that the NCC acted beyond its powers in issuing the Directive and that the Directive contravened the fundamental rights of the APC.[218] However, the NCC has appealed the Judgment on the grounds that the trial Judge erred in law by dismissing the NCC's Notice of Preliminary Objection which challenged the competence of the suit. Other grounds of appeal include that the trial Court misdirected itself in law when it held that the case fell within the fundamental human right provisions under Chapter IV of the 1999 Constitution and not rooted in contract.[219]

2.5.2 The Regulatory Mandate of the NCC

[218] D Iriekpena, 'Court Orders NCC, Telcos to Pay APC N500m for Closing Fund Raising Platform', *ThisDay*, 25 March, 2015, available at <http://www.thisdaylive.com/articles/court-orders-ncc-telecos-to-pay-apc-n500m-for-closing-fundraising-platform/205001/> last accessed on 30 March, 2016.

[219] N Isaac and O Soleye, 'Fundraising Sabotage: Court Orders NCC to Pay APC N500m Damages', *Leadership News*, 25 March, 2015, available at <http://leadership.ng/news/420016/ fundraising-sabotage-court-orders-ncc-to-pay-apc-n500m-damages> last accessed on 30 March, 2016.

The NCC's responsibility of regulating the telecommunications industry and enforcing the NCA entail broad mandates which include:

(a) facilitating investments for the provision and supply of telecommunications services, equipments and facilities in Nigeria;

(b) protecting and promoting the interests of consumers against unfair practices with respect to matters relating to tariffs and charges, the availability and quality of telecommunications services and telecommunications equipment and facilities;

(c) promoting fair competition in the telecommunications industry and protecting telecommunications service/facilities providers and equipment suppliers from misuse of market power or anti-competitive practices;

(d) granting and renewing telecommunications licenses and also monitoring and enforcing compliance with license conditions;

(e) managing and administering frequency spectrum for the telecommunications sector and also assisting the National Frequency Management Council in the development of a national frequency plan;

(f) developing and administering a national numbering plan and a national electronic addressing plan;

(g) assigning numbers and electronic addresses to licensees;

(h) setting and enforcing technical specifications and standards for the importation and use of telecommunications equipment in Nigeria;

(i) formulating Nigeria's inputs on the setting of international technical standards for telecommunications services and equipment;

(j) promoting and regulating infrastructure sharing amongst licensees;

(k) resolving disputes between licensed operators, subscribers and any other person in the telecommunications industry using dispute resolution mechanisms including mediation and arbitration;

(l) designing and implementing a universal access programme in accordance with the Federal Government's policy objectives;

(m) implementing programmes that promote the development of the telecommunications industry and the provision of telecommunications services in Nigeria;

(n) advising the Minister of Communication Technology on the formulation of the general policies for the telecommunications industry and implementing the Government's general policies for the industry;

(o) representing Nigeria at proceedings of international organizations on matters relating to the regulation of telecommunications, and;

(p) undertaking the general responsibility for economic and technical regulation of the telecommunications industry.[220]

The mandate of the NCC also extends to making Regulations and Guidelines to govern issues including: the grant of licenses; the assignment of frequency spectrum and numbering resources; universal service provision, and; telecommunications offences.[221] However, prior to establishing a Regulation, the NCC is required to conduct an inquiry and also take into consideration the findings of such inquiry in developing the Regulation.[222] On the other hand, the NCC has the discretion to determine whether or not to conduct an inquiry before establishing a Guideline. However, where the NCC

[220] NCA 2003, s. 4(1) a-w.
[221] NCA 2003, s. 70.
[222] S. 71 (1) & (2) *Ibid*.

considers that an inquiry is necessary before establishing a Guideline it will be obliged to conduct such inquiry and also take its findings into consideration while developing the Guideline.[223] The NCC has the powers to review any of its Regulations or Guidelines in order to amend them. Where a Regulation is to be reviewed, the NCC is required to constitute a public inquiry. However, the constitution of an inquiry is subject to the discretion of the NCC where a Guideline is being reviewed.[224] Through the process of a review, the NCC may modify or repeal any of its Regulations or Guidelines when they are no longer necessary in national interest or for the purpose of enforcing the NCA or its subsidiary legislation.[225]

The NCA establishes obligations on the NCC to efficiently and effectively exercise its regulatory mandates in a "non-discriminatory and transparent manner" that best ensures the provision of telecommunications throughout Nigeria.[226] These two principles underscore the critical elements for the regulatory independence of the NCC and its obligations to exercise its mandate in the public interest. These elements prevent the NCC from acting politically or opportunistically towards investors and telecommunications operators while also addressing the challenge of balancing government policy objectives and needs of industry operators.[227] This ensures that the NCC appropriately accounts for its decisions and thereby lessening the risk that undue political interference or corruption may hinder the exercise of its regulatory mandates

[223] S. 71 (3) *Ibid*.
[224] S. 72 (2) *Ibid*.
[225] S. 72 *Ibid*.
[226] S. 4 (2) *Ibid.*
[227] W H Melody, 'Comment on the Meaning and Importance of 'Independences' in Telecom Reform', (1997) 21/3 *Telecommunications Policy*, 195.

which are central to ensuring the availability and accessibility of telecommunications services and facilities in Nigeria.[228]

2.5.3 The NCC and Regulatory Accountability

The NCC can be held to account when it fails to exercise its regulatory mandate in accordance with the principles of 'non discrimination' and 'transparency'. There are three major mechanisms through which the NCC may be held to account for the exercise of its regulatory mandates. These mechanisms include: executive supervision, legislative oversight and judicial review. With respect to executive supervision, the NCC as an agency of government is under a duty to periodically answer to the President of the Federal Republic Nigeria on the exercise of its regulatory mandate. Accordingly, the NCC is under obligation to prepare and submit a yearly budget and supplementary expenditure to the National Assembly through the President.[229] The NCC is also required to prepare and submit an annual report of its activities and audited expenditures to the National Assembly through the President.[230] However, the power of executive supervision under the NCA does not entitle the Executive to lawfully review the regulatory decisions of the NCC.[231]

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[228] C B Opata, 'Regulatory Accountability in the Nigerian Telecommunications Sector', p.6, available at <http//www.ssrn.com/abstract=2338106> last accessed on 30 March, 2016.

[229] NCA 2003, s. 19 (1) which provides that "the Commission shall not later than 30th September in each financial year prepare and present to the National Assembly through the President for approval a statement of estimated income and expenditure for the following financial year". *See also* NCA 2003, s. 19 (2), which provides that "...the Commission may also, in any financial year submit supplementary or adjusted statements of estimated income and expenditure to the National Assembly through the President for approval".

[230] NCA 2003, s.21 (1), which provides that "the Commission shall prepare and submit to the National Assembly annually, through the President, not later than 6 months after the end of its financial year, a report on the activities of the Commission for the preceding financial year and shall include therein the Commission's audited accounts for the year under review together with the auditor's report thereon".

[231] *Mobitel Ltd v The Honorable Minister of Information and Communication and Others*, [2010] (Unreported), Suit No. FHC/ABJ/M/312/09, Judgment delivered at the Federal High Court, Abuja Division (18 March, 2010).

With respect to legislative oversight, the NCA recognizes the powers of the National Assembly to approve the NCC's budget and supplementary expenditures[232] and also receive annual reports of the NCC's activities and audited accounts as well as its annual reports on the performance of the operators in the telecommunication sector.[233] The section 88(1) of Constitution also establishes the powers of the National Assembly to engage in oversight functions including the investigation of issues within its legislative competence.[234] This establishes broad powers for any of the Houses of the National Assembly (the Senate or the House of Representatives) to investigate the exercise of the NCC's regulatory mandate since the National Assembly has exclusive powers to legislate on telecommunications.[235] However, section 88(2) of the Constitution explicitly requires the National Assembly to exercise its oversight powers:

> "…*only* for the purpose of enabling it to - (a) make laws with respect to any matter within its legislative competence and correcting any defects in existing laws; and
>
> (b) exposing corruption, inefficiency or waste in the execution or administration of laws within its legislative competence and in the disbursement or administration of funds appropriated by it".[236]

Hence, the Constitution limits the oversight powers of the National Assembly to those purposes stated in section 88(2) of the Constitution. Thus, the National Assembly is only entitled to exercise its oversight powers over the NCC for the purposes that are stated in

[232] NCA 2003, s. 19.
[233] S. 21 & 89 *Ibid*.
[234] S. 88 (1) Constitution of the Federal Republic of Nigeria, 1999.
[235] Items 46 and 66 Exclusive Legislative List, Part 1, Second Schedule to the Constitution of the Federal Republic of Nigeria, 1999.
[236] S. 88 (2) Constitution of the Federal Republic of Nigeria 1999.

section 88 (2) of the Constitution; any oversight exercises beyond that would be deemed unlawful.

In exercise of its oversight powers, the National Assembly has undertaken several public inquires into the exercise of the NCC's regulatory mandate. For example, in 2007, the House of Representatives set up an ad-hoc committee on the poor quality of telecommunications offered by GSM operators in Nigeria which also made recommendations including that the NCC should grant a 3G spectrum license to the NigComSAT.[237] However, that particular recommendation was apparently beyond the constitutional oversight powers of the National Assembly. In July 2011, the House of Representatives also undertook a public inquiry on issues relating to poor quality of service in the telecommunications industry.[238] This was also followed by another public inquiry in 2012 by the House of Senate which sought to investigate the causes of poor quality of telecommunications services and inability of service providers to share infrastructure.[239] In particular, the Senate noted that quality of service issues include persistent dropped calls, interconnectivity problems and resultant loss to the users that were billed for calls not utilized. It also observed that "despite the poor quality of service, operators [were] still flooding the market with promotions of all kinds in order to boost their revenues but failing to ensure customer satisfaction, [and] that subscribers [were]

[237] House of Representatives, Federal Republic of Nigeria, *Votes and Proceeding*, Wednesday 16 October, 2007, Fourth Republic 3rd National Assembly, First Session No.28, p.125. *See also* House of Representatives, Federal Republic of Nigeria, *Votes and Proceedings*, Wednesday 21 November 2007, Fourth Republic 3rd National Assembly, First Session No.40 p.179.

[238] D Eto, 'Nigeria to Probe its Poor Telecom Services', *IT News Africa*, 21 July, 2011, available at <http://www.itnewsafrica.com/2011/07/nigeria-to-probe-its-poor-telecom-services/> last accessed on 30 March, 2016.

[239] Senate of the Federal Republic of Nigeria, *Votes and Proceedings*, Thursday 26 April, 2012, 7th National Assembly, First Session, No.92, p.901.

being defrauded by operators due to the poor quality of service".[240] Also, in April 2015, the House of Senate Committee on Communications summoned telecommunications operators comprising of both GSM and CDMA service providers to explain the causes of the poor quality of telecommunications services in the country.[241] However, the National Assembly's exercise of its oversight powers has not really resulted in the imposition of sanctions where the NCC appeared to have been unable to satisfactorily justify the exercise of its mandate. This state of affairs can be traced to the limitation of the National Assembly's oversight powers to the purposes stated in section 88 (2) of the Constitution. Thus, except for the purpose of amending the NCA or exposing corruption or inefficiency in the administration of the NCA or the budget of the NCC, the National Assembly cannot lawfully issue directions to the NCC regarding the exercise of its regulatory mandate.

Judicial review apparently provides the best means of holding the NCC accountable for the exercise of its regulatory mandate, while also promoting the status of the NCC as an independent regulatory institution that is not subject to undue political control or interference. Sections 89-88 of the NCA establish the procedure for the judicial review of regulatory decisions made by the NCC. In this respect, section 86 of the NCA requires that a person who is aggrieved or whose interest is adversely affected by 'any'

[240] *Ibid*. *See also* Association of Telecommunications Companies of Nigeria (ATCON), *A Memorandum Submitted by ATCON to the Senate Committee on Communications on its Public Hearing on Matters Relating to Quality of Service (QoS) and Obvious Non-Co-Location of Facilities Among Service Providers in the Nigerian Telecommunications Sector (2012)*, available at <http://www.atcon.org.ng/atcon/wp-content/uploads/downloads/2012/12/memorandum-to-the-senate-committee-on-Quality-of-Service.pdf> last accessed on 30 March, 2016.

[241] U Ejikeme, 'Senate Summons Service Providers over Poor GSM Services', *The New Dawn*, 8 April, 2015, available at <http://www.thenewdawn.com.ng/?p =216> last accessed on 30 March, 2016.

decision[242] of the NCC in the execution of its regulatory mandate 'may'[243] write to the NCC to request a statement of the reasons for the decision.[244] Upon receiving such written request, the NCC is required to provide a copy of a statement of reasons for the decision and any relevant information that was taken into account in reaching the decision.[245] The NCA exempts the NCC from disclosing the reasons for its decision where such will result to the disclosure of confidential information, or prejudice the fair trial of a person or where it would involve the unreasonable disclosure of personal data.[246] However, the NCA does not specify a time frame within which the NCC would provide a statement of the reasons for its decision to an aggrieved party. This creates a vacuum that could be used in delaying the NCC's response to an aggrieved party. Thus, given the absence of a time frame, the NCC can take "as long as it likes"[247] to provide an aggrieved party with a statement of the reasons for its decision. This can create a problem especially where time is of the essence for a party who is aggrieved with a decision of the NCC. Accordingly, it has been aptly argued that section 86(2) should be amended to provide a specified time frame within which the NCC should provide a statement of the reasons for its decision to an aggrieved party, as the provision of such time frame "will remove the possibility of the NCC being perceived as stalling the review process" and thereby increasing the perception of the review process as credible and transparent.[248]

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[242] Within the context 'decision' includes any action, order, report or direction of the NCC, *see* NCA 2003, s. 86(4).
[243] *Orakul Resources Ltd & EDANO Ltd v NCC, MTN Communications Nigeria Ltd, ECONET Wireless Nigeria Ltd, GLOBACOM Nigeria Ltd & NITEL Ltd*, [2005] (Unreported) Appeal No. CA/A/96/2005.
[244] NCA 2003, s. 86 (1).
[245] S. 86(2) *Ibid*.
[246] S. 86 (3) *Ibid*.
[247] C B Opata, 'Regulatory Accountability in the Nigerian Telecommunications Sector', p.13, available at <http//www.ssrn.com/abstract=2338106> last accessed on 30 March, 2016.
[248] C B Opata, *opcit*, p.14.

Thus, "since the NCC is presumed to have arrived at a reasoned decision, mere disclosure or communication of the reasons for its decision cannot in reality take forever".[249]

However, pending the specification of a timeframe under the NCA, it is imperative for the NCC to provide an aggrieved party with a statement of reasons for its decision within a 'reasonable time'. Within the context, the construction of what constitutes a 'reasonable time' should take into account the urgency that is required by an aggrieved party to take steps towards reviewing the decision before the matter in issue becomes overtaken by subsequent events. Thus, the NCC's failure to take cognizance of the urgency of each situation in communicating the reasons for its decision may cause the aggrieved party to suffer adverse effects. For example, the aggrieved party could technically forgo the need to invoke judicial review especially if the NCC's delay has allowed new developments to overtake the issues that caused the party's dissatisfaction in the first place. The need for the NCC to take cognizance of the urgency of each situation in order to communicate the reasons for its decision within a reasonable time is further underscored by the dynamic nature of the telecommunications industry where technological innovations tend to emerge faster than the ability of regulators to keep up.

After the NCC has finally communicated a statement of the reasons for its decision to an aggrieved party, such party may within 30 days of receiving the statement write to the NCC to review its decision and also state the basis for such request.[250] Upon receiving the request, the NCC is required to undertake a review and also take into consideration

[249] C B Opata, *opcit*, p.14.

[250] NCA 2003, s. 87 (1).

the submissions of the aggrieved party.[251] The NCC is obliged to conclude the review and reach a decision within 60 days of receiving the request for review and also inform the aggrieved party of its final decision including the reasons for such decision.[252] Where a party is aggrieved with the NCC's final decision, such party may appeal to the Federal High Court for a judicial review of the decision.[253] Where the process of a judicial review has been initiated by an aggrieved party, the final decision of the NCC would still remain valid and binding on all parties until it is expressly set aside in a final judgment or order of a Federal High Court.[254] However, an aggrieved party is precluded from initiating the process of a judicial review unless such a party had first exhausted the NCC's administrative internal review mechanism under sections 86-87 of the NCA. Hence, the exhaustion of the NCC's internal review mechanism is a fundamental condition precedent for the initiation of judicial review by an aggrieved party. As such, the NCC cannot be held accountable through the judicial review mechanism where an aggrieved party has not complied with the NCA's pre-conditions for invoking the mechanism. This has been illustrated in several cases.

In *ORAKUL Resources Ltd & another v NCC & others*,[255] the plaintiffs brought an action at the Federal High Court seeking relief against the NCC and other defendants

[251] S. 87 (2) *Ibid*.
[252] S. 87 (4) *Ibid*.
[253] S. 88 (1) *Ibid*. S. 138 of the NCA establishes the exclusive jurisdiction of the Federal High Court to adjudicate all matters arising from the exercise of the NCC's regulatory mandate under the NCA. *See also*, *Okoi Obono-Obla v NCC and MTN Communication Nig. Ltd* [2010] (Unreported), Suit No. FHC/ABJ/382/CS/2010. The Constitution also establishes the exclusive jurisdiction of the Federal High Court to determine matters concerning the validity of any executive or administrative action or decision by the Federal Government or any of its agencies. *See* Constitution of the Federal Republic of Nigeria 1999, s. 251 (1) (r).
[254] NCA 2003, s. 88 (2).
[255] *Orakul Resources Ltd & EDANO Ltd v NCC, MTN Communications Nigeria Ltd, ECONET Wireless Nigeria Ltd, GLOBACOM Nigeria Ltd & NITEL Ltd*, [2005] (Unreported), Appeal No. CA/A/96/2005.

for the NCC's failure to comply with its legal obligations including the invitation of all stakeholders to a public inquiry as a pre-condition to the exercise of its regulatory powers on the determination of interconnection rates for telecommunications networks. However, the plaintiffs did not fulfill the provisions of sections 86-87 of the NCA which provides for the initiation of the NCC's administrative review mechanism before the recourse to judicial review. The defendants filed their objections asking the Court to strike out the suit on the basis that the plaintiffs did not first exhaust the NCA's internal review mechanism before approaching the court for a judicial review of the NCC's decision. The Court upheld the objections and struck out the suit for being pre-emptive and incompetent. On appeal to the Court of Appeal, the plaintiffs/appellants argued that a literal interpretation of the world 'may' in sections 86 and 87 of the NCA meant that the procedures established therein were merely directional and optional and therefore not obligatory for a party that is dissatisfied with the NCC's decision. The Court of Appeal dismissed the appeal and also held *inter alia* that sections 86-88 were meant to be read together and that parties were not at liberty to chose which section to rely on to the exclusion of others. The Court also affirmed that the exhaustion of the remedies in sections 86-88 of the NCA was a condition precedent for courts to lawfully exercise jurisdiction.

In *NCC v MTN Communications Nigeria Ltd*[256] the plaintiff/respondent (MTN) not being satisfied with the NCC's 2003 Interconnection Rate Determination which later came into force in 2004 brought an action before the Federal High Court seeking a judicial review of the NCC's determination. However, MTN did not exhaust the NCA's

[256] *NCC v MTN Communications Nigeria Ltd*, [2005] (Unreported), Appeal No.CA/A/25/2004.

internal review mechanisms under sections 86-88. The NCC filed a preliminary objection to the suit and contended that MTN ought to have exhausted the NCA's internal review mechanisms before seeking judicial review. The Federal High Court declined to make a ruling on the objection and the NCC filed an appeal on that ground at the Court of Appeal. The Court of Appeal held that compliance with sections 86-87 of the NCA was a condition precedent to the initiation of judicial review.

In a similar case, *ECONET Wireless Nigeria Ltd v NCC*[257] the plaintiff (ECONET) was also dissatisfied with the NCO's 2003 interconnection Rate Determination. However, the plaintiff did not exhaust the internal review mechanisms under sections 86-87 of the NCA before seeking judicial review. The NCC successfully contended both at the Federal High Court and the Court of Appeal that compliance with sections 86-87 of the NCA was a condition precedent that ECONET did not fulfill before seeking judicial review.

In *Bluechip Communications Nigeria Ltd v NCC*,[258] the plaintiff sought judicial review of the NCC's decision to award mobile spectrum licenses to operators other than the plaintiff. The NCC successfully contended at the Federal High Court that the plaintiff had not fulfilled the condition precedent for recourse to judicial review under sections 86-88 of the NCA. On appeal to the Court of Appeal, one argument of the plaintiff/appellant was that its application at the Federal High Court was commenced by an Originating Summons and therefore it was technically not an application for judicial review, but rather an original application seeking declaratory reliefs which were within the powers of

[257] *ECONET Wireless Nigeria Ltd v NCC*, [2005] (Unreported) Appeal No. CA/A/83/2004.
[258] *Bluechip Communications Nigeria Ltd v NCC* [2008] (Unreported), Appeal, No. CA/A/108/2004.

the Court to grant. The Court of Appeal rejected the arguments of Bluechip and struck out its appeal while upholding the decision of the Federal High Court. Bluechip however filed appeal processes at the Supreme Court to challenge the decision of the Court of Appeal.[259]

In *CELTEL Nigeria Ltd and MTN Communications Nigeria Ltd v NCC,*[260] the plaintiff applied to the Federal High Court for an interlocutory injunction restraining the NCC from adopting a proposed Traffic Channel Congestion Parameter for the purpose of determining the amount of compensation that will be paid by the plaintiffs to their subscribers for poor quality of service. The plaintiffs contended that the directions which were issued by the NCC in that regard did not comply with sections 53(2) of the NCA. They also contended that the proposed traffic congestion parameter should not be imposed on them since it was not a condition contained in their operating licenses, and neither was it part of the NCC's existing rules and regulations, and that there was no basis for the issuance of such directions by the NCC. On the other hand, the NCC contended that the suit should be dismissed as the plaintiffs had not complied with the pre-action requirements under sections 86-88 of the NCA. The Federal High Court agreed with the NCC and dismissed the suit for non-compliance with the pre-action requirements under the NCA. The Court held that 88 (3) of the NCA made "resort to the

[259] NCC, Landmark Decisions, p.2 available at <http://www.ncc.gov.ng/Archive/RegalatorFramework/landmark_decisions.pdf> last accessed on 30 March, 2016.

[260] *CELTEL Nigeria Ltd and MTN Communications Nigeria Ltd v NCC,* [2008] (Unreported), Suit No FHC/C/CS/909/2007.

remedies provided under the Act a condition precedent to approaching the court for a remedy".[261]

Apparently, the failure of parties that are dissatisfied with the NCC's regulatory decisions to fulfill the NCA's pre-action requirements under sections 86-88 has made it impossible for Courts to lawfully assume jurisdiction for the purpose of reviewing the decisions made by the NCC in the exercise of its regulatory mandate. To some extent, the unwillingness of parties to comply with the pre-action conditions under sections 86-88 of the NCA, may be traced to the absence of a timeframe within which the NCC is required to inform an aggrieved party of the reasons for its decision under section 86(2) of the NCA.[262] This state of affairs appears to have limited the application of judicial review as a mechanism for ensuring that the NCC accounts for the exercise of its regulatory mandate. Accordingly, it has been aptly observed that given the limited nature of executive and legislative accountability mechanisms under the NCA that it is imperative "that the potential for judicial accountability under the NCA is not minimized or rendered nugatory [as such] would increase the risk of the NCC developing a capacity to act unchecked".[263] To address this state of affairs, it has already been suggested that section

[261] C B Opata, 'Regulatory Accountability in the Nigerian Telecommunications Sector', p.17, available at <http//www.ssrn.com/abstract=2338106>. *See* NCC, Landmark Decisions, pp.2-3 available at <http://www.ncc.gov.ng/Archive/RegalatorFramework/landmark_decisions.pdf> last accessed on 30 March, 2016.

[262] In *NCC v MTN Communications Nigeria Ltd* [2005] (Unreported) Suit, Appeal No. CA/A/25/2004, MTN argued before the Federal High Court that s. 86 of the NCA was unconstitutional as it could practically impede a person's constitutional right of access to the Courts. However, the Court declined to rule on the issue. On Appeal, the Court dismissed MTN's suit for non-compliance with the pre-action conditions under s. 86-88 of the NCA. *See also ORAKUL Resources Ltd & Another v NCC & Others* [2005] (Unreported), Appeal No. CA/A/96/2005) where the plaintiff/appellants raised the issue of the absence of a timeframe under the NCA for the communication of the reasons for the NCC's decision, which gave the NCC an apparent ability to indefinitely to delay the communication of the statement of the reasons for its decision to an aggrieved party.

[263] C B Opata, 'Regulatory Accountability in the Nigerian Telecommunications Sector', p.18, available at <http//www.ssrn.com/abstract=2338106> last accessed on 30 March, 2016.

86 of the NCA should be amended to include a reasonable timeframe within which the NCC will have to communicate a statement of the reasons for its decision to an aggrieved party in order to ensure that the benefits of judicial review are effectively harnessed and not unduly impeded by mere technicalities.[264] Also, such measure would serve to provide an aggrieved party with an informed basis of making a decision as to whether to approach the Court for a judicial review of the NCC's decision under section 86(2) of the NCA. However, an aggrieved party would apparently be better off where such party first takes steps to comply with the pre-action requirements under sections 86-88 of the NCA, and in an event where the NCC unreasonably delays the communication of the statement of the reasons for its decision, such party may then approach the Court to grant an Order of Mandamus to compel the NCC to produce such statement within a reasonable time.

2.6 The Functions and Powers of the Minister of Communications Technology

The Minister of Communications Technology has the responsibility of negotiating and executing international telecommunications agreements and treaties on behalf of Nigeria[265] and also representing Nigeria along with the NCC at the proceedings of international organizations on matters relating to telecommunications.[266] More importantly, the NCA provides that Minister of Communications Technology shall be responsible for "…the formulation, determination and monitoring of the general policy for the communications sector in Nigeria with a view to ensuring amongst others, the utilization of the sector as a platform for the economic and social development of

[264] *Ibid*.
[265] *See* NCA 2003, s. 23 (b).
[266] S. 23 (c) *Ibid.*

Nigeria".[267] Thus, the Minister has the responsibility for articulating the general policy of the telecommunications sector to promote national development. Accordingly, the Minister has powers to request the NCC to carry out public consultations prior to the formulation or review of the general policy for the Nigerian telecommunications sector.[268] The Minister and the National Frequency Management Council is also required to take into consideration the findings of such public consultations when formulating or amending the policy of the telecommunications sector.[269]

The Minister also has a responsibility to communicate the Federal Government's general policy direction for the telecommunications sector to the NCC. In this respect, section 25(1) of the NCA provides that "…the Minister shall, in writing from time to time notify the Commission and express his views on the general policy direction of the Federal Government in respect of the communications sector".[270] This ensures that while the NCC is responsible for the regulation of the telecommunications sector that it will nevertheless discharge its regulatory mandate in accordance with the government's policy direction for the telecommunications sector. Apparently, the essence of such policy direction is to ensure that the NCC exercises its regulatory mandate in the national interest and while also reducing the possibility of conflict between the government's policy objectives for the telecommunications sector and the exercise of the NCC's mandate. This ensures the effective strengthening of the government's policy direction for the sector and the implementation of the NCC's mandate and further reduces

[267] NCA 2003, s. 23(a).
[268] S. 24(1) of the NCA provides that "prior to the formulation or review of the general policy for the Nigerian communications sector, the Minister shall cause the Commission on his behalf to first carry out a public consultative process on the proposed policy formulation or modification".
[269] S. 24 (2) *Ibid*.
[270] S. 25 (1) *Ibid*.

probability for undue executive interference with the NCC. However, the Minister while exercising the powers under the NCA is also required to ensure that the functional independence of the NCC is not compromised in any manner.[271]

The NCA does not empower the Minister to issue directions or guidelines to the NCC. The absence of such Ministerial powers under the NCA shields the NCC from ministerial control by politicians and also serves to guarantee the independence of the NCC as technical decision making body for the telecommunications sector. As such, where in the exercise of its mandate the NCC had reached a decision that the Minister is dissatisfied with, the Minister cannot lawfully upturn such decision. This was affirmed by the Court in *Mobitel Ltd v The Minister of Information and Communication and Others*.[272] In that case, the plaintiff had participated in the NCC's auction of frequency on the 2.3 spectrum frequency band. The NCC advertised four slots which were available on a 'first pay to first serve basis' upon the payment of N1,368,000,000.00 billion (about 8,973, 433 million USD at that time).[273] The plaintiff was one of the successful companies during the process. However, by a letter dated 25 May, 2009, the Honorable Minister of Information and Communications cancelled the process on the grounds that the particular licensing procedure that was adopted by the NCC lacked due process. The plaintiff being dissatisfied with the decision brought a legal action against the Minister and joined Attorney General of the Federation and the NCC as defendants. The plaintiff asked the Court for an order of *Certiorari* to nullify the Minister's letter which purported

[271] NCA 2003, s. 25(2).

[272] *Mobitel Ltd v The Honorable Minister of Information and Communication, the Federal Ministry of Information and Communication, the Attorney General of the Federation and Minister of Justice and the NCC*, [2010] (Unreported), Suit No. FHC/ABJ/M312/09 Judgment delivered at Federal High Court Abuja Division (18 March, 2010).

[273] C B Opata, 'The Nigerian Telecommunications Sector after the *Mobitel Case*', p.2, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2145251> last accessed on 30 March, 2016.

to cancel the licensing process and also for a declaration that the Minister and other defendants in the suit (the Attorney General of the Federation and the NCC) lacked the power and competence to lawfully cancel the licensing process or to direct the NCC to cancel the process. In addition, the plaintiff asked the Court for further orders including: (i) an order prohibiting the NCC from taking any steps to cancel the licensing process on the basis of the Minister's letter of 25 May, 2009; (ii) an injunction restraining the Minister and the Attorney General of the Federation from interfering with the licensing exercise conducted by the NCC, and; (iii) an order of mandatory injunction compelling the NCC to allocate one of the 4 slots in the 2.3 GHz frequency spectrum band to the plaintiff. A major issue for determination by the Court was whether the Minister of Information and Communications had the powers to cancel an auction conducted by the NCC for the purpose of issuing licenses in the telecommunications sector. The Court held that based on a construction of sections 23, 25 and 121 of the NCA, that the Minister is not empowered "to impose any directive or instructions on the NCC or any of its officers or to intervene in the performance of the NCC's functions".[274] According to the Court, section 123 of the NCA gave the NCC the exclusive powers on the sale of frequencies and makes absolutely no mention of the Minister. Hence, the Minister's action in canceling the auction was a violation of the NCA. The Court noted that the Minister chairs the National Frequency Management Council[275] which is comprised of eight members and that no member is accorded the prerogative of exercising unilateral powers as was done by the Minister. In addition, the Court noted that it is not open to anyone including the Minister to question the assignment of frequencies by the NCC, where the

[274] *Mobitel Ltd v The Minister of Information and Communication and Others*, at p.17.
[275] NCA 2003, s. 27 (1) (a).

NCC is lawfully performing its functions under the NCA.[276] Accordingly, the Court nullified the Minister's action and granted the plaintiff's application.

The decision in the *Mobitel Case* judicially confirms the independence of the NCC from executive interference by the Minister of Communications Technology. Thus, it restates the provisions the NCA which limits the role of the Minister to policy making functions[277] and the communication of the Federal Government's general policy direction for the telecommunications sector to the NCC[278] while also ensuring that the independence of the NCC is not compromised in any manner.[279] As such, although the NCC is an agency under the Ministry of Communications Technology, the Minister cannot lawfully intervene in the NCC's decision making process. More importantly, once a regulatory decision has been taken by the NCC, the Minister cannot lawfully upset such decision. The NCA's limitation of the Minister's powers serves to enhance the independence of the NCC and ensures that the NCC has the sole responsibility for making technical and operational decisions for the telecommunications sector without undue executive interference. This clearly "removes operational matters from the arena of political decision making and places them firmly in the technical decision making sphere".[280] The NCA's limitation of the Minister's executive powers in order promote the regulatory independence of the NCC appears to be in line with international best practices which emerged as critical elements for promoting the liberalization of national telecommunications sectors. This trend originates from the World Trade Organization's

[276] *Mobitel Ltd v The Minister of Information and Communication and Others*, at p.19. *See also* the powers of the NCC to manage and assign frequency spectrum, at Chapter VIII of the NCA.
[277] NCA 2003, s.24.
[278] S. 25 (1) *Ibid*.
[279] S. 25(2) *Ibid*.
[280] C B Opata, 'The Nigerian Telecommunications Sector After the *Mobitel Case*', p.4, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2145251> last accessed on 30 March, 2016.

(WTO) Reference Paper on Basic Telecommunications (1996) of which Nigeria is a signatory.[281] The Reference Paper requires signatories to separate the regulatory authority for the telecommunications sector from any supplier of basic telecommunications services and also guarantee the impartiality of the regulatory authority.[282]

2.7 The National Frequency Management Council (NFMC)

The NCA also establishes a radio frequency spectrum governance structure known as the National Frequency Management Council (NFMC) to facilitate the national coordination and allocation of spectrum to different sectors in Nigeria.[283] The NFMC is chaired by the Minister of Communications Technology and its membership comprises of representatives from: the NCC; the Federal Ministry of Communications Technology; the Federal Ministry of Aviation; the Federation Ministry of Transport; the Federal Ministry of Science and Technology; the National Broadcasting Commission, and; representatives from the security agencies of the Federal Republic of Nigeria.[284] However, the membership of the NFMC's committees may be constituted to include representatives of organizations that are not members of the NFMC where such measure is necessary to assist the NFMC in the discharge of its functions.[285]

However, the NCA does not grant the NFMC or any of its members' unilateral powers to intervene in the NCC's allocation of spectrum to an end-user where such

[281]WTO, GATS Telecommunications Reference Paper (1996) available at <http://www.wto.org/wto/english/tratop_e/serv_e/telecom_e/tel23_e.htm> last accessed on 30 March, 2016.
[282] GATS Telecommunications Reference Paper 1996 at Paragraph 5. *See also,* M Bronckers and P Larouche, 'Review of the WTO Regime for Telecommunications Services', in K Alexander and M Andenas, (eds), *The World Trade Organization and Trade in Services* (The Netherlands: Nijhoff Brill, 2008) p.343.
[283] NCA 2003, s. 26. *See also,* National Policy on Telecommunications (May, 2000) at chapter 3.
[284] NCA 2003, s. 27(1).
[285] S. 29(3) *Ibid*.

spectrum has been lawfully allocated to the NCC by the NFMC.[286] As such, once the NFMC has allotted spectrum to the NCC, it cannot unilaterally intervene in the NCC's allocation of such spectrum to end-users. However, to some extent there appears to be scope for intervention under sections 28(e) and (f) of the NCA which establishes the NFMC with powers to: "carry out bulk trans-sectoral allocation of spectrum to statutory bodies that are authorized by enabling laws to allocate spectrum to end-users, and; receive and collate returns and statistics on spectrum allocation to end-users from the statutory bodies …and [also] coordinate their respective activities".[287] Thus, it appears that after the NFMC may have allocated the NCC with spectrum which will be utilized in the telecommunications sector, that the NFMC may also intervene in the NCC's allocation of spectrum to end-users in order to effectively 'coordinate' the utilization of spectrum across the various sectors that also require spectrum such broadcasting, aviation, transport and security services. Apparently, the establishment of the NFMC's powers to coordinate spectrum allocation activities is underscored by the need to avoid harmful interference in the use of spectrum resources allocated to various sectors.

2.8 The National Policy on Telecommunications

The National Policy on Telecommunications was launched in October 1999. The need to promote full liberalization and competition in the telecommunications industry necessitated another revision of the policy by Telecommunications Sector Reform Committee in February 2000, and later in May 2000, the Government reissued the

[286] *Mobitel Ltd v The Minister of Information and Communication and Others*, at p.19.
[287] NCA 2003, s. 28 (e) and (f).

reviewed policy.[288] The policy seeks "to achieve the modernization and rapid expansion of the telecommunications network and services [to]…enhance national economic and social development" and the integration of Nigeria into the global telecommunications environment.[289] The policy set out the short term and medium term objectives for the development of the Nigerian telecommunications industry. In this respect, the policy established a timeframe of three (3) years for the achievement of the short term objectives, while a timeframe of five (5) years was set for the achievement of the medium-term objectives.

The policy established the structure and regulatory framework of the telecommunications industry including the roles of the Government, the Ministry of Communications, the Nigerian Communications Commission (NCC), and the National Frequency Management Council.[290] The policy also established frameworks and strategies addressing several aspects of telecommunications including: the development of Internet services;[291] the development of satellite communications;[292] the promotion of universal access;[293] the financing and funding of telecommunications development;[294] the development of human resources in the telecommunications industry;[295] the promotion of research and development in the telecommunications industry;[296] the promotion of local

[288] The National Policy on Telecommunications (May, 2000).
[289] *Ibid*, Chapter 2, p.10.
[290] *Ibid*, Chapter 3, pp.12-17.
[291] *Ibid*, Chapter 7, p.24.
[292] *Ibid*, Chapter 8, p.25.
[293] *Ibid*, Chapter 9, p.26.
[294] *Ibid*, Chapter 10, p.28.
[295] *Ibid*, Chapter 11, p.29.
[296] *Ibid*, Chapter 12, p.30.

content development;[297] the restructuring and privatization of NITEL and MTEL[298], and; the promotion of competition and the efficient economic regulation of the industry.[299]

2.9 The National Radio Frequency Management Policy

The National Radio Frequency Management Policy[300] was issued by the National Frequency Council (NFMC) to establish a general framework to govern the management and allocation of radio frequency spectrum in Nigeria. The policy classifies radio frequency spectrum as a scarce natural resource and recognizes the primary responsibility of the Government of Nigeria as the custodian of the country's radio frequency spectrum.[301] It also recognizes that spectrum based services will continue to yield significant economic benefits and contribute to the country's GDP due to their direct application in a broad range of industries including telecommunications, broadcasting, healthcare, delivery, scientific research, defense and security, social services, education and transportation industries.[302] The policy also establishes the roles of the Government with respect to: spectrum planning and licensing; the setting of technical specifications; the enforcement of spectrum laws and regulations; the monitoring of spectrum use, and; the promotion of international cooperation in spectrum management.[303] Other major components of the policy include guidelines for frequency spectrum management and

[297] The National Policy on Telecommunications (May, 2000), Chapter 13, p.31.
[298] *Ibid*, Chapter 5, p.21.
[299] *Ibid*, Chapters 3 & 6, pp.18-20, & 22-23.
[300] The National Radio Frequency Management Policy, available at <http://www.ncc.gov.ng/spectrumissues/national_radio_frequency_spectrum.pdf> last accessed on 30 March, 2016.
[301] *Ibid*, p1.
[302] *Ibid*, p1. *See also* F Odufuwa, *Open Spectrum for Development: Nigeria Case Study* (South Africa: Association for Progressive Communications, November 2010) p.6.
[303] *Ibid*, Chapter 3, p.3.

assignment, and sanctions for the non-utilization or wrongful use of spectrum allocations.[304]

2.10 The Nigerian National Policy for Information Technology[305]

This policy was established to harness information technology (IT) to facilitate Nigeria's sustainable development and global competitiveness with a view to making the country a key player in the global information society by 2005.[306] The policy is implemented by the National Information Technology Development Agency (NITDA) an agency under the Ministry of Communication Technology. Some of the objectives and strategies of the policy seek promote to the development of telecommunications. For example, the policy aims to promote IT awareness and universal access to facilitate IT diffusion.[307] The policy's strategies include: promoting the development of a National Information Infrastructure (NII) backbone using satellite technologies including VSAT, as well as fiber optic networks, high-speed gateways, and broadband/multimedia technologies, and; encouraging Internet telephony as well as Voice over Internet Protocol (VOIP) to reduce the cost of telephony.[308]

2.11 The National Information and Communication Technology (ICT) Draft Policy[309]

The final draft of this policy was issued by the Ministry of Communication Technology in August 2012. The policy seeks to harmonize all existing policies in the

[304] The National Radio Frequency Management Policy, Chapter 5, pp.7-12.
[305] The Nigerian National Policy for Information Technology (March, 2001).
[306] *Ibid*, p.iii.
[307] *Ibid*, pp.iii – v.
[308] *Ibid*, p.41.
[309] The National Information and Communication Technology (ICT) Final Draft Policy (August, 2012). [Hereafter Draft National ICT Policy 2012].

ICT sector into a single ICT policy. It sets out the framework to strengthen all productive sectors with a view to transforming Nigeria into a knowledge-based and globally competitive country in accordance with Nigeria's Vision 20:2020 objectives.[310] Accordingly, the policy establishes a comprehensive framework that will promote investment in the ICT sector and also enhance the rapid expansion of ICT networks and services at reasonable costs.[311] The policy recognizes the need for the convergence of regulatory activities across telecommunications, broadcasting, IT and Postal services. The Policy also addresses the need for the consolidation ICT development activities under an ICT Development Agency to ensure holistic development planning in collaboration with the private sector while also ensuring a holistic ICT sector regulation under a converged regulator.[312] Thus, generally the policy proposes ambitions changes designed to centralize ICT policy making and regulation.[313]

2.12 The Nigerian National Broadband Plan 2013-2018

The Nigerian National Broadband Plan 2013-2018 which was approved by the President in May 2013. Later in July 2013, the Federal Ministry of Communication Technology inaugurated a Broadband Council that would oversee the implementation of the Plan.[314] The need for developing the Plan was underscored by the strategic importance of broadband infrastructure to national economic growth. In this respect, the Plan notes a World Bank report which indicates that every 10 percent increase in broadband penetration in developing countries that are classified within the low to middle

[310] Draft National ICT Policy 2012, p.2.
[311] *Ibid*, p. 2.
[312] *Ibid*, p.3.
[313] F Odufuwa, *Understanding What is Happening in ICT in Nigeria: A Supply – and Demand Side Analysis of the ICT Sector* (South Africa: Research ICT Africa, 2012) p.10.
[314] *Ibid*.

income bracket results in a commensurate increase of 1.3 percent in GDP growth.[315] The Plan indicates that Nigeria's broadband penetration rate stood at between on 4% and 6% in 2012, and to address this state of affairs it declares the commitment of the Government to "…pursue, by the end of 2017, a fivefold increase in broadband penetration over the 2012 penetration rate".[316]

The Plan also identifies measures to address the challenges of broadband deployment in Nigeria including: the high costs of rights of way permits; long delays in the processing of permits; high costs of leasing transmission infrastructure; multiple taxation at the Federal, State and Local Government levels; the existence of multiple regulatory bodies; damage to existing fiber infrastructure due to cable theft, road works and other operations, and; the lack of reliable grid electricity supply.[317]

However, despite the comprehensive nature of the Plan, its successful implementation will be determined to a large extent by the willingness of States to cooperate with the Federal Government in sustaining the objectives of the Plan. Such cooperation is necessary to effectively address issues concerning right of way permits and multiple taxation. The Federal government could also consider establishing a uniform legal regime that will regulate the grant of right of way permits for broadband infrastructure development and the taxation of service providers. There is scope for

[315] The Nigerian National Broadband Plan 2013-2018 (May, 2013) pp. 9 & 32. *See also* T Kelly *et al*, 'What Role should Government Play in Broadband Development?', A Paper prepared for the InfoDev/OECD Workshop on Policy Coherence in ICT for Development, Paris, 10-11 September 2009) p.3, available at <http://www.infodev.org/infodev-files/resources/infodevDocuments_732.pdf> last accessed on 30 March, 2016; World Bank, *Information and Communication for Development For Development: Extending Reach and Increasing Impact* (Washington DC: World Bank, 2009), at chapter 3.

[316] The Nigerian National Broadband Plan 2013-2018 (May, 2013) p.9.

[317] *Ibid*, p.14.

taking such measures under the Nigerian Constitution given that telecommunications matters are established in the Constitution's Exclusive Legislative List wherein only the Federal government can exercise legislative powers.[318]

2.13 The National Space Policy

The National Space Policy was adopted by the Nigeria Government in July 2001.[319] One of the objectives of the policy is to enhance communication and information technology by providing "efficient and reliable telecommunications services in Nigeria in order to enhance the growth of the industrial, commercial and administrative sectors of the economy".[320] The policy also declares that the "Government shall use satellite communication systems to enhance telecommunications services and applications".[321] Since the adoption of the policy in 2001, the Nigerian government has taken several steps towards its implementation. Some of such steps include: the launch of Nigeria's first earth observation satellite, Nigeria SAT-1 in 2003; the launch of Nigeria's first communication satellite, NigCOMSAT– 1 in 2007;[322] the establishment of NigCOMSAT Ltd as a commercial outfit to develop Nigeria's communication satellite project; the enactment of the National Space Research and Development Agency Act in 2010; and the launch of NigeriaSAT-2 and NigeriaSAT-X into orbit in 2011.[323] However,

[318] Second Schedule, Part 1, Items 46, and 66 Constitution of the Federal Republic of Nigeria 1999. *See also, ALTON v A.G. Lagos State* [2007] (Unreported), Suit No.FHC/L/CS/517/06.
[319] BBC News, 'Nigeria adopts Space Policy', *BBC News*, 6 July, 2001, available at <http://news.bbc.co.uk/1/hi/sci/tech/1426573.stm> last accessed on 30 March, 2016.
[320] National Space Policy, 2001, Paragraph 4.1.
[321] *Ibid*, Paragraph 5.2.
[322] S O Mohammed, 'Nigeria Space Research and Development Agency' (2011) p.5, available at <http://www.nasrda.gov.ng/>
[323] *Ibid*.

challenges including poor funding, lack of technical capacities and skilled human resources appear to have hindered the effective implementation of the policy.[324]

[324] E Uja, 'Nigeria's Space Programme in Jeopardy', *Vanguard* (10 November, 2012) available at <http://www.vanguardngr.com/2012/11/nigerias-space-programme-in-jeopardy/> last accessed on 30 March, 2016.

CHAPTER THREE

THE LEGAL REGIME FOR THE INSTALLATION OF TELECOMMUNICATIONS NETWORK INFRASTRUCTURE

3.1 General Principles Governing the Installation of Network Facilities

3.1.1 The Duty of Care

The general principle that governs the installation of telecommunications network of facilities is that the service provider has a legal obligation to exercise a 'duty care' by taking "all reasonable steps" as is practicable to ensure that it causes very little inconvenience or damage while installing its network facilities.[325] The essence of this obligation is to ensure that a service provider's installation of network facilities does not adversely affect the public or the environment. Thus, the duty of care requires a service provider that is carrying out network installation activities to take all reasonable steps to act in accordance with good engineering practice and also ensure the protection of the safety of persons and property.[326] The duty of care also requires a service provider to take all reasonable steps to ensure that its network installation activities "interferes as little as practicable" with: public roads and paths; the movement of traffic; the use of land, or; the operation of a public utility (such as public electricity or water supply systems).[327] In order to minimize interference with the operation of public utilities during the installation of network facilities, the duty of care also requires service providers to enter into agreements with public utilities with a view to defining the manner in which network

[325] S. 136 (1) of the NCA provides that "a licensee shall, in installing its network facilities, take all reasonable steps to ensure that he causes as little detriment and inconvenience, and does as little damage as its practicable".
[326] NCA 2003, s. 136(3) (a) & (b).
[327] S. 136 (3) (C) *Ibid*.

installation activities will be executed and how they are likely to affect the operation of the public utilities. This for example requires a service provider to enter into agreements such as a memorandum of understandings with a public utilities provider (such as a public water supply corporation) prior to commencing network installation activities that may affect that operation of such public utility corporation.[328]

The duty of care also establishes an obligation on service providers to take reasonable steps to ensure that network installation activities do not damage the environment.[329] This environmental protection obligation also requires that a service provider that has damaged a land due to its network installation activities would have to restore the land to its condition prior to the activity.[330] In this respect section 136(2) of the NCA provides that a service provider that engages in an activity in relation to any land "shall take all reasonable steps to restore the land to a condition that it is similar to its condition before the activity began". Thus, the duty of care includes an environmental remedial obligation. However, within the context of section 136 (2) of the NCA, the environmental remedial obligation appears to have been technically limited to network installation activities that were carried out on 'land'. This is because the section does not adopt an encompassing term such as 'environment' but rather uses the term 'land'. As such, an environmental remedial obligation does not appear to exist where network installation activities have been carried out on water (such as where a base station has been sited on a water body). This limitation technically allows the non-remediation of water bodies that have affected by network installation activities. However, there may not

[328] NCA 2003, s. 136 (4).
[329] S. 136 (3) (d) *Ibid.*
[330] S.136 (2) *Ibid.*

be any need for a review of section 136 (2) of the NCA since the provisions of the National Environmental (Standards for Telecommunications and Broadcast facilities) Regulations (2011)[331] also apply within the context. In this respect, the Regulations provide that the sitting and installation of base stations and masts/towers shall not be detrimental to the 'environment'.[332] A service provider that fails to comply with this requirement would be liable to sanctions including the clean up and remediation of the polluted environment.[333]

3.1.2 Compliance with Environmental Standards

Another major principle that governs the installation of network facilities is the requirement that service providers also have to comply with obligations under relevant national environmental regulations that relate to the telecommunication industry. This implies compliance with obligations under NESREA's National Environmental (Standards for Telecommunications and Broadcast Facilities) Regulations. The Regulations apply to all telecommunications operations and services that impact on the environment.[334] It requires service providers to install and operate telecommunications masts/towers and base stations in accordance with the provisions of the Environmental Impact Assessment Act[335] and also submit site-specific environmental impact assessment (EIA) reports to NESREA.[336]

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[331] National Environmental (Standards for Telecommunications and Broadcast Facilities) Regulations 2011, *Official Gazette of the Federal Republic of Nigeria* (29 April, 2011) Vol. 98, No.38, Government Notice No.124.

[332] Regulation 5 (3) (a) National Environmental (Standards for Telecommunications and Broadcast Facilities) Regulations 2011.

[333] Regulation 11 (3) *Ibid*.

[334] Regulation 4 *Ibid*

[335] Environmental Impact Assessment Act No.86 1992, Cap, E12 LFN 2004.

[336] Regulation 5(1) (a) National Environmental (Standards for Telecommunications and Broadcast Facilities) Regulations 2011.

The Regulations also establish physical environmental specifications to govern the sitting and installation of telecommunications base stations and masts/towers. In this respect, the Regulations provide that the sitting of new telecommunications facilities should not be environmentally 'intrusive' due to excessive height or design or arrangement.[337] More importantly, the Regulations provide that "all new facilities shall: primarily be located in industrial, commercial and business areas [and] have a minimum set-back of ten (10) meters from the perimeter wall (fence) of residential/business premises, schools and hospitals…".[338] In situations where there is no perimeter wall, the Regulations require that new telecommunications facilities will be located after a minimum set-back distance of twelve (12) meters from the wall of a residential/business premises, or school or hospital.[339] However, the above conditions conflict with the provisions of the NCC Guidelines on Technical Specifications for the Installation of Telecommunications Masts and Towers.[340] The NCC Guidelines provide that telecommunications towers or masts that are not above the height of 150 meters should be placed at a minimum set-back distance of "5 meters from any demised property excluding the fence".[341] The Guidelines also provide that where the NCC permits the location of towers or masts that are above the height of 25 meters in residential areas that they should be placed at a minimum set-back distance of "5 meters from the nearest demised property, excluding the fence".[342] However, this specification does not apply to towers or masts that are above the height of 150 meters as they are required to be set-

[337] Regulation 5(2) National Environmental (Standards for Telecommunications and Broadcast Facilities) Regulations 2011.
[338] Regulation 5(4) (a)-(b) *Ibid*.
[339] Regulation 5(4) (c) *Ibid*.
[340] NCC Guidelines on Technical Specifications for the Installation of Telecommunications Masts and Towers (April 2009).
[341] Paragraph 9(c) *Ibid*.
[342] Paragraph 3(5) *Ibid.*

back at a minimum distance of 50 meters from the right of way as well as federal and state highways.[343]

The above differences in the NESREA Regulations and the NCC Guidelines have been a constant basis for regulatory conflict between the NCC and NESREA. Thus, while the NCC insists that its prescribed 5 meter set-back distance meets widely accepted international safety and health standards, the NESREA on the other hand maintains that service providers should comply with its prescribed 10 meter set-back distance. This has given rise to situations whereby telecommunications base stations and towers that met the NCC's 5 meter set-back specification were shut down by NESREA for not complying with its 10 meter set-back distance specification.[344] For example in 2012, the NCC is reported to have claimed that NESREA shut down 52 base stations that did not meet its own specifications across the country.[345] This state of affairs had effect of placing service providers in a regulatory quagmire while also posing obstacles to the deployment of network infrastructure and causing severe reductions in the quality of services.

3.2 Design and Installation of Telecommunications Masts and Towers

The NCC Guidelines on Technical Specifications for the Installation of Telecommunications Masts and Towers establishes the regulatory regime that governs the technical design and installation of telecommunications masts and towers.[346] The Guidelines provide a comprehensive framework of technical standards to regulate the

[343] Paragraph 9 (b) *Ibid*.
[344] E Okonji, 'FG Bars NESREA From Sealing Telecom Masts', *ThisDay*, 20 May, 2012, available at <http://www.thisdaylive.com/articles/fg-bars-nesrea-from-sealing-telecoms-mast/1167465>. *See also*, ALTON, 'Press Statement on Service Disruptions Caused by the Interference with Telecommunication Installations by NESREA and other Government Agencies' (Lagos, Nigeria: 2 May, 2012).
[345] E Okonji, 'FG Bars NESREA From Sealing Telecom Masts', *ThisDay*, 20 May, 2012.
[346] NCC Guidelines on Technical Specifications for the Installation of Telecommunications Masts and Towers, 2009.

design, fabrication and installation of telecommunications masts and towers. Telecommunications service providers as well as the designers, fabricators and installers of telecommunications masts and towers are required to comply with the Guidelines in order to ensure 'sound engineering practices' and 'environmental safety'.[347] Non-compliance with the mandatory provisions of the Guidelines constitutes an offence under the NCA and the Nigerian Communications (Enforcement Processes) Regulations 2005. However, the existence of the Guidelines does not unsettle the fact that telecommunications service providers are also required to comply with environmental specifications under NESREA's National Environmental (Standards for Telecommunications and Broadcast Facilities) Regulations when carrying out the installation of network infrastructure.

Matters that are addressed under the Guidelines include: the types and general technical specifications of mast and tower structures that can be installed in Nigeria;[348] the design and construction of masts and towers;[349] the environmental sitting of masts and towers;[350] the protection of masts and towers;[351] the maintenance of masts and towers;[352] the grant of permits by the NCC;[353] and general issues relating to the insurance and service life of masts and towers as well as the permissible radiation levels of masts and towers[354]

[347] Paragraph 1 (1) NCC Guidelines on Technical Specifications for the Installation of Telecommunications Masts and Towers, 2009.
[348] Paragraphs 2 &7 *Ibid*.
[349] Paragraphs 4 & 13(1)-(2) *Ibid*.
[350] Paragraph 3 & Chapter 5 *Ibid.*
[351] Paragraph 5 & 6 *Ibid*.
[352] Paragraph 8 *Ibid*.
[353] Paragraph 10 *Ibid*.
[354] Paragraph 13 *Ibid*.

3.3 Installation of Fiber Optic Cables

3.3.1 Fiber Optic Submarine Cables

A fiber optic submarine cable refers to a cable that is laid on the sea bed between land based stations for the purpose of supplying international bandwidth capacity. Currently four international fiber optic submarine cable systems have landed in Nigeria, and supply the country with a total international bandwidth capacity of 10 Terabytes (Tbits).[355] In Nigeria, the deployment and operation of international submarine cables and their landing stations is comprehensively governed by the NCC's International Submarine Cable Infrastructure and Landing Station Services License.[356] The license provides that operators of an international submarine cable that is licensed to land in Nigeria "shall obtain all necessary licenses and permits, including building permits and other non-telecommunications permits required to build, implement, modify and remove installations and buildings in accordance with relevant applicable laws and regulations in the Federal Republic of Nigeria".[357] This implies that a cable operator is to comply with all relevant applicable legal requirements governing the installation or removal of infrastructure in Nigeria such as the Environmental Impact Assessment Act and other infrastructure development laws. Accordingly, the license empowers the NCC to require a cable operator to file an environmental impact assessment report where it is of the view that the landing of a cable at specific locations and the construction of landing stations

[355] F Odufuwa, *Understanding What is Happening in ICT in Nigeria: A Supply – and Demand Side Analysis of the ICT Sector* (South Africa: Research ICT Africa, 2012) p.19.

[356] The NCC's International Submarine Cable Infrastructure and Landing Station Services License, available at <http://www.ncc.gov.ng/index.php?option=com_content&view=articles&id=76&itemld=81> last accessed on 30 March, 2016.

[357] Condition 17, International Submarine Cable Infrastructure and Landing Station Services License.

may affect the environment.[358] Also, prior to developing any cable landing sites or installing equipment, a cable operator is required to obtain approvals from the NCC.[359]

3.3.2 Metropolitan Fiber Optic Cables

The deployment of fiber optic cables and related transmission infrastructure within Nigeria is governed by the conditions under the NCC's Metropolitan Fiber Cable Network Services License which is established under section 32 of the NCA. The license establishes the specific terms and conditions under which telecommunications service provider are permitted to carry out the following activities:

(a) to construct, maintain and operate 'access tandem'[360] and fiber optic transmission facilities or backbone upon land or in water or under water in all territories of the states of Nigeria;

(b) to employ other means of transmission such as microwave/satellite or any other cost effective means other than fiber optic cables in topographical terrains such as streams, hills or mountains where the deployment of fiber optics may prove difficult;

(c) to carry intra-city telecommunications traffic within a designated area;

(d) to interconnect two or more metropolitan areas for the purpose of transmitting inter-city traffic between metropolitan areas, and;

(e) to establish 'points of presence'[361] for the purpose of interconnecting with 'private networks'[362] and the networks of 'access providers'.[363][364]

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[358] Condition 29.1, International Submarine Cable Infrastructure and Landing Station Services License.
[359] Condition 30 *Ibid*.
[360] 'Access tandem' refers to "switching systems that provide concentration and distribution for traffic originating and terminating in the networks of access providers". *See* Metropolitan Fiber Cable Network Services License, p.4, available at <http://www.ncc.gov.ng/index.php?option=com_content&view=articles&id=76&itemld=81> last accessed on 30 March, 2016.

Under the Metropolitan Fiber Cable Network Services License, a service provider that intends to install fiber optic transmission facilities has an obligation "[to] obtain all necessary licenses and permits, including …non-telecommunications permits required to build, implement, modify and remove installations and buildings in accordance with relevant applicable laws and regulations".[365] This implies that a service provider that intends to install fiber optic cables and related transmission facilities is required to comply with all applicable legal requirements governing the installation or removal of infrastructure in Nigeria such as the Environmental Impact Assessment Act and other related infrastructure development laws. In addition, the license requires a service provider to ensure that all its network equipment and sites are approved by the NCC before commencing operations and also obtain all necessary compliance certificates.[366] This entails a service provider's compliance with the NCC's environmental and technical specifications on the location of telecommunications infrastructure and other relevant regulations such as the National Environmental (Standards for Telecommunications and Broadcast Facilities) Regulations and the Environmental Impact Assessment Act.

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[361] 'Point of presence' refers to "a location designated by the licensee (service provider) where switching and transmission facilities are provided for the purpose of interfacing with other operators". *See* Metropolitan Fiber Cable Network Services License, p.7.

[362] 'Private network' refers to "a telecommunications network that is not deployed for the provision of commercial services to the public". *See* Metropolitan Fiber Cable Network Services License, p.7.

[363] An 'access provider" refers to "any person who provides last mile access to end- users of telecommunications services and includes but is not limited to fixed telephony service providers, mobile cellular telephony-service providers, value added service providers and virtual private network operators". *See* Metropolitan Fiber Cable Network Services License, p.4.

[364] Condition 22, Metropolitan Fiber Cable Network Services License.

[365] Condition 24.1, *Ibid*.

[366] Condition 25.1, *Ibid*.

3.4 Installation of Earth-based Network Infrastructure for Communications Satellites

A communications satellite is an artificial satellite that is stationed in space for the purpose of relaying and amplifying radio communications signals between a source and a receiver through the use of a transponder.[367] Communications satellites can be used for purposes including environmental management, commercial services, research, disaster management and military services. Communications satellites that are deployed for commercial purposes are mainly used to provide commercial broadcast and telecommunications services. In particular, commercial communications satellites are used to provide access to communications services in remote or difficult geographical terrains where fixed communications infrastructure cannot easily be deployed such as mountainous regions or where fixed infrastructure is generally lacking. For example, prior to deployment of GSM technology across Nigeria, satellite communications were used to service the demand for mobile telecommunications in Nigeria. However, communications satellites are also regarded as complementary to fixed telecommunications networks as service providers tend to use a mixture of both satellites and fixed networks in order to optimally deliver services.[368]

In Nigeria, the deployment and operation of commercial communications satellite infrastructure such as satellite earth stations and their antennas is governed by the NCC's

[367] Wikipedia, 'Communications Satellite' available at <https://en.wikipedia.org/wiki/Communications_satellite>.

[368] Commonwealth Telecommunications Organization, *The Socio-Economic Impact of Broadband in Sub-Saharan Africa: The Satellite Advantage* (London: Commonwealth Telecommunications Organization, 2012) pp.1, 11 & 28.

Commercial Satellite Communications Guidelines.[369] The Guidelines define a 'commercial satellite' as a satellite that is launched for a profit making or business purpose.[370] The Guidelines apply to operators that provide commercial satellite communications to third parties, and operators that own satellite space segments (Space segment providers) or own earth stations (Earth station providers).[371] However, the Guidelines do not apply to military and non-commercial government satellites. Other satellites that are outside the scope of the Guidelines include: radio navigation satellites, armature satellites, earth exploration and space research satellites, and broadcasting satellites.[372] Thus, the Guidelines basically apply to communications satellites that are used to provide commercial telecommunications services. However, a commercial satellite that is used to provide both broadcast and telecommunications services will be subject to the regulatory regime under the Guidelines.[373]

The Guidelines regulate the installation of the earth-based components of communications satellites. In this respect, it establishes the health and safety specifications for locating earth-based components of satellites in residential areas or buildings. Thus, paragraph 13 (a) of the Guidelines requires that all satellite dishes except those that are solely used for receiving transmissions must be located in accordance with

[369] NCC, Commercial Satellite Communications Guidelines, 30 June, 2008.
[370] Paragraph 24, NCC Commercial Satellite Communications Guidelines, 2008.
[371] Paragraph 1 (b) (i) and ii, *Ibid.*
[372] Paragraph 1 (c) *Ibid*.
[373] NCC, Report of the Public Inquiry on Commercial Satellites Communications Guidelines (15 July, 2009) p.2.

the following distances (*see* table 5) from residential areas or buildings depending on their EIRP (Equivalent Isotropic Radiated Power).[374]

Table 5: EIRP and Specified Distance from Residential Areas/Buildings[375]

EIRP	*Distance*
20W	5 meters
50W	10 meters
100W	15 meters
1 kilo watts	50 meters
5 kilo watts	100 meters

The essence of the above specification is to protect public health and safety by limiting human exposure to high power electromagnetic fields. The Guidelines also require that the installation of earth components of communications satellites should comply with the environmental specifications under the NCC Guidelines on Technical Specifications for the Installation Telecommunications Masts and Towers (2009).[376] This entails that the installation of satellite earth components shall:

(a) not be detrimental to public, safety or general welfare;

(b) not have negative effect on the neighborhood;

(c) be in conformity with the plan of the particular community where it is located, and;

[374] EIRP is the amount of power that an Isotropic antenna which evenly distributes power in all directions would emit to produce the peak power density in the direction of maximum antenna gain. The EIRP is used to estimate the service area of a transmitter. <http://www.antenna-theory.com/definitions/eirp.php>.
[375] Annex, NCC Commercial Satellite Communications Guidelines, 2008.
[376] Paragraph 13 (d), NCC Commercial Satellite Communications Guidelines, 2009.

(d) comply with other applicable laws or guidelines.[377] This also entails compliance with the Environmental Impact Assessment Act and the National Environmental (Standards for Telecommunications and Broadcast Facilities) Regulations.

The NCC's Commercial Satellite Communications Guidelines also prohibits the location of satellite transmitters in hospital premises or at airports or seaports, without the approval of the NCC.[378] In addition, the Guidelines prescribe that 'no [satellite] earth station shall be located within 100 meters of the geographical boundary of an airport".[379] This requirement aims to promote aviation safety by reducing the possibility of interference between aviation communication signals and telecommunication signals.

3.5 Challenges to the Deployment of Telecommunications Network Infrastructure

There are several challenges that hinder the timely and widespread deployment telecommunications network infrastructure in Nigeria. These challenges include: multiple and conflicting regulation, multiple taxation, inconsistencies in the administration of 'right of way' permits, lack of power supply, poor urban planning, vandalization and theft of telecommunications infrastructure, and poor coordination of infrastructure deployment. The above challenges and proposed remedies will be discussed in extensively in this section.

3.5.1 Multiple and Conflicting Regulation by State Actors

3.5.1.1 Conflicting Environmental Regulation: NCC vs. NESREA

Currently, the regulation of the installation of telecommunications infrastructure such as masts, base stations and fiber optic cables is not solely confined within the

[377] Chapter 5, Paragraph 1 (b), NCC Guidelines on Technical Specifications for the Installation of Telecommunications Masts and Towers, 2009.
[378] Paragraph 13 (b), *Ibid*.
[379] Paragraph 13 (b), *Ibid*.

exclusive regulatory mandate of the NCC. Thus, the mandate to regulate the installation of telecommunications infrastructure also extends to another federal agency – NESREA, as well as state and local government authorities. This state of affairs has created opportunities for a multiple and conflicting regulation of the telecommunications industry by government actors. For example, the difference between the regulations of the NCC and the NESREA on the environmental specifications for the location of masts and towers has been a constant source of regulatory conflict between the two agencies. Thus, while the NCC specifies that masts and towers should have a minimum set-back distance of 5 meters from buildings; NESREA specifies a minimum set-back distance of 10 meters. This however resulted in situations whereby NESREA shut down telecommunications base stations that were approved by the NCC on the basis that such stations did not comply with NESREA's regulations. For example, in 2012, it was reported that NESREA had shut down about 52 base stations that were approved by the NCC for not complying with the 10 meter set-back distance.[380] The situation created regulatory uncertainty and hindered the timely deployment of base stations. However, the regulatory conflict between the NCC and NESREA could have been avoided if one of the regulators had been explicitly precluded from the environmental regulation of telecommunications infrastructure[381]or if both regulators had successfully harmonized their environmental standards.

[380] E Okonji, 'FG Bars NESREA From Sealing Telecom Masts', *ThisDay*, 20 May, 2012, available at <http://www.thisdaylive.com/articles/fg-bars-nesrea-from-sealing-telecoms-mast/1167465> last accessed on 30 March, 2016. *See also*, ALTON, Press Statement on Service Disruptions Caused by the Interference with Telecommunication Installations by NESREA and other Government Agencies (Lagos, Nigeria, 2 May, 2012).

[381] The situation in the Nigerian oil and gas industry may provide an example. Thus, while the NESREA Act establishes the powers of NESREA to enforce environmental laws and regulations in Nigeria, the Act also precludes the Agency from enforcing environmental laws and regulations in the oil and gas industry. (*See* NESREA Act 2007, s.7 (g), (h), (j), (i), 8(g), (i), (n) & 24(3). The Department of

Industry stakeholders have blamed NESREA for failing to timely harmonize its environmental regulations with that of the NCC.[382] Thus, there are prospects that a harmonization of regulatory standards by both the NCC and NESREA would promote regulatory certainty and address incidence of regulatory conflicts while also reducing the operational costs of compliance by telecommunications operators. In 2012, the Minister of the Environment and the Minister of Communications Technology began a process of harmonizing the environmental regulation of the telecommunications industry by the NCC and NESREA, while the Federal Government also banned NESREA from sealing telecommunication base stations that met the NCC's specifications.[383] This intervention appeared to reduce the spate of regulatory conflicts between the NCC and NESREA. In December 2014, the NCC and NESREA formally announced that they have harmonized their environmental regulations on the installation of base stations. The harmonized regulatory position is that in a situation where a ten meter set-back is unattainable on a

Petroleum Resources (DPR) and the National Oil Spill Detection and Response Agency (NOSDRA) are solely responsible for the environmental regulation of the oil and gas industry. Although, the exclusion of NESREA from the environmental regulation of the oil and gas industry has been seriously criticized for encouraging environmental pollution, yet to some extent it can be argued that the exclusion has made it impossible for regulatory conflicts to arise with respect to the environmental regulation of the industry. *See* U J Orji, 'An Appraisal of the Legal Framework for the Control of Environmental Pollution in Nigeria', (2012) 38 (2) *Commonwealth Law Bulletin*, 338; U J Orji, 'Moving from Gas Flaring to Gas Conservation and Utilization in Nigeria: A Review of the Legal and Policy Regime', (June, 2014) XXXVIII (2) *OPEC Energy Review*, 164; M Okorodudu – Fubara, 'Country Report: Nigeria Legal Developments 2009 – 2011', (2012) (1) *IUCN Academy of Environmental Law e – Journal*, 176-177.

[382] ALTON, 'The Clash of Statutes Resolving Regulatory Conflicts over Critical Information Infrastructure in Nigeria – The NCC/NESREA Case', A presentation at the ICT Session of the Nigerian Bar Association 6th Business Law Conference, p.1, available at <http://gbengaadebayo.com.ng/altons-submission-at-the-ict-session-of-the-nba-business-group-the-clash-of-statutes-resolving-regulatory-conflicts-over-critical-information-infrastructure-in-nigeria-the-ncc> last accessed on 30 March, 2016.

[383] E Okonji, 'Federal Government Bars NESREA from Sealing Telecoms Masts', *ThisDay*, 28 May, 2012. *See also* H Ijaiya and O.T Joseph, 'Rethinking Environmental Law Enforcement in Nigeria', (2014) 5 *Beijing Law Review* (2014), 315.

proposed base station site due to lack of space, that officers of the NCC and NESREA will jointly assess the site and approve a minimum set-back of seven meters.[384]

3.5.1.2 Multiple and Conflicting Regulation at the State and Local Government Levels

Multiple and conflicting regulation of telecommunications infrastructure installation at the State and Local Government levels mainly arise from the fact that Nigeria operates a federal system of government where the legislative powers of the federation are shared between the Federal, State and Local tiers of governments.[385] Accordingly, the Constitution establishes the exclusive powers of the Federal Government to legislate matters under the Exclusive List that is set out in Part I of the Second Schedule to the Constitution,[386] while both the Federal and State Governments share the powers to legislate on matters in the Concurrent List that is set out in Part II of the Second Schedule to the Constitution.[387] However, the State Governments also have powers to legislate on any matters not included in the Exclusive List.[388] Matters relating to telecommunications are placed in the Exclusive Legislative List of the Constitution thus giving the Federal Government the exclusive powers to legislate on such matters;[389] however, matters relating to urban planning are not contained either in the Exclusive or Concurrent lists. This state of affairs implies that States and Local Governments can legislate on matters relating to urban or town planning.

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[384] F Onuegbu, 'NCC, NESREA Agree on 7 Meters Set-back for Base Stations', *News Agency of Nigeria*, 17 December, 2014, available at <http://nannewsnigeria.com/ncc-nesrea-agree-7-meters-setback-base-stations> last accessed on 30 March, 2016.

[385] Constitution of the Federal Republic of Nigeria 1999, s. 4.

[386] S. 4(2) & (3) *Ibid*.

[387] S. 4 (4) (a) & 7 (b) *Ibid*.

[388] S. 4(7) (a) *Ibid*.

[389] Items 46 & 66 Exclusive Legislative List, Part 1, Second Schedule to the Constitution of the Federal Republic of Nigeria 1999.

In *Attorney General of Lagos State v the Attorney General of the Federation & Others*,[390] the Lagos State Government instituted an action against the Federal Government at the Supreme Court and sought the Court to determine *inter alia* whether urban and regional planning and the regulation of physical development are legislative matters under the Nigerian Constitution. The majority view of the Court was that matters not included in the Exclusive and Concurrent Lists of the Constitution were residual matters only which the State Governments can legislate on. Accordingly, the Court held that urban and regional planning or development control was a residual legislative matter within exclusive legislative competence of the State Governments as such matter was not included in either the Exclusive or Concurrent Legislative Lists under the Nigerian Constitution. The majority of the Court also held that urban and regional planning or development control was a legislative objective that was separate from safeguarding the environment under section 20 of the Constitution.[391]

However, the exercise of urban and regional planning or development control powers by State Governments has also created opportunities for a multiple and conflicting regulation of the telecommunications industry. For example, in 2004, the Lagos State Government enacted an Infrastructure Maintenance Regulatory Agency Act that set up an Infrastructure Regulatory Agency to regulate some aspects of urban

[390] *Attorney General of Lagos State v the Attorney General of the Federation & Others* [2003] 12 NWLR (Pt 833) 1.

[391] *See also*: *Attorney General of Ogun State v Aberuagba* [1985] 1 NWLR (Pt.3) 395 at p.405 – where it was also observed *per* Bello (JSC) that the Federal Government has no power to make laws on residual matters. In particular, the Court held *per* Onu (JSC) that: "it is only proper that States which create areas under the Land Use Act and exercise jurisdiction over all persons and lands under territories and are closer to the people should be allowed to exercise their planning or development control functions in their territories so as to ensure that there is no abuse or distortion of their master plans. It is not a matter that should be left with a distant authority like the Federal Government operating from Abuja".

development including the deployment of telecommunications masts and base stations. However, the Law also appeared to encroach on the regulatory mandate of the NCC. Consequently, in *Registered Trustees of ALTON & Others v Lagos State Government & Others*,[392] the plaintiffs who were the Registered Trustees of the Association of Licensed Telecoms Operators of Nigeria (ALTON) challenged the constitutionality of certain provisions of the Law in the Federal High Court. The plaintiffs contended amongst other grounds that section 16 of the Law which sought to regulate the erection of telecommunications masts and towers duplicated the regulatory powers of the NCC, and that certain provisions of the Law amounted to an imposition of additional taxation on their operations. The Court found that the Law exceeded urban and regional planning requirements and purported to replicate the regulation of telecommunications by establishing provisions that were parallel to the NCA. Consequently, the Court held in favor of the plaintiffs. According to the Court:

> the Infrastructure Maintenance and Regulatory Agency Law, from the name it looks very innocent… from the contents of the Law, the driving force is just to make money for the State, as the State has numerous laws dealing with the issue of urban planning".[393] "…what the Lagos State Government is doing is to create an Agency that will get its own share of the booty, as their Counsel said that the operators are making billions of Naira.[394]

[392] *Registered Trustees of Association of Licensed Telecoms Operators of Nigeria (ALTON) & Others v Lagos State Government & Others* [2007] (Unreported) Suit No.FHC/L/CS/517/06.
[393] *ALTON v Lagos State Government & Others*, p.22.
[394] *Ibid*, pp.23-24. *See also* A Sanni, 'Multiplicity of Taxes in Nigeria: Issues, Problems and Solutions', (September, 2012) 3 (17) *International Journal of Business and Social Science*, 230.

Thus, the Court affirmed the exclusive powers of the Federal Government to legislate on telecommunications matters and struck out the Infrastructure Maintenance and Regulatory Agency Law to the extent that it sought to improve quality control and environmental standards in the location of telecommunications masts and towers.[395] The Court took a practical view that "it will be difficult to do telecommunications business in Nigeria if every State in the Federation in Nigeria, which is not unlikely, if this case succeeds, were to enact their own laws to take a piece of the action".[396] The Court also held that:

> the State House of Assembly has no right to make laws that are similar or identical to that of the National Assembly…if this law is allowed to subsist there will be confusion in the telecom industry…the whole purpose of this law is just to generate revenue for the State Government *simpliciter*. That is taxing the telecom operators indirectly…the NCC Act has covered the field.[397]

The Lagos State Government subsequently appealed the decision, and in 2009 the Court of Appeal upheld the decision of the Federal High Court.[398] However, the decision appears not to have effectively doused conflicts arising from the multiple regulation of telecommunications infrastructure deployment by States and Local Governments. For example, after its unsuccessful appeal against the decision of the Federal High Court in

[395] T Otubu, 'Mass Mast in Planning and Environmental Law Maze: Need to Regulate', p.15, available at <http://.http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2013985> last accessed on 30 March, 2016.
[396] *ALTON & Others v Lagos State Government & Others*, at 24.
[397] *Ibid*, at 23-25.
[398] A Oladapo, Minister Hastens Better Technology Driven Relationship with State Governments', available at <http://www.newsdirectonline.com/newstory.php?1D=11415>. *See also* C Nnaji, 'MoU with Lagos Boosts due Process on Taxes – ALTON', *ITREALMS*, 24 April, 2015, available at <http://www.itrealms.com.ng/2015/04/mou-with-lagos-boosts-due-process-on.html> last accessed on 30 March, 2016.

the *Registered Trustees of ALTON & Others*, the Lagos State Government established an agency known as the Urban Furniture Regulatory Unit (UFRU) under the State's Ministry of Physical Planning and Urban Development.[399] According to the Lagos State Government, the UFRU aims "to address the anomaly created by certain corporate entities that erect masts and towers without regard to physical planning laws and regulations of the Lagos State Government".[400] The UFRU is authorized to exercise powers which include:

(a) Regulating the siting of 'urban furniture' including telecommunications antennas masts and towers on land and buildings in Lagos State;

(b) Approving and supervising the location, position dimensions, appearance, display and manner in which urban furniture shall be affixed to land, and;

(c) Implementing the rates and fees chargeable for permits to erect all outdoor telecommunications infrastructure such as masts, towers, base stations, and antennas as may be prescribed by the Commissioner for Physical Planning and Urban Development under the Lagos State Urban and Regional Planning Law (No.3 of 5 June, 2010).

Apparently, the broad scope of the above urban planning powers entitles the UFRU to approve any proposed location of a telecommunications mast/base station infrastructure before a development permit can be granted by the Lagos State Physical

[399] Urban Furniture Regulatory Unit, available at <http://www.ufru.org/>.

[400] Public Notice Issued by the Honorable Commissioner, Lagos State Ministry of Physical Planning and Urban Development (20 July, 2012) available at <http://www.ufru.org/category/public-notices/> last accessed on 11 April, 2015.

Planning Permit Authority for the actual location of such infrastructure.[401] The powers of the UFRU also extend to the environmental assessment of the location of telecommunications infrastructure and the regulation of the structural standards of telecommunications masts and towers. For example, in August 2013, the UFRU issued a directive which prescribed that all telecommunications masts in Lagos State must be erected with galvanized steel materials and have a height of between 30 to 50 meters.[402] The UFRU also directed the replacement of all hollow pipe type masts with galvanized steel masts and further required that operator must obtain from its office (after the payment of prescribed fees) before any telecommunications masts can be installed or replaced.[403]

However, some of the UFRU's standards on the structure of telecommunications masts vary from the NCC's specifications.[404] This notwithstanding, the UFRU embarked on the demolition of telecommunications masts that did not comply with its

[401] Under the Lagos State Urban and Regional Planning and Development Law (2010), any physical development activity within the State requires the developer to obtain a Planning Permit from the Lagos State Planning Permit Authority. *See* Lagos State Urban and Regional Planning and Development law 2010, s. 26 and 27.

[402] Urban Furniture Regulatory Unit, 'Lagos Government Sets New Standards for Communication Masts – PPRU LASIMRA', (13 August, 2013), available at <http://www.ufru.org/lagos-govt-sets-new-standards-for-communication-masts-ppru-lasimra/> last accessed on 30 March, 2016.

[403] According to UFRU, the permit for the installation of new masts costs N400,000 per mast, while the permit for the replacement of existing masts costs N200,000 per mast. It also prescribed an annual masts supervision levy of N100,000. *See* Urban Furniture Regulatory Unit, 'Lagos Government Sets New Standards for Communication Masts – PPRU LASIMRA', (13 August, 2013), *Ibid*.

[404] For example, the NCC specifies that telecommunications masts that are above a height of 25 meters would not be permitted within residential areas. *See* Paragraph 3(4) NCC Guidelines on Technical Specifications for the Installation of Telecommunications Masts and Towers, 2009. The NCC also permits the installation of telecommunications masts that are above a height of fifty meters under some conditions. *See* Paragraphs 7(1) (a) (iv) & 9 (1)(a) & (b) NCC Guidelines on Technical Specifications for the Installation of Telecommunications Masts and Towers 2009. On the other hand, the UFRU specifies that masts must be within a height of 30 to 50 meters. *See* Urban Furniture Regulatory Unit, 'Lagos Government Sets New Standards for Communication Masts – PPRU LASIMRA', (13 August, 2013), *Ibid*

specifications.[405] In November 2012, ALTON also reported that the UFRU had requested that telecommunications operators should pay N3 million as the cost of permits of each new mast that will be erected in Lagos State with an additional 15 percent yearly renewal fee, while the permit for the replacement of an existing mast will cost 1 million. In addition, operators were required to pay a rent of N3 million for each base station that is erected in the State.[406] However, as at the time of writing, neither ALTON nor any telecommunications operator had legally challenged the regulation of telecommunications installations by the UFRU. Nevertheless operators have consistently complained of the UFRU's regulatory burden,[407] and the probability of such legal challenge cannot be ruled out entirely.

Aside from Lagos state, instances of excessive and multiple telecommunications infrastructure deployment charges abound across the country. For example, in 2012, an Executive Commissioner of the NCC reported several instances of such charges including: the Cross River State's Town Planning Authority's demand of a planning fee of N1.2million for each telecommunications site; the Jos Metropolitan Development Board's demand notice of N18,720,000.00 as permit renewal fees for Etisalat's base stations, and; the Abuja Municipal Management Council's demand of over N257 million

[405] E Okwuke, 'Lagos, NCC, ALTON Clash over Demolition of BTS Site', *Daily Independent*, 10 July, 2012, available at <http://www.dailyindependent.nig.com/2012/07/lagos-ncc-alton-clash-over-demolition-of-bts-site.html>. *See also* E Elebeke, 'NATCOMS Blasts UFRU on Demolition of Telecom Masts', *The Vanguard* (22 August, 2012) available at <http://www.vanguardngr.com/2012/08/ natcom-blasts-ufru-on-demolition-of-telecom-masts.html> last accessed on 30 March, 2016.

[406] NCC, 'Telecoms Operators Fault New Lagos Rule on Mast Installations', (21 November, 2012) available at<http://www.ncc.gov.ng/index.php?option=com_content&view=article&id=1113%3Aguardian-21st-november-2012-telcoms-operators-fault-new-lagos-rule-on-mastinstallations&catid=86%3Acat-mediapr-headlines&Itemid=60> last accessed on 30 March, 2016.

[407] E Okonji, 'We Will Resist Telecoms Regulation, ALTON Tells Lagos State Government', *ThisDay* (4 March, 2012) available <http://nigershowbiz.com/we-ll-resist-telecoms-regulation-alton-tells-lagos-govt/> last accessed on 30 March, 2016.

as the annual charge for MTN telecommunications base stations located in the Federal Capital Territory.[408] However, there were no reported legal actions challenging the above charges.

Another example of multiple regulation of telecommunications infrastructure deployment at the State and Local Government levels is that some States and Local Government authorities usually reject Environmental Impact Assessment (EIA) certificates issued by NESREA while insisting that telecommunications operators should process such certificates with them.[409] Thus, some environmental protection agencies at the State and Local Government levels have claimed the regulatory powers to grant EIA certifications for the deployment of telecommunications infrastructure within their jurisdictions. However, the exercise of such powers has been a source of conflict with NESREA which claims to have the exclusive powers to grant EIA certificates in accordance with the Environmental Impact Assessment (EIA) Act.

The case of *NESREA v Helios Towers and the Kaduna Environmental Protection Agency (KEPA)*[410] illustrates the above state of affairs. Around May 2007, Helios Towers installed a telecommunications mast in a residential area in Kaduna and then obtained an EIA certificate from KEPA. NESREA then directed Helios Towers to remove the mast

[408] O Itanyi (Executive Commissioner NCC) 'Press Briefing on Recent Cases of Multiple Taxations and its Dangers to the Growing Telecoms Industry', (15 March, 2012) available at <http://www.ncc.gov.ng/index.php?option=com_docman&task=doc_download&gid=249&Itemid=> last accessed on 30 March, 2016.

[409] Industry Working Group, *Position Paper on Hazards and Further Implications of Multiple Taxation and Regulation of the Communications Industry in Nigeria* (March, 2012) p.5.

[410] *NESREA v Helios Towers and the Kaduna Environmental Protection Agency (KEPA)* [2015] (Unreported Suit) *reported by* E Badejo, 'Court Bars States on Issuance of EIA Approval Certificate', *The Guardian*, 22 February, 2015, available at <http://www.ngrguardiannews.com/2015/02/court-bars-states-on-issuance-of-eia-approval-certificate/> last accessed on 30 March, 2016. *See also* C Ologunagba, 'FG Threatens to Sanction State Agencies Issuing Fake EIA Certificates', *News Agency of Nigeria*, 24 March, 2015.

on the basis that its installation was done in violation of the NESREA Act and the EIA Act and that KEPA had acted ultra wires in issuing the EIA certificate. Helios Towers however refused to remove the mast. Subsequently, NESREA instituted an action in the Federal High Court, seeking the Court to declare that KEPA had no authority to issue an EIA certification. It also sought the Court declare that the EIA certificate that had been issued by KEPA to Helios Towers was illegal and unlawful and further requested an order directing Helios Towers to remove the mast. On the other hand, it was contended that the Kaduna State Government had enacted the KEPA Law pursuant to the EIA Act and that KEPA had the powers to issue the EIA certificate as environmental issues were neither in the Exclusive or Concurrent Legislative Lists under the Nigerian Constitution. It was also contended that environmental matters are residual matters which were within the legislative competence of States and that the NESREA Act was enacted contrary to the provisions of the Constitution and its guiding principle of federalism. Consequently, it was submitted that the EIA certificate that was issued by KEPA was valid and that NESREA's directive for the removal of the mast was void. The Federal High Court found against the defendants and granted the reliefs sought by NESREA. The Court was also of the opinion that environmental matters were enshrined in the Exclusive Legislative List of the Constitution and that no State had the competence to issue an EIA certificate. On appeal, the major issue in contention was for the Court to determine whether it was NESREA or KEPA that had the authority to issue an EIA certificate. The Court of Appeal while dismissing the appeal and affirming the decision of the Federal High Court held that:

> NESREA is the statutory body established by the National Assembly to replace the Federal Environmental Protection Agency (FEPA) and the body (Agency) entrusted with the enforcement of environmental standards and regulations in Nigeria. It is therefore the body that is vested with powers to issue Environmental Impact Assessment Certificates.[411]

The Court recognized that while State agencies have a role to play in conducting environmental impact assessments with respect to projects that will be carried out in their States, it however held that "[such] role 'is to be played in conjunction with or at the behest of NESREA, which… has the power at the completion of all assessments, to issue an Environmental Impact Assessment Approval Certificate".[412]

To a large extent, the above discussion has shown that the multiple regulation of the deployment of telecommunications infrastructure arise mainly from the practice of federalism in Nigeria. Thus, since States and Local Governments have powers to control urban and regional planning then matters relating to telecommunications infrastructure deployment clearly have a 'multi – jurisdictional' dimension which also entitles the State and Local tiers of Government to exercise some degree of regulation. This arises from the fact that telecommunications infrastructure will be located on land that is subject to the jurisdiction of a State or Local Government's planning regime. Furthermore, the States and Local Governments are apparently more informed about the areas where such infrastructure will be located and also have more proximity and regulatory presence to ensure the effective supervision of such infrastructure in the public interest. Accordingly,

[411] *NESREA v Helios Towers and the Kaduna Environmental Protection Agency (KEPA) Ibid*.
[412] E Badejo, 'Court Bars States on Issuance of EIA Approval Certificate', *The Guardian*, 22 February, 2015.

the industry may be classified as a 'multi-jurisdictional industry' over which all the three tiers of Government have a certain degree of regulatory competence or responsibility. A statement that is credited to the Governor of Lagos State appears to capture this state of affairs. According to the Governor,

> while the Federal Government has the 'exclusive' right to license [telecommunications] operators, the same tier of Government cannot dictate where masts would be sited, because when those masts come down as they often do, it is the municipal authorities that take responsibilities arising from both the fatalities and damage to properties.[413]

Thus, it cannot be overemphasized that the State and Local Governments clearly possess the requisite local knowledge of the terrain and layout of municipalities to know the best places for locating infrastructure such as masts and base stations,[414] and are also more proximate in terms of ensuring that such infrastructure conforms to urban development plans. However, this state of affairs would also create operational challenges for the provision of telecommunications services where the 36 States of Nigeria, the Federal Capital Territory (FCT) and Nigeria's 774 Local Government Councils[415] have different urban development regimes governing the deployment of telecommunications infrastructure such as the height of masts, and their distance from residential buildings. While, it is agreed that State and Local Government development plans vary across Nigeria due to different in demographic and geographic characteristics, however telecommunications operators or infrastructure providers that have to deploy

[413]L Ajanaku, 'Saving the Public from Killer – Telecoms Masts', *The Nation*, 26 September, 2015, p.47.
[414] C B Opata, 'Regulatory Convergence: Reflections from Nigeria', p.11, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2347229> last accessed on 30 March, 2016.
[415]The First Schedule, s. 3, Part 1, Constitution of the Federal Republic of Nigeria, 1999.

infrastructure across States will be faced with varying and conflicting regimes which may slow down the timely deployment of networks and also increase operational costs. Also, the operational costs of such excessive regulatory burden in a particular State or Local Government area may be reassigned by service providers to all consumers on their network regardless of their location.

3.5.1.3 A Comparative Example from the United States

The position in another Federal State - the United States may also be considered in the context of addressing the challenge of multiple regulation of the telecommunications industry. In the United States, the construction and location of telecommunications masts and other physical infrastructure has traditionally been regulated at the local level and thus subject to local land-use and zoning regulations. However, the United States Telecommunications Act of 1996 added section 332 (c) (7) to the Communications Act of 1934, which limits State and Local authorities over zoning and land use decisions for wireless telecommunications services.[416] The section establishes a national policy to govern the siting of wireless telecommunications facilities and also aims to balance the need to accelerate the deployment of telecommunication facilities and the need to maintain the control of State and Local authorities over the siting of such facilities on land.[417] The section also recognizes the rights and powers of a State or Local Government to make land zoning decisions regarding the deployment of

[416]K Lee and J Prime, 'US Telecommunications Law and Regulation', in I Walden (ed) *Telecommunications Law and Regulation* (Oxford: Oxford University Press, 2012), p.238. *See also*, United States Telecommunications Act 1996, s. 704(a).

[417] *ATC Reality LLC v Town of Kingston*, 303 F. 3d 91, 94 (1st Cir. 2002), and *Town of Amherst v Omnipoint Communications Enters*, Inc, 173 F. 3d9, 13 (1st Cir. 1999).

wireless telecommunications facilities.[418] However, the section prohibits a State or Local Government from unreasonably discriminating among providers of functionally equivalent wireless services.[419] It also requires a State or Local Government not to regulate in a manner that will prohibit or have the effect of prohibiting of wireless telecommunications services.[420] In addition, a State or Local Government is required to respond within a 'reasonable time' to applications for authorizations to deploy wireless infrastructure[421]and also provide any denial of an application for authorization in writing supported by substantial evidence contained in a written record.[422] More importantly, the section prohibits a State or Local Government from regulating the deployment of telecommunications infrastructure on the basis of the environmental effects of radio frequency (RF) emissions, so long as such infrastructure complies with the RF rules of the United States Federal Communications Commission (FCC).[423] The Courts have the exclusive powers to resolve all matters bordering on whether a State or Local Government has failed to comply with the requirements of the section.[424]

It has been observed that with the establishment of section 332 (c) (7), that Courts have generally found in favor of telecommunications operators seeking access to site telecommunications masts, or towers, although States or Local authorities have also prevailed when they accompanied their denials of authorization with a clear written record and when the Courts were convinced that they were not acting to effectively deny

[418] 47 United States Code (U.S.C.) at Section 332 (c) (7) (A).
[419] 47 U.S.C. at Section 332 (c) (7) (B) (i) (I).
[420]47 U.S.C at Section 332 (c) (7) (B) (i) (II).
[421]47 U.S.C at Section 332 (c) (7) (B) (ii).
[422] 47 U.S.C at Section 332 (c) (7) (B) (iii).
[423] 47 U.S.C at Section 332 (c) (7) (B) (iv).
[424] 47 U.S.C at Section 332 (c) (7) (B) (v).

all new facilities.[425] Within the Nigerian context, a similar amendment to the NCA would be helpful, especially where such amendment precludes a State or Local Government that is exercising its urban planning powers from regulating the deployment of telecommunications infrastructure with a set of technical or environmental specifications that is different from those set by the NCC or NESREA.

3.5.2 Multiple and Illegal Taxation

Multiple and illegal taxation also constitute major challenges to the deployment of telecommunications network infrastructure in Nigeria.[426] A 2012 report of the International Chamber of Commerce (ICC) estimates that "the cumulative impact of the multiple taxes imposed on Nigerian mobile operators is close to a 35% rate, which is double the global average".[427] Within the context, 'multiple taxation' refers to a situation whereby a telecommunications asset or operation is taxed multiple times by state actors at different tiers of government.[428] According to the NCC Industry Working Group on Multiple Taxation, 'multiple taxation' includes "the incidence of more than one tax, levy, charge, fee or other payments imposed on the same infrastructure, operations, or events by the same or different MDA's and other stakeholders; and the multiplication of

[425] K Lee and J Prime, 'US Telecommunications Law and Regulation', in I Walden (ed) *Telecommunications Law and Regulation* (Oxford: Oxford University Press, 2012), p.238.
[426] Industry Working Group, *Position Paper on Hazards and Further Implications of Multiple Taxation and Regulation of the Communications Industry in Nigeria* (March, 2012), pp.3-11.
[427] International Chamber of Commerce (ICC) *Updated ICC Discussion Paper on the Adverse Effects of Discriminatory Taxes on Telecommunications Services*, Document No. 373/518 (Paris, France: ICC, December 2012), p.5.
[428] The National Tax Policy, 2008, p.78 at paragraph 60. *See also*, A Sanni, 'Multiplicity of Taxes in Nigeria: Issues, Problems and Solutions', (September, 2012) 3 (17) *International Journal of Business and Social Science*, 229.

nuisance taxes, levies, charges and fees".[429] On the other hand, 'illegal taxes' refer to taxes that are imposed by state actors without a legal basis.

Under the Nigerian Constitution, matters relating to taxation are established both in the Exclusive and Concurrent Legislative Lists, thus enabling all the three tiers of government to exercise some level of tax jurisdiction. The Exclusive List establishes the exclusive powers of the Federal Government to legislate on the "taxation of incomes, profits and capital gains", to the extent prescribed by the Constitution.[430] The Exclusive List also establishes the exclusive powers of the Federal Government to legislate on customs and excise duties.[431] In the exercise of the above powers, the Federal Government has imposed taxes and levies on telecommunications operators such as the company income tax[432] and annual operating levy.[433] On the other hand, the Concurrent Legislative List establishes the powers of the three tiers of government (Federal, State and Local Government) to collect taxes.[434] The Fourth Schedule to the Constitution also establishes the functions of a Local Government Council to include the collection of rates.[435]

In order to clearly outline the tax jurisdiction of three tiers of government, the Federal Government enacted the Taxes and Levies (Approved Rates for Collection) Act[436] which establishes the list of levies and taxies that can be collected by all the tiers

[429] Report on the Activities and Achievement of the Industry Working Group on Multiple Taxation (2012).
[430] Item 59, Exclusive Legislative List, Constitution of the Federal Republic of Nigeria 1999.
[431] Item 16, Exclusive Legislative List, Constitution of the Federal Republic of Nigeria (1999).
[432] Companies Income Tax Act, Cap 21 LFN, 2004, s. 9.
[433] NCC Annual Operating Levy Regulations 2014.
[434] Items 7 to 10, Concurrent Legislative List, Second Schedule to the Constitution of the Federal Republic of Nigeria, 1999.
[435] Item 1(b), Fourth Schedule to the Constitution of the Federal Republic of Nigeria, 1999.
[436] Taxes and Levies (Approved Rates for Collection) Act No.21, Cap T2 LFN 2004.

of government. In this respect, the Act establishes a list of 38 taxes that may be collected by the three tiers of government[437] and any tax or levy that is not covered within the scope of the Act is deemed illegal.[438] With respect to telecommunications matters, the Federal Government is entitled to collect the companies income tax, the value added tax and the education tax,[439] while State Governments are entitled to collect fees for the registration of business premises in urban and rural areas and the fees for the right of occupancy on lands owned by the State Government in urban areas of the State.[440] On the other hand, Local Governments are entitled to collect tenement rates fees for Rights of Occupancy on lands in rural areas (excluding those that are collectable by the Federal and State governments) and signboard and advertisement permit fees.[441]

However, despite the provisions of the Taxes and Levies (Approved Rates for Collection) Act, the exercise of tax jurisdiction by the three tiers of government has given rise to the imposition of multiple and illegal taxes/levies on telecommunications operators in Nigeria. Such taxes and levies are imposed by government authorities at all tiers of government through various guises such as development levy, environment impact assessment certification fees, development fees, site approval fees, mast renewal fees, mast premises registration fees, base station registration fee, annual charges, cell site revenue, building permits, ecological permits or infrastructural development levy. The imposition and collection of the above forms of taxes and charges generally vary across

[437] Schedule to the Taxes and Levies (Approved List for Collection) Act 1998.
[438] *Eti-Osa Local Government v Jegede* [2007] 10 NWLR Pt 537 at 545.
[439] Item 1, 4 and 5, Part 1, Schedule to the Taxes and Levies (Approved List for Collection) Act 1998.
[440] Items 7 and 10, Part II, Schedule to the Taxes and Levies (Approved List for Collection) Act 1998.
[441] Items 2, 7, and 20, Part III, Schedule to the Taxes and Levies (Approved List for Collection) Act 1998.

the 36 States and 774 Local Government areas that make up Nigeria.[442] The report of an Executive Commissioner of the NCC has noted several instances of such multiple taxes and charges. For example, in Abia State, the Infrastructural Development Fund Board demanded nineteen million Naira (₦19, 000,000.00) from an operator as infrastructural development levy. In Cross River State, the State's Internal Revenue Service is noted to have demanded the sum of five hundred and ten million Naira (₦510, 000,000.00) as the amount of cell site revenue due to the State (between 2005 and 2010). In Bauchi State, the Signage and Advertising Management Agency is noted have demanded seven hundred and fifty five million Naira (₦755, 000,000.00) from an operator as signage, branding and advert levy. In Delta State, the Ministry of Environment, is noted to demanded an operator to pay the sum of two hundred and seventy six million Naira (₦276,000,000.00) as ecological tariff.[443]

Apparently, the widespread incidence of exorbitant multiple charges and taxes on telecommunications operations indicates that the telecommunications industry is now being seen as a fertile ground for government revenue generation. However, the outcome is the existence of expensive governmental approval fees and charges that are confusing and difficult for telecommunications operators to administer across the different States and Local Governments in Nigeria. Also in many States and Local Governments, the

[442] The varying nature of taxes in Nigeria has already been captured thus: "The Nigerian Federation comprises three tiers of government – the Federal Government, 36 State Governments and the Federal Capital Territory and 774 Local Governments. The exact number of taxes levied on businesses seems to vary significantly between various States and Local governments throughout Nigeria and "businesses may be subject to as many as 100 different taxes, charges, fees and levies, and in some instances taxed for the same event or asset" that are levied by the three tiers of government". *See* M Pitigala and M Hope, 'Impact of Multiple Taxation on Competitiveness in Nigeria', (March, 2011) 16 *Africa Trade Policy*, 1-2.

[443] O Itanyi (Executive Commissioner NCC) 'Press Briefing on Recent Cases of Multiple Taxations and its Dangers to the Growing Telecoms Industry' (15 March, 2012) available at <http://www.ncc.gov.ng/index.php?option=com_docman&task=doc_download&gid=249&Itemid=>.

collection of such multiple taxes is governed by informal rules which allow a high degree of corruption and tax diversion.[444] For example, tax consultants at all tiers of government are noted to be paid a certain percentage of the revenue they are able to generate.[445] An undesirable outcome however is that the consultants dream up taxes and levies without a legal basis and then employ thugs and unscrupulous state security personnel as well as other unsanctioned methods to collect such illegal taxes. Such methods include the arbitrary closure of telecommunications sites and offices, physical attacks and intimidation of an operator's personnel and the seizure of equipment.[446] In some cases, Government agencies have disrupted the operation of telecommunications operators and also caused poor quality of services due to the arbitral shut down of base stations in the process of extracting multiple taxes and levies from operators.[447] According to the report of the NCC Industry Working Group on Multiple Taxation,

> [Government Ministries, Departments and Agencies (MDAs)] employ coercive means such as facility lock-outs to enforce compliance by telecommunications operators. Operators are denied access to such sites

[444] E Okpanachi, 'Federation and Economic Growth: the Importance of Context in Nigerian Public Finance Reform', (2010) 41 (2) *Publius: The Journal of Federalism*, 319.

[445] *Report of the Study Group on the Nigeria Tax System - Nigeria Tax Reform in 2003 and Beyond* (July, 2003) p.320. *See also*, A Sanni, 'Multiplicity of Taxes in Nigeria: Issues, Problems and Solutions', (September, 2012) 3 (17) *International Journal of Business and Social Science*, 232-236.

[446] Industry Working Group, *Position Paper on Hazards and Further Implications of Multiple Taxation and Regulation of the Communications Industry in Nigeria* (March, 2012) pp.4-5. *See also*, NCC, *2015 Year End Subscriber/Network Data Report for Telecommunications Operating Companies in Nigeria* (Abuja: NCC, 2013) pp.20-21.

[447] For example, in 2010, two MTN base stations in Abuja were shut down by the Abuja Metropolitan Municipal Council for non-payment of annual charges. In May 2010, the Osun State Capital Territory Development Authority shut down MTN sites in Osogbo over non-payment of land use clearance fees. In July 2010 the Abia State Task Force shut down five of Airtel's base stations over the non-payment of tower premises registration and renewal fees. *See* E Okonji, 'Ending Multiple Taxes in Telecoms', *ThisDay*, 18 September, 2014. In Ebonyi State, MTN's backbone and hub site was sealed in May 2010 by the Ebonyi State Environmental Protection Agency for what the Agency called non-payment of environmental impact assessment, monitoring sanitation, effluent discharge and environmental support fees for seven years. *See also*, P Osugwu, 'Fresh Trouble in Telecoms Sector-Senate Frowns at Non-Resolution of Indiscriminate Teleclosure', *Vanguard*, 27 August, 2012.

> for refueling, maintenance or fault resolution, leading to congestion and other quality of service deficiencies. Indeed, to ensure that operators feel the squeeze … the agents of the MDAs 'go for the jugular' by targeting Hub sites to which anywhere between 20 to 100 or more sites are parented. This effectively paralyses a good section of the network, causing complete network outage for the affected communities over an area that could stretch across as many as 2 or more adjoining States with quality of service deficiencies across a much wider area.[448]

However, a major problem with the multiple taxation of the Nigerian telecommunications industry is that it places heavy burdens on operators in an environment where the State appears to have failed in effectively fulfilling its basic responsibilities such as providing reliable and affordable access to electricity and addressing concerns for security of telecommunications infrastructure. For example, operators currently generate most of the electricity that is used to power their base stations and also provide security at such stations. Also, in an environment where multiple taxes and levies add to the operational costs of providing telecommunications services, their arbitral implementation further heightens the uncertainty of the business environment, and discourages operators from deploying new infrastructure to meet increasing consumer demand. Thus, the link between multiple taxes and the inability of telecommunications operators to rapidly deploy more infrastructure to meet consumer demands in Nigeria has already been noted by a report of the International Chamber of Commerce. According to the report,

[448]Industry Working Group, *Position Paper on Hazards and Further Implications of Multiple Taxation and Regulation of the Communications Industry in Nigeria* (March, 2012) p.6.

> "the Nigerian wireless sector has highlighted that the multiple taxation system focused on the industry has negatively impacted the ability to invest in Infrastructure such towers/base stations. The industry has built only 20,000 of the estimated 70,000 towers needed across the country".[449]

Another implication of multiple and illegal taxation in the industry is that operators would definitely have to raise consumer prices in order address the cost of compliance.[450] This could also have the effect of reducing consumer demand for telecommunications services and generally increasing the costs of businesses that are dependent on telecommunications.

To some extent, the imposition of multiple taxes on telecommunications operators appears to reflect the outdated view that telecommunications services should be taxed as luxuries affordable only by the rich, rather than as essential services that should be made available and affordable for all. However, the imposition of such high tax burdens produces the most stifling impact on low income consumers who represent the largest population of consumers, while also hindering the universal adoption of fixed or mobile broadband and the timely achievement of the Millennium Development Goals. Hence, the current state of multiple and illegal taxation in the telecommunications industry

[449] International Chamber of Commerce, (ICC) *Updated ICC Discussion Paper on the Adverse Effects of Discriminatory Taxes on Telecommunications Services*, Document No. 373/518 (Paris, France: ICC, December 2012), p.5.

[450] For example, in 2014 the Association of Licensed Telecoms Operators of Nigeria (ALTON) issued a warning to the effect that operators would have to increase the costs of services in States where multiple taxation was prevalent. According to the Chairman of ALTON, "in States where telecommunications operations become increasingly difficult due to issues of multiple taxes and levies and continuous closure of sites, we will have no option than to consider introduction of new tariff regimes to reflect the high cost of that operating environment". *See* E Okonji, 'Ending Multiple Taxes in Telecoms', *ThisDay*, 18 September, 2014.

constitutes an impediment to the achievement of universal service objectives and further limits the participation of Nigeria in the global information society.

3.5.3 Security of Telecommunications Infrastructure

Security concerns also constitute a major challenge to the deployment of telecommunications network infrastructure in Nigeria. Major security concerns include theft and deliberate destruction of telecommunications infrastructure and other ancillary infrastructure.[451] The NCC estimates that telecommunications operators daily lose about 16 to 17 of their power generating sets to theft, resulting in a yearly loss of over 6000 generating sets that are used to power base stations. Other items that are usually stolen include diesel, batteries and solar panels.[452] There is also the issue of the vandalization of equipment at base stations by community miscreants and other criminal actors in order to force operators to pay appeasement fees for siting telecommunications infrastructure.[453] Another major problem is the vandalization of fiber optic cables. In 2013, the NCC noted that it had recorded about 1200 fiber cable cuts in a few months.[454] One operator is reported to annually spend about 90 million USD to repair cuts to its fiber cables.[455] In some cases, frequent cuts to fiber optic cables arise from road works and various uncoordinated construction works. However, a report indicates that "it also widely believed by operators that some [cable] cuts are a form of commercial vandalism

[451] R Johnson, *African Mobile Fact Book 2012* (England: Blycroft Publishing, March 2012), p.10.

[452] E Okonji, 'Telecos Lose 6000 Generators in One Year to Miscreants', *ThisDay* (15 February, 2013) available at <http://allafrica.com/stories/201302150615.html> last accessed on 30 March, 2016. *See* GSMA, *Powering Telecoms: West Africa Market Analysis* (London: GSMA, 2013) p.22.

[453] Editorial, 'Operators Appeal to Government amid Vandalism and Theft', *News 24*, (22 October, 2013) available at <http://www.news24.com.ng/Business/News/Operators-appeal-to-government-amid-vandalism-theft-20131022> last accessed on 30 March, 2016. *See also*, F Akanbi and E Okonji, 'Nigerians Express Frustration over Telecom Services', *ThisDay*, 1 June, 2014.

[454] P Osuagwu, 'Why Telecom Operators May Not Invest More in Nigeria', *The Vanguard*, 6 August, 2014.

[455] The Nigerian National Broadband Plan 2013-2018 (Abuja: Presidential Committee on Broadband, 2013) p.53.

designed to damage competitor operators".[456] Also, in some cases cables may be deliberately vandalized to generate employment for workers within the vicinity of the cut.[457] However, one of the most common forms of fiber cable vandalization involve criminals digging up the fiber cables with the expectation that they will uncover valuable copper cable that can be sold in the black market.[458]

A very worrisome dimension is the destruction of telecommunications towers and base stations by terrorist actors. For over half a decade now Nigeria has been challenged by the terrorist activities of the Boko Haram Islamist sect in the North-Eastern part of the country.[459] In order to effectively degrade the activities of the sect, in July 2011, the Federal Government through the Office of the National Security Adviser sought the assistance the GSM operators to intercept and track the communications of the sect's members including requiring the operators to dedicate emergency toll-free lines to the public with a view to fast tracking intelligence gathering on the sect.[460] On 14 February 2012, the sect threatened that it will attack the facilities of GSM operators and the offices of the NCC for providing assistance to security agencies in bugging the lines of their members and thereby enabling security agents to track and arrest of their members.[461] Later in September 2012, the sect launched coordinated attacks on telecommunications

[456] R Southwood, *Strategies for the Promotion of Broadband Services in Nigeria*, (Geneva: Broadband Commission/ITU, 2012) p.7.
[457] *Ibid.*
[458] *Ibid*.
[459] F Chothia, 'Who are Nigeria's Boko Haram Islamists?', *BBC News*, 4 May, 2015, available at <http://www.bbc.com/news/world-africa-13809501>. last accessed on 30 March, 2016.
[460] S Iroegbu, 'FG to Provide Toll-Free Lines to Tackle Boko Haram', *ThisDay*, 27 July 2011, available at <http://www.thisdaylive.com/articles/fg-to-provide-toll-free-lines-to-tackle-boko-haram/ 957841> last accessed on 30 March, 2016.
[461] F S Iqtidaruddin, 'Nigeria's Boko Haram Threatens to Attack Telecom Firms', *Business Recorder*, 14 February, 2012, available at <htttp://www.brecorder.com/world/africa/45736-nigerias-boko-haram-threatens-to-attack-telecoms-firms.html> last accessed on 30 March, 2016. *See also*, F Onuoha, 'Understanding Boko Haram's Attacks on Telecommunication Infrastructure', in l Mantzikos (ed) *Boko Haram: Anatomy of a Crisis* (Bristol, United Kingdom: e-International Relations, 2013) p.23.

base stations across five major cities in Northern Nigeria (Bauchi, Gombe, Maiduguri, Kano and Potiskum). By the end of 2012, the sect had destroyed over 150 base stations in Northern Nigeria and thus exacerbating quality of service issues in the region and further straining the operational costs of telecommunications operators.[462] Aside from the sect's destruction of base stations there is also the issue of the safety of the maintenance personnel that are deployed to repair the damaged stations.[463]

More worrisome is the resulting loss of investor confidence due to concerns that similar coordinated terrorist attacks could also be executed against telecommunications facilities located across the country. Loss of investor confidence due to the vandalization of base stations is not only caused by the terrorist activities of the Boko Haram sect, but also by the widespread acts of vandalism targeting telecommunications infrastructure across the country.[464] For example, due to incidents of vandalism, it is estimated that about 2 to 3 percent of Nigeria's base stations are usually shut down at any point in time, resulting in very significant losses for operators.[465] In order to effectively address the vandalization of telecommunications infrastructure, stakeholders including the Ministry of Communications Technology, the NCC and ALTON have proposed the enactment of a law that will designate telecommunications facilities as 'critical national

[462] F Onuoha, 'Understanding Boko Haram's Attacks on Telecommunication Infrastructure', *Ibid*, p.24. *See also*, E Okonji, 'Replacement of Damaged Base Stations to Cost Telecoms N16 Billion', *ThisDay*, 7 January, 2013, p.1.

[463] B Olaleye, 'Bombing: Over N3.9 Trillion Telecommunications Infrastructure under Threat', *The Sun* (11 September, 2012) available at<http://www.osundefender.org/2012/09/11/bombing-over-n3-9trillion-telecoms-infrastructure-under-threat/> last accessed on 30 March, 2016.

[464]A B Ola and Y YAdewale, 'Infrastructural Vandalism in Nigerian Cities: The Case of Osogbo, Osun State', (2014) 4 (3) *Research on Humanities and Social Sciences*, 49-59.

[465] P Osuagwu, 'Why Telecom Operators May Not Invest More in Nigeria', *The Vanguard* (6 August, 2014).

infrastructure'[466] and also criminalize acts of vandalism targeting such facilities with severe penalties as seen in many countries.[467]

To some extent, it may seem that the enactment of the Nigerian Cybercrimes Act (2015) have partly addressed the need for a law that will designate telecommunications facilities as critical national information infrastructure.[468] One of the objectives of the Act is to ensure the protection of 'critical national information infrastructure'.[469] The Act does not define 'critical national information infrastructure', however, it defines 'critical infrastructure' as "systems and assets which are so vital to the country that the destruction of such systems and assets would have an impact on the security, national economic security, national public health and safety of the country".[470] Section 3(1) of the Act provides that:

> the President may on the recommendation of the National Security Adviser by [an] Order published in the Federal Gazette designate certain *computer systems and/or networks whether physical or virtual*…vital to [the] country that the incapacity or destruction of, or interference with such system and assets would have a debilitating impact on security, national or economic security, national public health and safety, or any

[466]A Ogbadu, 'Telecommunications Infrastructure as Critical National Infrastructure', (August, 2015) 4 *The Communicator*, available at <http://www.ncc.gov.ng/thecommunicator/index.php?option=com_content&view=article&id=538&Itemid=5>. *See also*, NCC Industry Working Group on Multiple Taxation, *Brief on the Designation of Telecommunications Infrastructure as Critical National infrastructure*, pp.8-9, available at <http://.http://www.ncc.gov.ng/index.php?option=com_content&view=article&id=839&Itemid=195> last accessed on 30 March, 2016.

[467]U J Orji, *Cybersecurity Law and Regulation* (Nijmegen, The Netherlands: Wolf Legal Publishers, 2012) pp.24-30, 224 - 225, 230, 248-250, 296,317& 412.

[468] Nigerian Cybercrimes (Prohibition, Prevention Etc) Act 2015.

[469] Nigerian Cybercrimes Act 2015, s. 1(b).

[470] S. 58 *Ibid*.

combination of these matters as constituting critical national information infrastructure.[471]

The Act does not explicitly provide for the protection of telecommunications facilities, however, it is apparent within the above context that '*computer systems and/or networks whether physical or virtual*' would also include physical elements of telecommunications network such as network infrastructure that facilitates the exchange of information between computer systems. This is due to the effect of the convergence of computer and telecommunications technologies which makes it impossible to explicitly distinguish between computer networks and telecommunications networks in modern telecommunications[472]since most modern telecommunications networks simultaneously carry information/communications to both telecommunications devices and computer systems.[473] Also, section 58 of the Act broadly defines a 'computer system' to include "…any type of device with data processing capabilities including but not limited to, computers and mobile phones".[474] The Act also defines a 'network' as "a collection of hardware components and computers interconnected by communications channels that allow the sharing of resources and information".[475] Hence, within the context of section 3(1) of the Cybercrime Act a 'computer network' would include a telecommunications network.

A Presidential Order that is made under section 3(1) of the Cybercrime Act may prescribe minimum standards, guidelines, or rules for the protection or general

[471] S. 3 (1) *Ibid.*
[472] U J Orji, *Cybersecurity Law and Regulation* (Nijmegen, The Netherlands: Wolf Legal Publishers, 2012) p.21.
[473] *Ibid.*
[474]Cybercrime Act 2015, s.58.
[475] S. 58 *Ibid*.

management of critical information infrastructure.[476] The Act also criminalizes malicious acts against critical national information infrastructure.[477] However, the Act does not explicitly criminalize the physical destruction or vandalization of critical national information infrastructure. Rather, it criminalizes core cybercrimes such as unauthorized access to a computer system (hacking), the dissemination of computer viruses and other electronic crimes that target critical national information infrastructure. Hence, in the present circumstance, the Act can only be made to protect telecommunications network facilities where a Presidential Order is made under section 3(1) of the Act to designate such facilities as critical national information infrastructure and also provide for their protection. This also implies that still need for the enactment of a law that will explicitly criminalize the physical destruction or vandalization of telecommunications network facilities. Also, the establishment of a Presidential Order on the protection of telecommunications network facilities as critical national information infrastructure will not be enough in the absence of effective enforcement mechanisms.

3.5.4 Lack of Adequate Power Supply

According to a report of the United States Energy Information Administration (EIA), "Nigeria has one of the lowest rates of net electricity generation per capital in the world. Electricity generation falls short of demand, resulting in load shedding, blackouts and a reliance on private generators".[478] Another report suggests that Nigeria produces

[476] Cybercrime Act 2015, s. 3(2).
[477] S. 5 *Ibid.*
[478] United States Energy Information Administration (EIA), *Country Analysis Brief: Nigeria* (27 February, 2015) p.17, available at <http://www.eia.gov/beta/international/analysis.cfm?iso=NGA> last accessed on 30 March, 2016.

only 10% of its electricity requirements.[479] Recent estimates from the Federal Ministry of Power indicate that Nigeria generates about 4.8107 Megawatts of electricity out of which 4.026.49 Megawatt is distributed.[480] This however falls short of the country's estimated electricity demand of over 12,000 Megawatts.[481] The above state of affairs has implications for commercial activities in Nigeria as over 90 percent of businesses must generate most of their electricity demands from private supplies which are usually generators running on diesel or petrol.[482] This comes with very huge costs to business operators, the Nigerian economy and the natural environment. With respect to the telecommunications sector, the need for adequate and reliable power supply cannot be overemphasized as almost all telecommunications facilities require power to function. Also, power failures and unreliable power with surges are noted to cause significant damage and downtime to equipment that control telecommunications networks.[483]

Due to the poor state of power supply in Nigeria, telecommunications operators privately generate most of the electricity that power their base stations and other network

[479] R Southwood, *Strategies for the Promotion of Broadband Services and Infrastructure. A Case Study of Nigeria* (Geneva: Broadband Commission/ITU, 2012) p.8.

[480] Federal Ministry of Power, *Power Generation Statistics* (25 August, 2015) available at <http://www.power.gov.ng>.

[481] *Ibid*.

[482] African Development Bank, *Nigeria Economic and Power Sector Reform Program (EPSERP) Appraisal Report*, p vii, available at <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/Nigeria_The_Economic_and_Power_Sector_Reform_Program_EPSERP_Appraisal_Report.pdf> last accessed on 30 March, 2016. *See also* U J Orji, 'Enhancing Sustainable Development in Nigeria: A Discourse on the Legal Basis and Proposals to Strengthen Legal and Policy Strategies for its Implementation', (March, 2013) 39 (1) *Commonwealth Law Bulletin*, 177; U J Orji, *Realizing Agenda 21: A Nigerian Perspective* (Saarbrucken, Germany: VDM Verlag Dr. Muller, 2010) pp.58-59.

[483] R F Weir, *Heat and Power Problems are the Greatest Risks to Telecom Equipment*, available at <http://www.hsb.com/Thelocomotive/HeatAndPowerProblemArethetriskstoTelecomEquipment.aspx>. *See also*, DPS Telecom, *Power Outages Cause Long-Term Damage to Your Equipment and Your Business*, available at <http://www.dpstele.com/network-monitoring/outage/index.php> last accessed on 30 March, 2016.

facilities in order to provide services to consumers. A 2013 study by the GSMA indicates that:

> Out of the total of 24,252 telecommunications sites (base stations) in Nigeria, around 52 percent of the sites are off-grid (i.e.) located in places without access to grid power supply, against only 11 percent in Ghana. The remaining sites [in Ghana] are on-grid sites and have grid power supply of variable quality and reliability. [However] due to Nigeria's poor grid power supply over 81 percent of its on-grid sites suffer power outages for up to 6 hours a day.[484]

A more recent disclosure by the CEO of Helios Towers Nigeria Ltd, a leading infrastructure provider that owns over 1300 telecommunications towers in Nigeria indicates that out of the 25,000 towers that exist in Nigeria that "only 25-35 percent are connected to the national power grid, and where this connection exists, power supply is only for an average of 4-5 hours per day".[485] Consequently, between 65 to 75 percent of tower sites run only on diesel powered generators.[486] In most cases, operators have to deploy two diesel generators as well as solar energy panels to power each base station. This state of affairs however comes with huge cost implications for telecommunications operators and consumers in addition to perennial concerns for quality of service. Thus, in order to keep power available at the base stations for 24 hours a day and all year round, operators spend very huge amounts of money to fuel and maintain the generators. For

[484] GSMA, *Powering Telecoms: West Africa Market Analysis – Sizing the Potential for Green Telecoms in Nigeria and Ghana* (London: GSMA, 2013) p.6.
[485] E Okonji, 'Bajaj: Telecoms Service Quality Must Be Addressed Through Collective Responsibility', (Interview), *ThisDay*, 20 March, 2014, available at <http://allafrica.com/stories/ 201403210529.html> last accessed on 30 March, 2016.
[486] *Ibid*.

example, ALTON estimates that it costs over N5 billion per month to operate two diesel generators in each of the over 25,000 base stations in Nigeria.[487] Another estimate indicates that "up to 13 billion USD a year is spent on diesel generators".[488] In 2013, MTN reported that it spent N34 billion on the cost of purchasing diesel to power its base stations.[489] It is estimated that operators in Nigeria spend over 80 percent of their operating costs on power generation compared to very low margins of about 5 percent in some African countries.[490] Thus, the cost of generating power from generators is observed to be "five to six times more expensive than the cost of grid power [and] results in telecommunications costs in Nigeria being three times the costs of other markets in Africa".[491] The cost implications for the supply of services are also staggering when compared with the situation in some other developing countries outside Africa. For example, on the average it costs a consumer in Nigeria seven times more to make voice calls, when compared to a consumer in India.[492] Several public hearings conducted by the Nigerian Senate and House of Representatives have also revealed that the power challenge contribute to over 40 percent of the quality of service issues that affect consumers in the Nigerian telecommunications industry.[493]

[487] A Adeputun, 'Why Quality of Telecoms Service Remains Poor', *The Guardian*, 13 May, 2015.
[488] R Southwood, *Strategies for the Promotion of Broadband Services and Infrastructure. A Case Study of Nigeria* (Geneva: Broadband Commission/ITU, 2012) p.8.
[489] NCC, *2013 Year End Subscriber/Network Data Report for Telecommunications Companies in Nigeria* (NCC: Abuja, 2013) p.21. In 2007, MTN stated it uses "two power generators per base station and three at its switch centers, causing it to spend about 12 billion USD on generating sets instead of investing the money in developing infrastructure for enhanced service delivery". *See* 'Reps Tackle GSM Providers Over Poor Services', *Vanguard*, 23 July, 2007.
[490] A Adeputun, 'Why Quality of Telecoms Service Remains Poor', *The Guardian*, 13 May, 2015.
[491] E Okonji, 'Bajaj: Telecoms Service Quality Must Be Addressed Through Collective Responsibility', (Interview), *ThisDay*, 20 March, 2014.
[492] E Okonji, *Ibid*.
[493] A Adeputun, *Ibid*.

To some extent, the cost implications of inadequate power supply could be addressed where operators engage in passive infrastructure sharing.[494] 'Infrastructure sharing' refers to "the joint use of network facilities by two or more operators subject to an agreement specifying relevant technical and commercial conditions".[495] Through such arrangement operators could share available infrastructure including site space and power supply.[496] This helps operators to rationalize or reduce operational costs that may arise from providing power and other supporting facilities. There been some progress towards passive infrastructure sharing amongst operators in the Nigerian telecommunications industry.[497] Examples include the infrastructure sharing arrangement between MTN and ZAIN (now Airtel).[498] However, while the promotion of infrastructure sharing will reduce operational costs to some extent, it will not entirely address the challenge of inadequate power supply. Another option is for the Government to consider supporting operators to carry out a large scale implementation of solar energy solutions to power their base stations. Already, operators are making significant investments in both solar powered and hybrid powered base stations.[499] However, there is need for the Government to encourage such investments. In particular, there is need to consider the option of

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[494] KPMG, 'Passive Infrastructure sharing in Telecommunications', (2009) p.3, available at<http://www.kpmg.com/BE/en/issuesAndinsights/Articlespublications/Documents/passive-infrastructure-sharing-in-Telecommunciations.pdf> last accessed on 30 March, 2016.

[495] Paragraph 18, NCC Guidelines on Collocation and Infrastructure Sharing, available at <http://www.ncc.gov.ng/ files/Legal-Guidelines_Collocation_and_Infrastructure_Sharing.pdf>.

[496] G Hasbani, *et al*, *Telecom Infrastructure Sharing: Regulatory Enablers and Economic Benefits* (USA: Booz & Company, 2007) p.6.

[497] C Uba, 'Infrastructure Sharing the Way Forward for Nigerian Telecoms', available at <http:// www.afrotrading.net/index.php?option=com-content&view=article&id=705%3Ainfrastructure-sharing-the-way-forward-for-Nigeria>. *See also*, B Adewumi, 'Why Telecoms Infrastructure Sharing Remains the in-Thing', *The Tribune*, 9 June, 2015, available at <http://www.tribuneonlineng.com/content/why-telecoms-infrastructure-sharing-remains-thing> last accessed on 30 March, 2016.

[498] For an extensive discussion *see*, E Onuzuruike, *Telecom Infrastructure Sharing as a Strategy for Cost Optimization and Revenue Generation: A Case Study of MTN Nigeria/Zain Nigeria Collocation* (A Master's Degree Thesis Submitted at the School of Management Blekinge Institute of Technology, Sweden, December 2009).

[499] B Orismisan, 'Nigerian Set for Solar Powered Network', *The Guardian*, 27 June, 2012.

granting fiscal incentives that will encourage operators to use solar energy to power their base stations. This will not only reduce operational costs, but also reduce carbon emissions and the theft of power generating sets at base stations. Such fiscal incentives will help to cushion the initial capital outlay that is required to deploy solar energy systems on a large scale without exposing operators to significant costs that will be eventually transferred to consumers in form of high tariffs.

3.5.5 Unharmonized Administration of 'Right of Way' Permits

'Right of Way' is a term that classifies a legal right established either by contract, usage or by a public authority which authorizes passage through a specific route or property owned by another.[500] Within the telecommunications context, 'right of way' generally refers to an authorization issued by a government authority permitting an operator to deploy telecommunications infrastructure such as fiber optic cables on public roads. In Nigeria, the practice of federalism entitles all the three tiers of government to exercise some level of jurisdiction over land in accordance with the provisions of the Land Use Act and other relevant laws. This state of affairs requires operators to obtain 'right of way' permits from authorities either at the Federal, State or Local tier of government before deploying infrastructure along public roads within the jurisdiction of any of these tiers of government. However, this has also resulted to the unharmonized administration of right of way permits across Nigeria and further slowing investments in the deployment of fiber optic cable infrastructure.[501] Thus, according to the NCC "fiber

[500] B A. Garner (ed), *The Black's Law Dictionary* (9th edn, St Paul MN, United States: West Publishing Co, 2009) p.1440.

[501] S A Ehikioya, *Broadband Initiatives and Challenges: West African Sub-Region as a Case Study* (27 March, 2012), p.5, available at <http://technologytimes.ng/nigeria-will-be-key-driver-of-west-african-broadband-future-ehikioya-says/> last accessed on 30 March, 2016.

deployment in Nigeria has … been plagued by inconsistency in administrative procedures regarding 'right of way permits'…".[502] In particular, the unharmonized administration of right of way permits increases the regulatory difficulties that are associated with obtaining such permits. Operators have stated that the cost for the procuring of right of way permits has been "prohibitively expansive and … time consuming",[503] with Local Government authorities usually charging disproportionately high amounts.[504]According to the National Broadband Plan "available data shows that the cost of obtaining right of way could account for as high as 50 percent to 70 percent of the total cost of deploying fiber in various States of the Federation. Lengthy approval times (in some cases up to two years) also contribute greatly to delays and escalation of cost in rollout of broadband networks".[505] This state of affairs has generally hindered the efforts of operators to build out backbone infrastructure that will facilitate access to broadband capacity in Nigeria.

In order to address right of way issues on Federal roads, the Federal Ministry of Works and the Federal Ministry of Communications Technology developed guidelines for the effective administration of right of way permits. The Guidelines aim to reduce cost of obtaining right of way permits, while also eliminating duplication and reducing fiber cuts. The Guidelines are also expected to serve as examples for the administration of right of way permits on State and Local Government roads.[506] The Federal Government has also undertaken discussions with some State Governments on how to

[502] E Juwah, (Executive Vice Chairman NCC), 'Nigerian Communication Commission: Delivering Broadband for Development in Nigeria – The open Access Model', (June, 2011) 5 *ITU News*, 26.
[503]The Nigerian National Broadband Plan 2013 – 2018 (Abuja: Presidential Committee on Broadband, 2013) p.52.
[504] R Southwood, *Strategies for the Promotion of Broadband Services and Infrastructure. A Case Study of Nigeria* (Geneva: Broadband Commission/ITU, 2012) p.7.
[505] The Nigerian National Broadband Plan 2013 – 2018 (Abuja: Presidential Committee on Broadband, 2013) p.52.
[506]The Nigerian National Broadband Plan 2013 – 2018, p.73.

simplify right of way administration including the possible reduction or outright wavier of right of way fees for a period of four years in order to boost rapid broadband expansion.[507] This appears to be achieving some level of success. For example in 2014, the Federal Government developed the 'Smart State Initiative' and signed Memorandum of Understandings (MoU) with three States (Lagos, Cross River and Bayelsa) and the Federal Capital Territory. The MoU under the Smart State initiative sought to significantly reduce right of way fees and also standardize state levies and taxes on telecommunications infrastructure. Under the MoU the Lagos State agreed to reduce its right of way fees by 85 percent.[508] However, it may be challenging to sustain this approach across all the States and Local Governments in the country due to the fact that the grant of right of way permits is seen as huge revenue opportunity by many government authorities.

The adoption of the '*dig once*' approach may effectively reduce challenges arising from right of way issues. This approach entails the construction of a specially designed underground conduit along public roads which would allow operators to simply pass their fiber cables through the conduit without going through the process of excavating the ground, and thus reducing the need to obtain a right of way permit. This approach is being applied with respect to federal and tribal lands in the United States through the Presidential Executive Order 13616 of 2012.[509] The Executive Order seeks to address right of way issues on federal lands, federally assisted highways, and tribal and individual

[507] *Ibid*, p.73.

[508] Alliance for Affordable Internet, 'Nigeria Gets Smarter as States Sign up to Reduce Cost of Running Telecoms Services', (19 December, 2014) available at<http://www.a4ai.org/nigeria-gets-smarter-as-states-sign-up-to-reduce-cost-of-running-telecoms-services> last accessed on 30 March, 2016.

[509] Presidential Documents, Executive Order 13616 of June 14, 2012 – Accelerating Broadband Infrastructure Deployment, *Federal Register* (June 20, 2012) Vol. 77, No 119. [Hereafter Executive Order 13616].

Indian trust lands in order to facilitate broadband deployment. The Executive Order defines 'dig once requirements' as "requirements designed to reduce the number and scale of repeated excavations for the installation and maintenance of broadband facilities in the rights of way".[510] In particular, the Executive Order declares that "the installation of underground fiber conduit along highway and roadway rights of way can improve traffic flow and safety…and reduce the cost of future broadband deployment".[511] Accordingly, the Order establishes measures to minimize excavations that characterize broadband deployment including:

(a) directing the United States Department of Transportation to work with State and Local Governments to help them develop and implement best practices on dig once requirement;[512]

(b) directing the United States Department of Interior and other relevant agencies to encourage the deployment of broadband infrastructure in conjunction with federal highway construction;[513]

(c) directing the United States Department of Transportation in consultation with the American Association of State Highway and Transportation Officials to create an online platform where States and Local governments can publicly publish their rights of way laws. [514]

The implementation of the above measures within a short space of time is noted have brought significant improvements in several areas of broadband development including fostering the deployment of conduit for broadband facilitates in conjunction

[510] S. 5(b) Executive Order 13616.
[511] S. 5(a) Executive Order 13616.
[512] S. 5(a) (ii) Executive Order 13616.
[513] S. 5(a) (iii) Executive Order 13616.
[514] S. 5(a) (v) Executive Order 13616.

with federal or federal assisted highway construction. It has also promoted the establishment of 'dig once' best practices by State and Local Governments. For example, some States and Local Government planning or transportation agencies have engaged in 'joint trench' agreements ('joint use' or 'joint build') with telecommunications operators when plans are made for excavation. This arrangement requires that all operators will install their infrastructure at the same time, in the same trench or in the same conduit and also share the cost of installing the infrastructure.[515]

[515] Federal Property Working Group, *Implementing Executive Order 13616: Progress on Accelerating Broadband Infrastructure Deployment* (Washington DC, August, 2013), p.8.

CHAPTER FOUR

THE LEGAL REGIME FOR CONSUMER PROTECTION IN TELECOMMUNICATIONS INDUSTRY

4.1 The Concept of Consumer Protection

It appears imperative to first consider the meaning of a 'consumer' before defining the concept of 'consumer protection'. The Blacks Law Dictionary defines a 'consumer' as "a person who buys goods or services for personal, family or household use, with no intention of resale [or] a natural person who uses products for personal rather than business purpose".[516] Another definition states that a 'consumer' is a "[person] who uses or requests a service for non-business use and would include someone not contractually bound to the supplier".[517] The Nigerian Consumer Protection Council Act also defines a 'consumer' as "an individual who purchases, uses, maintains or disposes of product or services".[518] Thus, in generic terms, a 'consumer' may be defined as an 'end-user' of goods or services. In the telecommunications context, the NCA defines a 'consumer' as "any person who subscribes to and uses a communication service".[519] Hence, a telecommunications consumer includes a 'customer' or 'subscriber' that has signed up to use a telecommunication service and uses such service.

[516] B A Garner (ed), *The Black's Law Dictionary* (9th edn, St Paul MN, United States: West Publishing Co, 2009) p.358.
[517] E Newman, 'Consumer Protection and Telecommunications', in I Walden (ed) *Telecommunications Law and Regulation* (Oxford: Oxford University Press, 2012) p.455.
[518] Consumer Protection Act 1992, s.32.
[519] NCA 2003, s.157.

'Consumer protection' refers to the "act of safeguarding the interests of the consumer in matters relating to the supply of goods and services".[520] Accordingly, the concept of consumer protection is generally used to classify measures that seek to ensure that consumers are fairly treated and that their rights are protected in commercial transactions that involve the supply goods or services. Thus, the concept of consumer protection generally aims to prevent the suppliers of goods or services from taking advantage of consumers while also ensuring that consumers obtain redress for defective goods or services. Consumer protection also promotes market competition by checking unfair market practices that affect consumers.[521] In legal literature, the concept of consumer protection is generally explained and justified with the concept of the 'weaker party'.[522] This is because consumers are generally considered to be 'weaker' than their contracting partners and are assumed to be unable to protect their interests due to an inferior bargaining power.[523] Another reason is because consumers are less knowledgeable about products and contracts than service providers.[524]

4.2 The Essence of Consumer Protection in Telecommunications

Generally, the essence of consumer protection is underscored by the need to prevent suppliers from exploiting the vulnerability of consumers. This need appears to arise from reasons including: the disparity between the bargaining power and resources of the consumer and that of the supplier, and the disparity between the knowledge of a supplier

[520] F Monye, *Law of Consumer Protection* (Ibadan: Spectrum Books Ltd, 2003) p.19.
[521] T S Shankyula, 'An Analysis of the Market Economy Approach to Consumer Protection', *Nigerian Institute of Advanced Legal Studies, Journal of Business Law*, 64, available at <http://www.nials-nigeria.org/journals/Shankyula%20Tersoobus.pdf> last accessed on 30 March, 2016. *See also* G Howells, 'Consumer Representation', (1993) 17 *Consumer Law Journal* ,18.
[522] G Ruhl, 'Consumer Protection in Choice of Law', (2011) 44 *Cornell International Law Journal*, 571.
[523] *Ibid*.
[524] *Ibid*.

and that of the consumer with respect to a products or service.[525]Also, there is the assumption that suppliers given their expertise and knowledge can manipulate demand and prices to the determinant of consumers and also diminish the ability of consumers to make choices.[526] In the telecommunications context, the essence of consumer protection is noted to arise from two major reasons. The first reason is that telecommunications services "are considered to be so important to people's lives that measures have been put in place to ensure that people have access to them, and are not prevented from using them".[527] The second reason is that following the end of the era of monopolies in telecommunications markets, regulation has been necessary to ensure the development of competitive markets. In this respect, the introduction of competition is seen as being favorable to consumers in terms of choice, cost and quality services.[528] Also, regulatory intervention to promote competition has usually sought to uphold a minimum set of consumer rights.[529] However, with the introduction of competition in telecommunications markets it may seem in theory that the need for sector specific consumer protection may not exist, because a consumer who is dissatisfied has the option of simply switching to a service provider that offers better services. Also, the availability of alternative services due to competition may also seem in theory that every telecommunications service provider that wants to remain in business has to ensure that its subscribers are satisfied with the service they getting in order to ensure that they do not switch to a competing

[525]B B Kanyip, 'Consumer Redress', (1998) 2 (2) *Modern Practice Journal of Finance and Investment Law*,76.
[526]C J Mgbeokwere, 'Consumer Protection under the Communications Act 2003: A Critical Appraisal', A Master of Laws (LL.M) Thesis Submitted at the Faculty of Law, University of Ibadan, March 2009, p.7.
[527] E Newman, 'Consumer Protection and Telecommunications', in I Walden (ed) *Telecommunications Law and Regulation* (Oxford: Oxford University Press, 2012) p.453.
[528] *Ibid.*
[529] *Ibid*.

service provider.[530] Nevertheless, despite the introduction of competition in telecommunications markets, the continued provision of sector specific consumer protection measures is justified on the basis that "competition alone may not be enough to satisfy the needs of all citizens and protect users' rights". Consequently, additional measures such as consumer protection laws are needed to help "balance the respective bargaining positions of consumers and the [telecommunications] companies with whom they contract." [531] Another justification for sector specific consumer protection measures in telecommunications is that such measures enhance consumer confidence and also stimulate consumer demand[532] and market competition.[533]

Specific consumer rights in telecommunications include: the right to information; the right to quality of service; the right to access services; the right to privacy of communications data; the right to the confidentiality of subscriber data; the right to make complaints; the right to the portability of telephone numbers; the right to terminate or change a service contract; the right to block unsolicited advertisements; the right to accurate billing; the right to compensation in case of service interruptions, and; the right to access emergency numbers.[534] Currently, many countries including Nigeria have established sector specific consumer protection regimes for telecommunications.[535]

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[530]E Newman, 'Consumer Protection and Telecommunications', in I Walden (ed) *Telecommunications Law and Regulation* (Oxford: Oxford University Press, 2012), p.454.

[531] *Ibid*, p.455.

[532] R Stevens, *Consumer Protection: Meeting the Expectations of the Connected Consumer*, GSR Discussion Paper (Geneva: ITU, 2009) p.4.

[533] E Newman, 'Consumer Protection and Telecommunications', in I Walden (ed) *Telecommunications Law and Regulation* (Oxford: Oxford University Press, 2012) p.455.

[534]R Stevens, *Regulation and Consumer Protection in a Converging Environment* (Geneva: ITU, March 2013). *See also* Consumer Protection Council, *A Compendium of the Rights of Telecom Subscribers in Nigeria* (Abuja: Consumer Protection Council, 2014).

[535] R Stevens, *Consumer Protection: Meeting the Expectations of the Connected Consumer*, GSR Discussion Paper (Geneva: ITU, 2009) p.4.

4.3 The Consumer Protection Regime in the Nigerian Telecommunications Industry

Consumer protection issues in the Nigerian telecommunications industry include: poor quality of service; inadequate protection of subscriber data; high incidence of unsolicited communications including advertisements, telemarketing and caller tunes; high incidence of billing for unsolicited services; poor customer service; high tariffs; inadequate legal protection of subscriber communications, and; the influx of sub-standard telecommunications devices.[536] These issues will be elaborately examined within the context of the NCA and its subsidiary legislations as well as other regimes including the Standard Organization of Nigeria (SON) Act and the Consumer Protection Council (CPC) Act. The NCA and its subsidiary legislations establish a comprehensive sector specific regime for the protection of consumers in the telecommunications industry.[537] The CPC Act establishes a general legal framework for the protection of consumers in Nigeria,[538] while the SON Act establishes a framework for the standardizing and certifying products in Nigeria in order to ensure quality control.[539]

4.4 Consumer Protection under the NCA

The NCA establishes a consumer protection regime to address issues[540] including quality of service concerns,[541] and the resolution of consumer complaints and disputes.[542] Service providers are also required to "deal reasonably with consumers; and adequately

[536] Consumer Protection Council, *A Compendium of the Rights of Telecom Subscribers in Nigeria* (Consumer Protection Council: Abuja, 2014).
[537] NCA 2003, s. 1(g).
[538] Consumer Protection council Act 1992, s. 2.
[539] Standard Organization of Nigeria 1990, s.4 (1).
[540] NCA 2003, Chapter VII.
[541] NCA 2003, s.104.
[542] S. 105 *Ibid*.

address consumer complaints".[543] In addition, the NCA provides for the establishment of a consumer forum and a Consumer Code by the NCC. Thus, section 106 (1) of the NCA provides that the NCC "may designate an industry body to be a consumer forum and to prepare a Consumer Code… and the Consumer Code prepared by such industry body shall be subject to the prior approval of and ratification by the [NCC]".[544] The NCC is required to publish the Consumer Code and advertise a notice of the publication in one national daily newspaper.[545] The NCA also establishes the powers of the NCC to require every telecommunications service provider to prepare a Consumer Code for its subscribers which shall also be subject to the prior approval and ratification of the NCC.[546] A Consumer Code that is established either by the NCC or a service provider is basically required to include:

(a) Procedures for reasonably meeting consumer requirements;

(b) Procedures for handling consumer complaints and disputes including an inexpensive arbitration process other than judicial proceedings in a Court;

(c) Procedures for compensating consumers in the event of a breach of the Code, and;

(d) Procedures for the protecting consumer information.[547]

In addition to the above, a Consumer Code is also required to include options that are available to a consumer that is dissatisfied with a service provider's complaints handling procedures including specific details of the service provider's consumer

[543] S. 104 (b) &(c) *Ibid*.
[544] S. 106 (1) *Ibid*.
[545] S. 106(5).
[546] S.106 (2) *Ibid*. *See also*, Regulation 4(1) NCC Consumer Code of Practice Regulations 2007.
[547] S. 106(3) *Ibid*.

compensation and refund policy.[548] Other matters that are meant to be addressed in a Consumer Code include the provision of information on services, rates, performance, fault repair services, advertising services, consumer charging, credit practices, and any matter that the NCC may consider to be of concern to consumers.[549] These requirements are further elaborated by the NCC's Consumer Code of Practice Regulations (2007).

4.5 The Consumer Code of Practice Regulations (CCPR)[550]

The CCPR was established by the NCC to elaborate the elements of consumer codes in the telecommunications industry.[551]Accordingly, the CCPR establishes a General Consumer Code of Practice which sets down the minimum standards and requirements that will be enshrined in a service provider's consumer code.[552] Service providers are prohibited from establishing consumer codes that include terms and conditions that are less favorable than those set down in the NCC's General Consumer Code of Practice.[553] The NCC has the powers to amend a consumer code that has been proposed by a service provider with a view to bringing such proposed code in line with the General Consumer Code of Practice.[554] After the NCC has approved a service provider's consumer code, such service provider is required to publish the approved consumer code in two national newspapers or according to the directions of the NCC.[555] A service provider is bound to comply with the provisions of its approved consumer code while providing services or addressing consumer related issues.

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[548] S.106 (4) (a) *Ibid*.
[549] S. 106 (4) (b) – (f) *Ibid*.
[550] The Consumer Code of Practice Regulations, S. I. 32 of 2007, *Official Gazette of the Federal Republic of Nigeria*, (10th July, 2007) Vol. 94, No. 87, Government Notice No. 56. [Hereafter CCPR]
[551]Regulations 1 & 2 CCPR.
[552]Regulations 4(2) (3) & 5 *Ibid*.
[553] Regulation 7(3) *Ibid*.
[554] Regulation 6 (1) (b) *Ibid*.
[555] Regulation 7(1) *Ibid*.

4.5.1 Specific Obligations of Service Providers under the NCC's General Consumer Code of Practice

4.5.1.1 Provision of Information to Consumers

The NCC's General Consumer Code of Practice requires a service provider to make available upon a consumer's request, a copy of the contract for the provision of services which is also meant to be written in a plain and clear language.[556] In this regard, it provides that service provider "shall supply, or make available on request, a copy of the contract or agreement for the provision of services, and such contract shall be written in plain and clear language".[557] However, the language of the above provision does not appear to impose an obligation on service provider to make available a copy of the service contract except where it is requested by the consumer. The implication is that a consumer that does not request for a copy of the service contract may subscribe to a service provider's services without having knowledge of the contracted terms and conditions. This appears to have become the norm in the industry as service providers do not generally provide consumers with copies of the service contract at the point of sale but rather ask consumers to visit their websites in order to obtain information on the terms and conditions of the service contract. On the other hand, most consumers do not know that they are entitled to demand for a copy of the service contract from service providers at the point of sale.

Before entering into a service contract with a consumer, the service provider is required to provide the consumer with a clear description of the services to be provided

[556]Paragraph 7, Schedule to the CCPR.
[557]*Ibid.*

using a plain language and avoiding unnecessary technical terms.[558] Other information that a service provider is required to provide before commencing services include: service quality levels and coverage areas;[559] compensation and refund arrangements where quality of service levels are not met; procedures for resolving disputes arising from the service contract;[560] information regarding service upgrade or migration terms as well as the applicable charges;[561] pricing information including the applicable rates or charges, and whether the charges are subject to change from time to time as well as the circumstances of such changes and how the consumer will be informed of such charges;[562] information regarding any contractual warranty relating to any products supplied for use in connection with the service,[563] and; information on any maintenance service offered by the service provider.[564]

4.5.2. Consumer Obligations

The NCC's General Consumer Code of Practice establishes a range of consumer obligations. The obligations arise where a consumer has accepted the terms and conditions of a service provider's service contract. A consumer is deemed to have accepted the terms and condition of a service contract under any of the following instances:

(a) where the consumer returns a signed copy of the service contract to the service provider, or;

[558] Paragraph 8 (1) Schedule to the CCPR
[559] Paragraph 8(2) *Ibid*.
[560] Paragraph 8(3) *Ibid*.
[561] Paragraph 8(5) *Ibid*.
[562] Paragraph 9 *Ibid*.
[563] Paragraph 11(1) *Ibid*.
[564] Paragraph 11(2) *Ibid*.

(b) where the consumer has clearly accepted the terms of the service contract through any form of telecommunications to the service provider, or;

(c) where the consumer commences the use of the service following an adequate communication of the service terms and conditions by the service provider.[565]

Where a consumer is deemed to have accepted the service provider's terms and conditions, the consumer will be liable to fulfill specified obligations which include:

(a) Granting the service provider or its authorized representative access without charge to premises, equipment or facilities required for the provision or maintenance of the service. [566]

(b) Not tempering with the service provider's equipment, facilities or service.[567]

(c) Not reselling any service provided by the service provider except where such is permitted by the service contract and also subject to the authorization of the NCC.[568]

(d) Not misusing public telecommunications services by: (a) fraudulently obtaining telecommunications services, or; (b) possessing or supplying equipment that may be used to obtain such services fraudulently, or; (c) using services to send messages that are obscene, threatening or contrary to applicable laws or regulations.[569]

(e) Settling all valid payment arrears with a service provider before switching to another service provider.[570]

[565]Paragraph 28 Schedule to the CCPR.
[566] Paragraph 29 *Ibid*.
[567] Paragraph 30 *Ibid*.
[568] Paragraph 31 *Ibid*.
[569] Paragraph 32 *Ibid*.
[570] Paragraph 33(1) *Ibid*.

4.6 Specific Consumer Protection Issues and Responses

4.6.1 Quality of Service

'Quality of service' is a term that is commonly used in classifying the efficiency or standard of service that is experienced by consumer while accessing telecommunications services. The International Telecommunication Union (ITU) defines 'quality of service' as the "totality of characteristics of a telecommunications service that bear on its ability to satisfy stated and implied needs of the user of the service".[571] Thus, 'quality of service' refers to the overall performance of a telecommunications network as seen by the end-users of the network. It comprises elements such as availability of service, service response time, transmission delay, error rates, and signal interpretation rates.

In Nigeria, poor quality of services has been a reoccurring cause of consumer dissatisfaction in the telecommunications industry.[572][573] Thus, it has been observed that: "since the advent of the mobile revolution [in Nigeria] availability has grown but has not been matched by quality of service owing largely to some issues including: the notoriously unreliable public power supply; security; limited transmission infrastructure; network congestion and lack of information to consumers on downtime".[574] In July 2012, a nationwide quality of service survey conducted by the NCC's Consumer Affairs Bureau (CAB) found that "it has become increasingly evident … that quality of service issues,

[571] ITU (Telecommunications Standardization Sector), *Definitions of Terms Related to Quality of Services - Recommendation ITU-T E.800 (09/2008)* (Geneva: ITU, 2009) p.3, at paragraph 2.2.

[572] C B Opata, 'The Curious Case of Consumer Dissatisfaction in Nigerian Telecommunications Sector', pp. 1-46, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract _id=2356804> last accessed on 30 March, 2016.

[573] On 19 September, 2003 GSM subscribers in Nigeria protested the poor quality of services being provided by service providers by embarking on a one day national switch-off of handsets. *See* A B Abiodun, 'Nigeria, *Competition Regimes in the World – A Civil Society Report*, p.271, available at <.http://www. competitionregimes.com/> last accessed on 30 February, 2015.

[574] *Nigerian Communications Weekly* (March, 2011).

including the complete loss of service, has become more pronounced … causing much frustration amongst consumers".[575] The survey also found quality of service issues in the Nigerian telecommunications industry to include: incorrect billing; inability to place or receive calls; challenges in assessing value added services; prolonged complaint resolution periods; inability to recharge pre-paid accounts; inability to deliver SMS messages; multiple delivery of SMS, and; a high incidence of unsolicited messages.[576]

On the other hand, operators have often cited several reasons as the cause of poor quality of services in the industry. Such reasons include: rapid growth in the demand for services and its consequent strain on the available network; vandalization of network equipment and insecurity in some parts of the country; inadequate power supply;[577] and the disruption of telecommunications services due to multiple regulation and taxation.[578] The causes of poor quality of service in the industry have further, been classified into operational and environmental causes. The operational causes include: interconnection problems; promotions and lotteries by operators causing network congestion; lack of adequate infrastructural capacity to satisfactorily carry the volume of communications traffic generated by networks; hurried and poor construction of some existing networks; poor network upgrades, and; personnel challenges.[579] While the environmental causes include: inadequate power supply; theft, vandalization, terrorist attacks on networks; natural disasters such as flooding; multiple regulation of the industry, and; the multiple

[575] NCC Consumer Affairs Bureau, *Nigeria Consumer Satisfaction Survey - Final Report* (Abuja: NCC, November 2012) p.25.
[576] *Ibid*, pp.32-55.
[577] *Ibid*, p.25.
[578] NCC Industry Working Group, *Position Paper on Hazards and Further Implications of Multiple Taxation and Regulation of the Communications Industry in Nigeria* (March, 2012) p.7.
[579] C B Opata, 'The Curious Case of Consumer Dissatisfaction in Nigerian Telecommunications Sector', pp. 4-8, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2356804>. last accessed on 30 March, 2016.

taxation of service providers.[580] However, although the above factors are all interconnected in exacerbating the problem of poor quality of service, it has also been observed that the major cause of the problem is the issue of inadequate capacity on the networks of service providers.[581] It is also observed that "the issue of consumer dissatisfaction with telecommunications services provision in Nigeria is not unconnected with the perception that some mobile operators are declaring substantial profits annually while providing poor quality services and charging high tariffs for their services".[582]

The NCC is responsible for regulating the quality of service in the Nigerian telecommunications industry. In this regard, section 104 (a) of the NCA provides that "all service providers shall in meet such minimum standards of quality of service as the NCC may from time to time specify and publish".[583] A service provider that fails to meet the NCC's minimum quality of service standards would be liable for an offence under the Nigerian Communications (Enforcement Processes) Regulations 2005.[584] The offending service provider may be subject to a maximum fine of five hundred thousand Naira (₦500,000.00) for each month that it fails to comply with the NCC's deadline on the minimum standards of quality of service.[585]

The exercise of the NCC's powers to set and enforce minimum quality of service standards has been gradual since the liberalization of the telecommunications industry and the licensing of GSM service providers. In the period that immediately followed the

[580] *Ibid*, pp.8-15.
[581] *Ibid*, p.42.
[582] *Ibid*, pp. 4 & 42. *See also*, U Uduma, 'NCC, GSM Operators and the Future of Mobile Phone in the Country', *Leadership*, 27 May, 2012.
[583] NCA 2003, s. 104(a).
[584] Regulation 12 Nigerian Communication (Enforcement Processes) Regulations 2005.
[585] Paragraph 1, Part B, Second Schedule, Nigerian Communications (Enforcement Processes) Regulations 2005.

rollout of GSM services in the country, the NCC's response did not go beyond the mere denunciation of poor quality of service and issuing warnings to apply sanctions against service providers that failed to meet quality of services standards.[586] Following the enactment of the NCA in 2003, the NCC warned that the grace period that was given to operators was over, and that the two year period within which the operators had commenced the provision of services was enough for them to optimize their networks and offer acceptable quality of service to consumers.[587] However, although the enactment of the NCA gave the NCC powers to regulate quality of service issues,[588] the NCC did not take any steps to enforce quality of service standards. Rather the NCC urged service providers to improve their quality of service.[589]

In 2005, the NCC established the Nigerian Communications (Enforcement Processes) Regulation which required service providers to comply with the NCC's quality of service standards and also empowered the NCC to impose sanctions on service providers that failed to comply with such standards.[590] Also in 2005, the NCC held an inquiry into the causes of poor quality of service by GSM service providers and found that there were insufficient interconnection circuits amongst operators and that all operators had challenges of insufficient capacity. In the light of the findings, the NCC recommended that operators should provide monthly quality of service reports and also carry out regular audits of their base stations and transmission links in order to ensure the

[586] Editorial, 'GSM: NCC Goes Tough on Substandard Services', *ThisDay*, 11 October, 2002. *See also*, C B Opata, 'The Curious Case of Consumer Dissatisfaction in Nigerian Telecommunications Sector', p.15.
[587] Editorial, 'NCC Reads Riot Act to GSM Operators', *ThisDay*, 23 July, 2003. *See* C B Opata, *Ibid*, p.16.
[588] NCA 2003, s. 104.
[589] C B Opata, *Ibid*, p.16.
[590] Regulation 12, Nigerian Communications (Enforcement Processes) Regulations 2005.

timely resolution of transmission failures.[591] The NCC also recommended automatic refunds for subscribers whose SMS messages were not delivered and the upgrading of operators' customer care and call centers. In addition, the NCC ordered a ban on the sale of SIM cards at certain congestion levels and also announced that it was considering the imposition of fines on non-compliant operators.[592] Later in 2006, the NCC published a draft Quality of Service Regulations; however operators failed to meet the Key Performance Indicators (KPIs) that were established in the draft Regulations. Consequently in 2007, the NCC announced its intention to demand operators with high traffic congestion levels to make refunds to subscribers. It proposed a refund of N50 per subscriber for congestion levels ranging from 2 to 5 percent; N100 for congestion levels ranging from 5 to 10 percent, and; N175 for congestion levels above 10 percent.[593] Following the receipt of the Notice of the NCC's intention to impose sanctions for traffic congestion, two operators MTN and Celtel brought an action against the NCC at the Federal High Court (*CELTEL Nigeria Ltd and MTN Nigeria Communications Ltd v NCC*).[594] The two operators argued that the traffic congestion parameter which the NCC sought to enforce was contained in a draft Regulation which was yet to come into force. The NCC however raised a preliminary objection to the suit on the basis that the plaintiffs did not comply with the pre-action requirements under sections 86-88 of the NCA. The Court dismissed the suit and ruled in favor of the NCC.

[591] 'NCC Inquiry: Only Vmobile and MTN Interconnect Well', *ThisDay*, 10 February 2005. *See also*, C B Opata, *Ibid*, pp.16-17.
[592] Editorial, 'NCC Inquiry: Only Vmobile and MTN Interconnect Well', *ThisDay*, 10 February 2005.
[593] C B Opata, *opcit*, p.17.
[594] *CELTEL Nigeria Ltd and MTN Nigeria Communications Ltd v NCC*, [2008] (Unreported) Suit No FHC/L/CS/909/2007. Ruling by Justice DD Abutu delivered on 9 January, 2008.

In 2007, both Houses of the National Assembly also established committees to investigate the causes of poor services by operators in 2007.[595] In 2008, the NCC found that the traffic channel congestion in MTN and Celtel's networks was above 10 percent and asked both operators to refund each subscriber the sum of N175, resulting to a refund of about of N4.7 billion.[596] In 2011, the NCC's assessment of 100 base stations found that about 30 percent of the assessed stations were congested. This led the NCC to issue a 2 week ultimatum to operators to decongest their networks.[597] Later in 2012, the NCC established a new set of quality of service regulations. This set of regulations will be discussed in the next section.

4.6.2 The NCC Quality of Service Regulations[598]

The Quality of Service (QoS) Regulations establishes the minimum quality and standards for telecommunications services that can be provided by service providers in Nigeria.[599] The objectives of the QoS Regulations include:

(a) to ensure the protection of the interests of consumers against unfair practices, including matters relating to tariffs and charges, the availability and quality of communications services;

(b) to improve service quality by identifying service deficiencies and promoting and enforcing appropriate solutions;

(c) to maintain service quality while recognizing environmental and operating conditions;

[595] NCC Consumer Affairs Bureau, *Nigeria Consumer Satisfaction Survey - Final Report* (Abuja: NCC, November 2012) p.26.
[596] Editorial, TN, Celtel to refund N4.7 Billion to Subscribers', *The Vanguard*, 3 March, 2008.
[597] NCC Consumer Affairs Bureau, *Ibid*, p.26.
[598] NCC Quality of Service Regulations 2012, *Official Gazette of the Federal Republic of Nigeria* (January 2012) Vol.99, No.5, Government Notice No.4. [Hereafter QoS Regulations].
[599] Regulation 3 QoS Regulations.

(d) to make available information that will help consumers to make an informed choice of services and service providers;

(e) to improve the operation and performance of interconnected networks, and;

(f) to assist the development of telecommunications markets.[600]

The QoS Regulations contains a Schedule which establishes the threshold targets and Key Performance Indicators on the minimum quality of service that can be provided by service providers in Nigeria. For example, with respect to unsolicited messages, the Schedule requires a service provider to provide the subscriber with an option to 'opt out' of receiving such messages where such messages originate from the service provider or its third party business partners. It also requires a service provider to make reasonable efforts to identify and block or filter bulk unsolicited and offensive messages from other sources.[601] Other quality of service issues that are addressed in the QoS Regulations include the standard period of time for the resolution of specific consumer complaints.[602] Service providers are obligated to resolve any consumer complaint within the time frame specified in the QoS Regulations or within any resolution time that may be approved by the NCC.[603] A service provider that fails to resolve a consumer complaint within the stipulated time frame is required to compensate consumer, in addition to paying any other fines that may be imposed by the NCC.[604] The NCC is required to sanction a service provider where the rate of the occurrence of a particular complaint exceeds the maximum

[600] Regulation 2 QoS Regulations.
[601] Item 23, Schedule 1, QoS Regulations.
[602] Schedule 1, QoS Regulations.
[603] Regulation 8 (1) *Ibid*.
[604] Regulation 8 (2) *Ibid*.

rate stated in the First Schedule to the QoS Regulations. [605] Generally, a service provider that fails to comply with the quality of service targets that have been set by the NCC will be liable for a breach of the QoS Regulations.[606] In this respect, the NCC may impose a fine of fifteen million Naira (₦15,000,000) for each act of contravention and a fine of twenty five million Naira (₦25,000, 000) for each day that the contravention subsists.[607]

Under the QoS Regulations service providers have obligations to measure and report quality of service data to the NCC.[608] Failure to fulfill such obligations is deemed an offence under the Regulations.[609] In this respect, the NCC may impose a fine of fifteen million Naira (₦15,000,000) for each act of contravention and a fine of twenty five million Naira (₦25,000, 000) for each day that the contravention subsists.[610] Also, a service provider that submits or publishes false or misleading information regarding its quality of service, or obstructs the NCC's collection of quality of service data will be liable for a breach of the QoS Regulations.[611]

4.6.2.1 Enforcement of the QoS Regulations

Where a service provider contravenes any of the standards under the QoS Regulations, the NCC may:

(a) require the service provider to submit or publish additional information about the quality of the relevant service including the implementation of a remedial plan within a time frame set by the NCC;

[605] Regulation 8 (3) *Ibid*. *See also*, Table 2, Schedule 1, QoS Regulations.
[606] Regulation 13 (b) *Ibid*.
[607] Paragraph 2, Schedule 3, QoS Regulations.
[608] Regulation 7 *Ibid*.
[609] Regulation 13(a) *Ibid*.
[610] Paragraph 1, Schedule 3, *Ibid.*
[611] Regulation 13(c) – (e) *Ibid*.

(b) issue directions to the service provider to address the poor quality of service, including a direction for the compensation of the service provider's subscribers or consumers for poor quality of service, or;

(c) impose a fine on the service provider in accordance with the provisions of Third Schedule to the QoS Regulations.[612] For example, where a service provider fails to meet and maintain the NCC's quality of service standards, the NCC may impose a fine of fifteen million Naira (₦15,000,000) for each act of contravention and a fine of twenty five million Naira (₦25,000, 000) for each day that the contravention subsists.[613]Also where a service provider submits or publishes false information regarding its quality of service standards or obstructs the NCC's investigation of its quality of service, the NCC may impose a fine of fifteen million Naira (₦15,000,000) for each act of contravention and a fine of twenty five million Naira (₦25,000, 000) for each day that the contravention subsists.[614]

However, before applying the above enforcement measures, the NCC is also required to consider some factors including: the need for the imposition of administrative fines on the service provider; [615] the time taken by the service provider to achieve the NCC's quality of service targets,[616]and; the service credits or rebates that have been provided by the service provider to subscribers affected as a result of the service provider's failure to comply with provisions of the QoS Regulations.[617]

[612] Regulation 14 QoS Regulations.
[613] Paragraph 2, Schedule 3, QoS Regulations.
[614] Paragraphs 3-5, Schedule 3, *Ibid.*
[615] Regulation 15 (a) QoS Regulations. *See also*, Regulation 15, Nigerian Communications (Enforcement Processes) Regulation 2005.
[616] Regulation 15(d) QoS Regulations.
[617] Regulation 15(f) *Ibid*.

After the QoS Regulations were established in January 2012, the NCC declared a grace period of two months to allow operators some time to meet the targets under the Regulations' Key Performance Indicators (KPI).[618] Following the end of the grace period, the NCC found that all the four GSM operators in the country had breached the QoS Regulations by failing to meet the KPI targets for the months of March and April 2012. Hence, in May 2012, the NCC fined the four operators a total of ₦1.17 billion (MTN - ₦360 million, Etisalat - ₦360 million, Airtel ₦270 million and Globacom ₦180 million).[619] The operators however argued that the fines were not necessary on the basis that the KPI targets were unrealistic and unattainable in the Nigerian operating environment,[620] and that the NCC instead of addressing the root causes of the problems challenging operators had made a public show of sanctioning them.[621] However, the NCC met with the operators who demonstrated mechanisms through which they intended to comply with the future KPI targets. As a precondition for paying the fine, the operators made the NCC to establish a glide path which would enable them to progressively achieve the requisite KPI targets by December 2012.[622] Later in March 2013, the NCC fined MTN ₦90 million for contravening the QoS Regulations.[623] In February 2014, the NCC also imposed a fine of ₦647 million on three operators Airtel, Globacom, and MTN (Airtel - ₦185 million, MTN - ₦185 million and Globacom - ₦277, 500 million) and

[618] C B Opata, 'The Curious Case of Consumer Dissatisfaction in Nigerian Telecommunications Sector', p.19, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2356804> last accessed on 30 March, 2016.
[619] NCC Consumer Affairs Bureau, *Nigeria Consumer Satisfaction Survey - Final Report* (Abuja: NCC, November 2012) p.26.
[620] E Okonji, 'Telcos Not Willing to Succumb as Fine Reaches N1.3 Billion', *ThisDay*, 7 June, 2012.
[621] E Okonji, and A Eze, 'Telecom Operators Fail to Pay N1.17 Billion NCC Fine', *ThisDay*, 26 May, 2012.
[622] E Okonji and A Eze, 'Telecom Firms Agree to Pay NCC Fine', *ThisDay*, 15 June, 2012.
[623] 'NCC Fines MTN N90M for Poor Quality of Service from July – December', (23 March, 2013) available at<http://www.informationing.com/2013/ncc-fines-mtn-n90m-for-poor-quality-of-service-from-july-december.html> last accessed on 30 March, 2016.

banned them from selling new SIM cards for a period of one month, following their inability to meet the NCC's KPI targets for quality of service in the month of January 2014.[624]

However, the NCC has been criticized for imposing fines on operators rather than compensating consumers who are actually affected by poor quality of services provided by operators.[625] For example, the National Association of Telecom Subscribers (NATCOMS) had suggested that "rather than imposing fines on operators and giving the money to Government, the NCC should compel the operators to pay each subscriber on their networks the sum of ₦10, 000 each".[626] This position is based on the view that is the consumers who suffer from poor quality of services that should be compensated, rather than raising revenue for the government treasury through the imposition of fines.[627] On the other hand, the NCC maintains that paying the fine into Government coffers will eat into the financial returns that the operators are supposed to make to their shareholders and thereby propelling them to enhance their services in order to avoid such fines in future.[628] However, while the argument for the compensation of consumers has merit, the NCC's approach appears a better remedy towards addressing the challenge of poor services since

[624]P Ugwu, 'NCC Slams N647 Million Fines on GSM Operators Over Poor Service', *Nigeria Communications Week* (25 February, 2014) available at<http://www.nigeriacommunicationsweek.com.ng/telecom/ncc-slams-n647m-fines-on-gsm-operators-over-poor-service> last accessed on 30 March, 2016. *See also*, GSMA Intelligence, *Country Overview: Nigeria* (London: GSMA Intelligence, June 2014) p.17.

[625]A Adepetun, 'Poor Telecoms Services: Subscribers Clamor For Compensation', *The Guardian* (13 September, 2015) available at <http://www.ngrguardianews.com/2015/09/poor-telecoms-services-sbuscribers-clamour-for-compensation/>.

[626] P Osuagwu, 'Who Keeps the N647 Million QoS Fine: Subscribers Queue behind the NCC', *The Vanguard* (26 March, 2014), available at <http://www.vanguardngr.com/2014/03/keeps-n647m-qos-fine-subscribers-quene-behind-ncc/>. *See also* 'Compensate Subscribers With N1.17 Billion Fine, NATCOM urges NCC', available at <http://www.consumer.ncc.gov.ng/news.asp?index=242> last accessed on 30 March, 2016.

[627] *Ibid*.

[628] *Ibid*.

the common demand of all consumers is the improvement of services and not the distribution of compensation. Also, the NCC has the powers to enforce the QoS Regulations through measures which include the issuance of directions to service providers to compensate subscribers[629] or the imposition of fines.[630] Hence, the NCC is entitled to exercise discretion to either impose fines or issue directions for the compensation of subscribers where it considers any of the options to be in the public interest or necessary for the development of the telecommunication industry.

4.6.3 Consumer Remedies for Poor Quality of Service under Contract law

There are prospects that the law of contract may provide a basis for consumer remedies for poor quality of services by operators. Within the consumer protection context, the law of contract provides a legal basis upon which a party who is a consumer in a contract for services may claim remedies where there is a breach of the contract terms by the service supplier or provider. However, it has been observed that a shortcoming of applying the law of contract for consumer protection arises from certain inherent principles of law such as the doctrine of privity and freedom of contract.[631] Thus, under the doctrine of privity of contract, only a person who is a party to a contract can acquire a right or assume an obligation under it.[632] Apparently, the implication of the doctrine of privity in the consumer protection context is that a consumer who has suffered loss or damage as a result of defective goods or services would not be entitled to any contractual remedy against the supplier or service provider where such consumer is not a

[629] Regulation 14 (b) QoS Regulations.
[630] Regulation 14 (c) *Ibid*.
[631] F O Ukwueze, 'Legal Remedies for Consumers of Telecommunications Services in Nigeria', (2011-2012) 10 *The Nigerian Juridical Review*, 147.
[632] *Price v Easton* (1833) 4. B & Ad 433; *Tweddle v Atkinson* (1861) 1 B85 393; *Dunlop Pneumatic Tyre Co. Ltd v Selfrigde Ltd* (1915) AC 847; and; *Shuwa v Chad Basin Authority* (1991) 7 NWLR (Pt. 205) 550 *cited* in F O Ukwueze, *Ibid*.

party or privy to the contract for the supply of goods or services. As such, a causal borrower or gratuitous donee does not have a basis to seek remedy from a supplier or service provider under the law of contract.[633]

On the strength of the above position it has been argued that "the NCA seems to strongly uphold the doctrine of privity by its definition of a 'consumer' as "any person who subscribes to and uses a communication service".[634] Apparently, the implication of the definition is that "only the subscriber of a telecommunications service can be referred to as the consumer of the telecommunications service even where the service subscribed to is used by a different person".[635] Hence, the NCA's definition of a consumer has been criticized as being "very restrictive and excludes persons who use communications services but are themselves not subscribers".[636] Accordingly, it has been argued that the "definition excludes a person who uses a GSM phone with a line which he received as a gift since such a benefactor would not be the subscriber. In the absence of any contractual relationship, such persons may only have right of action in tort where they suffer harm, loss or injury as a result of such services".[637] Thus, section 157 of the NCA appears to restrict the meaning of a 'consumer' to a contractual relationship rather than adopting definitions which have a broader scope, such as a definition that covers the end-users of

[633] F O Ukwueze, 'Consumer Protection under the Law of Contract in Nigeria', (2008) 7 (1) *Nnamdi Azikiwe University Law Journal*, 1-18.
[634] NCA 2003, s. 157. *See* F O Ukwueze, 'Legal Remedies for Consumers of Telecommunications Services in Nigeria', (2011-2012) 10 *The Nigerian Juridical Review*, 147-148.
[635] C B Opata, 'Rethinking Remedies for Dissatisfied Nigerian Consumers of Telecommunications Services', p.5, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2346820> last accessed on 30 March, 2016.
[636] S. 157 NCA. *See* F O Ukwueze, 'Legal Remedies for Consumers of Telecommunications Services in Nigeria', (2011-2012) 10 *The Nigerian Juridical Review*,148.
[637] F O Ukwueze, 'Legal Remedies for Consumers of Telecommunications Services in Nigeria', *Ibid*.

telecommunications services.[638] For example, the Consumer Protection Council Act broadly defines a 'consumer' as "an individual, who purchases, uses, maintains or disposes of product or services".[639]

However, despite the above critique of the definition of a 'consumer' under section 157 of the NCA, the end-user of a SIM card (Subscriber Identification Module) that is registered under another person's name appears to have a legal basis for seeking remedy for poor quality of service rendered by a service provider. This legal basis arises from three reasons. The first reason is that the NCC's QoS Regulations establishes Key Performance Indicators that are also meant to affect the 'end-users' of telecommunications services and not necessarily 'subscribers'.[640] As such, service providers may be sanctioned for not meeting the standards under the QoS Regulations while providing service to end-users. Where the NCC directs a service provider to compensate consumers for poor services, [641] such compensation will ultimately be received by the end-user of the SIM card at that particular time and not the subscriber under whose name the SIM card is registered.[642]

The second reason is that the purchase and registration of a SIM card does not imply the actual purchase of telecommunications services through that SIM card. Accordingly, it has been aptly argued that "the purchase of a SIM card alone makes the paying customer a subscriber for a mobile phone line rental service" which may be in

[638] F M Monye, *Law of Consumer Protection* (Ibadan: Spectrum Books Limited, 2003) p.17.
[639] Consumer Protection Council Act 1992, s. 32.
[640]Regulation 1, QoS Regulations. *See also,* C B Opata, 'Rethinking Remedies for Dissatisfied Nigerian Consumers of Telecommunications Services', p.6, available at <http://papers.ssrn.com/ sol3/papers.cfm? abstract_id=2346820> last accessed on 30 March, 2016.
[641] Regulation 14 (b) QoS Regulations.
[642] C B Opata, *Ibid*, p.7.

form of a prepaid or post-paid telephone line service.[643] Where it is a post-paid telephone line service, the line rental service is usually bundled with other telecommunications services such as voice telephony, SMS services and Internet services, and access to those services is considered part of a single contract which is usually paid through monthly installments. On the other hand, pre-paid services also include services such as voice telephony, SMS services and Internet access, and consumers can obtain access to such services through the purchase of recharge cards or fund transfers.[644] Thus, under the pre-paid model, the purchase of a telephone recharge card is deemed to represent a distinct contract between the end-user of the recharge card and the service provider for the purchase of telecommunications services up to the value of the purchased recharge card. Accordingly, the service provider that issues the recharge card makes an offer which the purchaser or end-user accepts by paying for the value of the recharge card.[645] Consequently, the person in whose name a SIM card is registered is the subscriber of the telephone line whereas the end-user of each recharge card is the subscriber of the service provider's service to the value consumed from the recharge card. Thus, the end-user of a recharge card is entitled to contractual remedies for poor telecommunications services that were experienced while consuming the value of the recharge card on the service provider's services.[646]

The third reason is that where a gratuitous donee is the end-user of a SIM card and desires to sue a service provider for poor services or for a breach of a contractual term,

[643]*Ibid.*
[644]C B Opata, 'Rethinking Remedies for Dissatisfied Nigerian Consumers of Telecommunications Services', p.7, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2346820> last accessed on 30 March, 2016.
[645]*Ibid.*
[646]*Ibid*, p.8.

such end-user can join the subscriber that donated the SIM card as a party to the suit. This is considered imperative especially where the SIM card was donated to a minor or an elderly person in care of the subscriber.[647] For example, in *Multichoice Nigeria Limited v Mr. Bankole Azeez*,[648] the respondent, Mr. Bankole Azeez successfully sued the appellant a digital satellite television services provider for breach of contract following the increment of the subscription fee and scrambling of the respondent's satellite services signal without any prior notice of the fee increment. The respondent had jointly commenced the action with his father Dr. Olayinka Azeez in the High Court. The appellant's appeal against the judgment was dismissed by the Court of Appeal.[649]

Also, prior to the enactment of the NCA in 2003, there have been reported cases where consumers relied on the law of contract to institute actions for the breach of contract relating to the provision of telecommunications services. In *GKF Investment Nigeria Limited v Nigerian Telecommunications Plc*,[650] the plaintiff, GKF was allocated a telephone line by the defendant, NITEL in early 1999. In September 1996, the defendant withdrew the line which made it impossible for GKF in communicate with it. The defendant attributed the withdrawal to GKF's non-payment of an amount charged for the use of the line. However, GKF had already paid the amount in question through a bank that remitted the money to the defendant on 23 September, 1996. Yet despite the payment, the defendant refused to restore the line notwithstanding several demands by GKF. This state of affairs caused hardship to GKF's business. Consequently, GKF sued the defendant in the High Court of Lagos State, and sought reliefs including: the sum of

[647] C B Opata, *opcit*, p.7.
[648] *Multichoice Nigeria Limited v Mr. Bankole Azeez* [2010] 15 NWLR (Pt 1215) at 40, 46.
[649] C B Opata, *Ibid*, p.7.
[650] *GKF Investment Nigeria Limited v Nigerian Telecommunications Plc* [2009] 15 NWLR (Pt 1164) 344.

thirty million Naira as special, exemplary and general damages for breach of contract. The High Court awarded GKF two hundred thousand Naira and also ordered the defendant to provide GKF with a fault free line within seven days from the date of the judgment. GKF was however not satisfied with the amount of money that was awarded as damages by the High Court and subsequently appealed to the Court of Appeal. The Court of Appeal affirmed the award of two hundred thousand Naira by the High Court and also awarded interest at the rate of seven percent on the amount. GKF's further appeal to the Supreme Court was unanimously dismissed.[651]

In *Nigerian Telecommunications Plc v Chief S.J. Mayaki*,[652] the respondent a legal practitioner was allocated a telephone line by the appellant before July 1991. However, the appellant disconnected the line and transferred it to another subscriber on the basis that the respondent owed an accumulated telephone service debt of ₦1.966.70 K (one thousand, nine hundred and sixty six Naira, seventy kobo), which the respondent denied owing. As a result of the disconnection of the telephone line, the respondent lost a valuable retainer and an associated income of 30 thousand USD. The respondent subsequently sued the appellant at the Lagos State High Court and sought reliefs including an order directing the appellant to restore the disconnected line. Following the appellant's lack of diligence in presenting the defense, the Court formed the opinion that the appellant was unserious in the matter. A day before the date that was set for judgment, the appellant filed a motion to recall the plaintiff/respondent for cross examination and also to amend its statement of defense. However, the Court refused to

[651] C B Opata, 'Rethinking Remedies for Dissatisfied Nigerian Consumers of Telecommunications Services', p.9, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2346820> last accessed on 30 March, 2016.
[652] *Nigerian Telecommunications Plc v Chief S.J. Mayaki* [2007] 4 NWLR (Pt. 1023) at 173.

hear the motion and awarded judgment against the appellant. On appeal, the Court of Appeal held that the High Court's refusal to determine the motion constituted a breach of the constitutional right to fair hearing.[653]

In *Jeph C. Njikonye Esq. v MTN Nigeria*,[654] the plaintiff, a practicing Lawyer acquired a GSM line from MTN and used the line for purposes which included business facilitation. On a day in 2003, MTN denied the plaintiff access to its network from 7 am to 5pm which made it impossible for him to place or receive calls even where he had a call credit balance. As a result, the plaintiff lost a number of legal briefs including 206 bank searches that would have earned him ₦515,000.00 (five hundred and fifteen thousand Naira). Consequently, the plaintiff sued MTN at the High Court of the Federal Capital Territory, and claimed reliefs which included the amount of money that was lost as a result his inability to access MTN's telephony services and the sum of two million Naira as damages for distress and inconvenience. MTN filed a preliminary objection challenging the jurisdiction of the High Court of the Federal Capital Territory to hear the suit since the Federal High Court had exclusive jurisdiction to hear matters under the Nigerian Communications Act of 1992. The Court upheld MTN's objection and declined jurisdiction. However, an appeal, the Court of Appeal set aside the ruling of the lower Court on the basis that a Court's jurisdiction is determined by the reliefs sought by the plaintiff. Hence, a Court could assume jurisdiction where the reliefs are within the subject matter jurisdiction of the Court. As such, the Court could assume jurisdiction since the

[653] *Ibid* at 188-89. C B Opata, 'Rethinking Remedies for Dissatisfied Nigerian Consumers of Telecommunications Services', p.10.
[654] *Jeph C. Njikonye Esq. v MTN Nigeria* [2008] 9 NWLR (Pt. 1091) 339.

dispute arose from contract and matters relating to contracts are not within the exclusive jurisdiction of the Federal High Court.[655]

4.6.3.1 Must Consumers First Seek Relief from the NCC before Suing for a Remedy under Contract Law?

Following the enactment of the NCA (2003), the NCC has powers to settle disputes between parties who are subject to the NCA where such disputes relate to any matter under the NCA or its subsidiary legislation.[656] Within that context, consumers and telecommunications service providers would qualify as parties that are subject to the NCA. Also disputes arising from poor quality of service would be subject to the NCA since the NCA provides the general legal framework for the regulation of telecommunications services in Nigeria. Sections 73 - 78 of the NCA establish a framework for dispute resolution by the NCC. A party that is not satisfied with the decision of the NCC can apply for a review of the decision at the Federal High Court.[657] However, such party must first obtain a statement of the NCC's reasons for the decision,[658] and where the party is not satisfied with the NCC's statement of reasons it will request the NCC to reconsider the decision, and also state grounds for such request.[659] A party that is dissatisfied with the NCC's decision can only apply to the Federal High Court for a judicial review of that decision after exhausting the above procedures.[660]

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[655] *Ibid* at 369. *See also*, C B Opata, 'Rethinking Remedies for Dissatisfied Nigerian Consumers of Telecommunications Services', p.10, available <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2346820>last accessed on 30 March, 2016.
[656] NCA 2003, s. 73.
[657] S. 88 *Ibid*.
[658] S. 86 *Ibid*.
[659] S. 87 *Ibid*.
[660] S. 88 *Ibid*.

However, questions arise as to whether consumers in all cases must first seek reliefs from the NCC under sections 73-75 and sections 86-88 of the NCA as a condition precedent before suing for a remedy under the law of contract?, or; whether those sections apply only to parties that set out from the onset to sue for remedies under the NCA 2003 or its subsidiary legislations such as the QoS Regulations?. The second position would imply that consumers can successfully maintain actions for contractual remedies for poor quality of service without first exhausting the NCA's dispute resolution mechanism as a condition precedent. In this respect, it has been argued that:

> If a consumer can sue for a breach of contract without submitting the matter first to the NCC as required by sections 73-75 [of the NCA], the appropriate forum for a remedy in contract would, on the authority of the decision in *Njikonye v MTN*, be the High Court of the State where the cause of action arose or the High Court of the Federal Capital Territory if the cause of action arose in Abuja. If on the other hand a consumer can only apply for a judicial review of the NCC's decision in all circumstances involving telecommunications matters, then the Federal High Court would have exclusive jurisdiction even if a breach of contract is involved.[661]

The general trend as seen from the decisions of the Courts is that compliance with the dispute resolution procedure under sections 73-75 of the NCA constitutes a condition precedent to the commencement of a suit by a consumer.

[661] C B Opata, 'Rethinking Remedies for Dissatisfied Nigerian Consumers of Telecommunications Services', p.12, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2346820> last accessed on 30 March, 2016.

In *Nationwide Action against Corruption & another v ECONET Wireless Ltd & others*,[662] the plaintiffs instituted an action in the Federal High Court against three GSM service providers and obtained the leave of the Court to represent GSM subscribers in Nigeria as a class. Through the class action, the plaintiffs asked the Court for reliefs which included a declaration that the defendants had violated provisions of the NCA 2003 in respect of the services they offered to GSM subscribers in Nigeria. The service providers raised a preliminary objection on the ground that the plaintiffs failed to refer the dispute to the NCC as required under sections 73-75 of the NCA 2003 before commencing action in the Federal High Court. The Court upheld the objection and struck out the suit, while also holding that the judicial review of the NCC's decisions was the exclusive remedy for all disputes concerning telecommunications matters.[663] On appeal, the Court of Appeal affirmed the decision of the lower Court that compliance with sections 73-75 of the NCA constitutes a condition precedent to the exercise of the appellants' rights to access the Courts. The Court of Appeal took the view that sections 73-75 of the NCA did not constitute an ouster of the Court's jurisdiction but rather regulated the plaintiff's right to access to the Court by making such access subject to the fulfillment of conditions stipulated in the NCA. On the constitutionality of sections 73-75 of the NCA due to its perceived inconsistency with the constitutionally guaranteed right of access to the Court given that the appellants were not challenging a decision of the NCC nor seeking the NCC's intervention, the Court of Appeal held that the issue was not argued before the Federal High Court and hence could not be raised on appeal without an

[662] *Nationwide Action Against Corruption & Benson Ibezim v ECONET Wireless Ltd, MTN Nigeria Communications Ltd and Globacom Nigeria* [2008] (Unreported) Appeal No.CA/A/10/2005.
[663] *Ibid* at 3-4.

appropriate steps being taken in that regard.[664] However, the Court of Appeal maintained that the sections were not unconstitutional since a decision by the NCC would not be final but still subject to judicial review, hence compliance with the condition precedent will not prevent the appellants from exercising their constitutionally guaranteed right of access to the Court.[665]

In *Mike Nkwocha & Others v MTN Nigeria Communications Ltd & ECONET Wireless Nigeria Ltd,*[666] the plaintiffs instituted an action against two GSM providers as class representatives of GSM subscribers using the defendants' services. The plaintiffs alleged several breaches of contract by the defendants including the breach of their digital mobile licenses due to their failure to ensure that the traffic capacity on their networks guaranteed a satisfactory quality of service.[667] The plaintiff sought the defendants to account for the monies they received on behalf of the plaintiffs which represented the monetary values of dropped and uncompleted calls. The defendants raised a preliminary objection that the suit was commenced without complying with the condition precedents under sections 73 -75 of the NCA. During the hearing of the preliminary objection, the defendants applied to the Court that the ruling on the objection in *Nationwide Action against Corruption & another v ECONET Wireless Ltd & others,*[668] which was also pending before the same Court should also apply to this present case. Both parties agreed on it and the Court adopted that procedure. After the Court upheld the preliminary

[664]*Ibid* at 37.
[665]*Ibid* at 38. *See also*, C B Opata, 'Rethinking Remedies for Dissatisfied Nigerian Consumers of Telecommunications Services', p.13, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2346820> last accessed on 30 March, 2016.
[666]*Mike Nkwocha, Jerry Akinwumi and Ibrahim Wachy v MTN Nigeria Communications Ltd and ECONET Wireless Nigeria Ltd* [2008] 11 NWLR (Pt 1099) at 439.
[667]*Ibid* at 452.
[668]*Nationwide Action Against Corruption & Benson Ibezim v ECONET Wireless Ltd, MTN Nigeria Communications Ltd and Globacom Nigeria* [2008] (Unreported) Appeal No. CA/A/10/2005.

objection in the *Nationwide Case*, the present case was adjourned for hearing in the presence of the plaintiffs' counsel. However, the plaintiff's counsel was absent on the adjourned date. The Court struck out the suit on the basis of the decision in the *Nationwide Case* and also for want of diligent prosecution. On appeal to the Court of Appeal, the plaintiffs/appellants argued that the Federal High Court erred in striking out their suit on the basis of the decision in the *Nationwide Case* without first hearing the suit. However, the Court of Appeal dismissed appeal holding that when a party agrees to the adoption of a procedure by the Court which does not occasion any injustice, that such party is not entitled to reject the procedure simply because judgment was given against it.[669]

The failure of the Court to distinguish the *Nationwide Case* from the *Nkwocha Case* has been described as 'unfortunate' because while the *Nationwide Case* was based on the violation of the NCA, the *Nkwocha Case* was partly based on breach of contract which made it a different matter.[670] It has also been observed that the combined effect of the decisions in the *Njikonye Case* (which stated that the Federal High Court does not have subject matter jurisdiction of contractual matters and that any the State High Court and High Court of the Federal Capital Territory (FCT) has such jurisdiction) and the *Nationwide Case* (which stated that compliance with sections 73-75 NCA of the NCA was a condition precedent to seeking judicial recourse on any dispute concerning telecommunications matters) appears to have technically left consumers who seek

[669]*Mike Nkwocha, Mr. Jerry Akinwumi and Ibrahim Wachy v MTN Nigeria Communications Ltd and ECONET Wireless Nigeria Ltd* [2008] 11 NWLR (Pt 1099) at 461 -462. *See also*, C B Opata, 'Rethinking Remedies for Dissatisfied Nigerian Consumers of Telecommunications Services', pp.13-14, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract _id=2346820> last accessed on 30 March, 2016.

[670]C B Opata, *Ibid*, p.14.

remedies for breach of contract by service providers without any forum to pursue such remedies. This position is based on the fact that the Federal High Court does not have subject matter jurisdiction over contractual matters. On the other hand, the State High Court and the High Court of the FCT which has jurisdiction over contractual matters both lack jurisdiction to review the decisions of the NCC.[671] This state of affairs underscores the need for the Court of Appeal or the Supreme Court to consider the issue of the appropriate forum for instituting consumer claims for breach of contracts against telecommunications service providers at the earliest possible opportunity. Pending such judicial response, the Federal High Court appears to be the appropriate forum for the commencement of claims for contractual remedies arising from telecommunications matters. This is because the Federal High Court's jurisdiction to entertain telecommunications matters is exclusive and not limited to any specified issues or areas. Hence, its jurisdiction would extend to matters arising from telecommunications contracts.

With respect to the question as to whether consumers in all cases must first seek reliefs from the NCC under sections 73-75 of the NCA, it is also important to note that although section 73 of the NCA establishes the powers of the NCC to resolve telecommunications disputes between parties who are subject to the NCA and where such disputes relate to any matter under the NCA or its subsidiary legislation;[672] however, the NCA does not provide that such dispute resolution powers will be automatically exercised by the NCC once a telecommunications dispute has arisen between parties who are subject to the NCA. Thus before the NCC can exercise the dispute resolution powers under section 73

[671]C B Opata, *opcit*, p.14.
[672]NCA 2003, s. 73.

of the NCA, some conditions must exist. Firstly, the parties to the dispute must have made an unsuccessful attempt to resolve the dispute through negotiation before seeking the intervention of the NCC.[673] Secondly, section 75(1) of the NCA provides that "a party to a dispute may, in writing, notify the NCC of the dispute and the NCC may only resolve a dispute…if it is notified in writing of the dispute and requested by either or both parties to intervene thereon".[674] This implies that the NCC's dispute resolution powers can only be activated on the invitation of a party or both parties to the dispute. Consequently, where both parties fail to amicably settle their dispute through negotiation, they can agree to seek redress through the Court without seeking the intervention of the NCC in resolving the dispute. On this basis, it is submitted that a consumer does not need to first seek reliefs from the NCC under sections 73-75 of the NCA as a condition precedent before suing for a remedy under the law of contract, or the QoS Regulations or under the Consumer Protection Council Act, provided that the consumer or the service provider has not earlier sought the intervention of the NCC to resolve the dispute in accordance with section 75(1) of the NCA. However, where any of the parties to the dispute (the consumer or service provider) has requested the intervention of the NCC under section 75(1) of the NCA, then compliance with section 86-88 of the NCA will become a condition precedent to any remedy which is been sought through the Courts. On the basis of this position it appears to some extent that the position of the Courts in the *Nationwide Case* and the *Nkwocha Case* may not be entirely correct.

[673]NCA 2003, s. 74(1).
[674]*Ibid*, s. 75(1).

4.6.4 Telecommunications Tariff Rates and Consumer Billing

How consumers are charged and billed for the utilization of telecommunications services are also addressed in NCA's consumer protection regime.[675] Section 108 (1) of the NCA provides that "holders of individual licenses shall not impose any tariff or charges for the provision of any service until the Commission [NCC] has approved such tariff rates and charges…"[676] Thus, the above provision establishes the powers of the NCC to regulate telecommunications tariffs or charges that will be imposed on consumers by telecommunications service providers that hold individual licenses under the NCA, such as service providers that provide GSM and broadband services. Apparently, the broad scope of the above section 108 (1) empowers the NCC to exercise regulatory powers which include the setting of price caps for consumer tariffs. For example, in the exercise its powers to approve the tariff rates of service providers the NCC may decide not to approve a tariff rate that is considered unfair to consumers. For example, when MTN introduced the 'per second' billing platform, it offered its subscribers the opportunity to migrate from the 'per minute' billing platform to the 'per second' billing platform after the payment of a ₦100 migration fee. However in December 2004, the NCC exercised its powers under section 108 of the NCA and directed MTN to refund all subscribers who had paid the migration fee. The NCC also directed MTN not to charge such fees in future.[677]

[675]NCA 2003, Chapter VII, Part III. *See also*, Part IV NCC General Consumers Code of Practice, Consumer Code of Practice Regulations 2007.
[676]NCA 2003, s. 108 (1).
[677] Editorial, 'GSM-NCC Orders MTN to Refund Subscribers on Migration Charges', *The Vanguard*, 27 December, 2004.

When setting tariff rates, service providers are required to comply with a set of principles which include: that tariff rates shall be fair and not discriminatory and that tariff rates shall be cost-oriented and that cross-subsidies shall be eliminated.[678] In addition, service providers are required to comply with any tariff setting principles established in the NCC's regulations or guidelines.[679] Where the NCC has approved a service provider's tariff rates and charges, the service is obligated to strictly adhere to the approved tariff rates and charges.[680] However, where the service provider intends to change the approved tariff rates and charges, it will first obtain the approval of the NCC before implementing the proposed changes.[681] In addition, service providers are required to publish subscriber tariff rates for their respective services and any approved modifications to such rates.[682] However, although service providers are meant to set tariff rates subject to the approval of the NCC, the NCA also establishes the powers of the NCC to intervene in any manner it deems appropriate to determine and set the tariff rates for any non-competitive services provided by a service provider.[683]

Prior to the enactment of the NCA (2003), the NCC attempted to regulate tariffs by establishing price caps beyond which service providers were not allowed to charge consumers. Thus, following the award of digital mobile licenses in 2001, and the subsequent rollout of GSM services the NCC capped tariffs for mobile calls at ₦50 per minute.[684] The NCC also took the view that the growth of market competition in the

[678]NCA 2003, s. 108 (4).
[679]NCA 2003, s. 108 (4). *See also* s. 110 of the NCA which establishes the powers of the NCC to make regulations on the determination and publication of tariff rates for service providers.
[680] S. 108 (2) *Ibid*.
[681] S. 108 (3) *Ibid*.
[682] S. 108 (3) *Ibid*.
[683] S. 109 *Ibid*.
[684]K Nwogbo, 'NCC's Equivocation on Price Cap', *Nigeria Communications Week*, 4 May, 2010.

industry would result in the inevitable decline of consumer tariff rates.[685] Following the enactment of the NCA in 2003 the NCC did not revise the price cap for mobile calls, however it resorted to fixing interconnection rates for service providers with the expectation that cost based interconnection tariffs and the effects of market competition would eventually drive down consumer tariff rates.[686] The last interconnection rates for voice services were issued by the NCC in March 2013.[687] Thus, instead of exercising its regulatory powers to establish explicit price caps on consumer tariff rates, the NCC rather set up an interconnection regime for service providers that would determine consumer tariffs following interaction with market forces. While this is seen as a *lassie faire* regulatory approach,[688] however, interconnection rates have always been on a downward trajectory in the industry[689] resulting in the driving down of consumer tariffs.[690] For example, consumer tariff for mobile calls fell from ₦50 in 2001 to about ₦45 in 2005[691] and several times lower by 2016.

However, on one occasion the NCC has intervened to set price caps for consumer tariffs when it was of the view that market forces had failed to deliver consumer tariff reduction despite lower interconnection tariffs. Thus, following the expiration of the 2009 SMS Interconnection Rate Regime, the NCC found that the cost of text messages still

[685]C B Opata, 'Rethinking Remedies for Dissatisfied Nigerian Consumers of Telecommunications Services', p.36, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2346820> last accessed on 30 March, 2016.
[686]*Ibid*.
[687]NCC, Determination of Voice Interconnection Rates (Abuja: NCC, 20 March, 2013) p.12.
[688]K Nwogbo, 'NCC's Equivocation on Price Cap', *Nigeria Communications Week*, 4 May, 2010.
[689]C B Opata, 'Transplantation and Evolution of Legal Regulation of Interconnection Arrangements in the Nigerian Telecommunications Sector', (2011) 14 *International Journal of Communications Law & Policy*, 25.
[690]O Banguda, 'GSM Companies Should Lower Tariff – Usoro', *Premium Times*, 21 December, 2013 available at <http://www.premiumtimesing.com/business/151834-gsm-companies-lower-tariff-usoro .html> last accessed on 30 March, 2016.
[691] *Ibid*.

remained high despite the fact that the interconnect rate regime fixed ₦1,02K as the rate for domestic SMS since 2009. Consequently, in January 2013 the NCC established a price cap of N4 for domestic SMS.[692] However, the failure of the NCC to place a price cap on international SMS has been criticized for encouraging a situation whereby Nigerian consumers may still be paying too much for international SMS in an increasingly globalized world.[693]

4.6.5 Regulation of Advertisements, Promotional Offers and Lotteries

Advertisements, sales promotions and lotteries by telecommunications service providers are regulated with a view to ensuring the protection of consumers in the Nigerian telecommunications industry.

4.6.5.1 Advertisements

Advertising[694] in Nigeria is generally regulated by the Advertisement Practitioner's Council of Nigeria (APCON) Act.[695] This Act also applies to advertising activities in the Nigerian telecommunications industry.[696] In addition, the NCC Guidelines on Advertisements and Promotions[697] and the NCC General Consumer Code of Practice also establish specific provisions that regulate advertising in the telecommunications industry. Under the NCC Guidelines on Advertisements and Promotions 'advertisement' is defined

[692] E Okonji, 'NCC Sets New Price Cap on Text Messages', *ThisDay*, 25 January, 2013.

[693] C B Opata, 'The Curious Case of Consumer Dissatisfaction in Nigerian Telecommunications Sector', p.36, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2356804> last accessed on 30 March, 2016.

[694] 'Advertising' refers to the act of drawing the public's attention to something in order to promote its sale. *See* B A Garner (ed), *The Black's Law Dictionary* (9th edn, St Paul MN, United States: West Publishing Co, 2009) p.63.

[695] Advertisement Practitioner's Council of Nigeria (APCON) Act, No.55 of 1998, CAP. 7, LFN.

[696] Paragraph 17, General Consumer Code of Practice, Schedule to the NCC Consumer Code of Practice Regulations 2007, *Official Gazette of the Federal Republic of Nigeria* (10 July, 2007) Vol. 94, No. 87, Government Notice No. 56.

[697] NCC Guidelines on Advertisements and Promotions, available at <http://www.ncc.gov.ng/Archive/RegulatorFramework/Advertisements_Promotions.pdf> last accessed on 30 March, 2016.

as "any message, the content of which is controlled directly or indirectly by the advertiser expressed in any language and communicated in any medium with the intent to influence their choice, opinion or behavior".[698] The Guidelines establish the minimum standards and requirements to regulate the advertisements of products and services by telecommunications service providers in order to ensure the protection of consumers and ethical marketing by service providers.[699] Under the Guidelines service providers are required to provide the NCC with a written notification of all proposed advertisements for products and services within 7 days of the proposed publication of the advertisement.[700] The Guidelines also address requirements including: compliance with the NCC's standards; the clear communication of the prices of products and services; the medium of advertisement; the prohibition of unfair and misleading advertisements, and; the requirement to indicate Internet connection speed to consumers with respect to advertisements offering Internet connections.[701]

Under the NCC's General Consumer Code of Practice, service providers that are advertising the availability of a service are required to clearly disclose the geographical or technical limitations on the availability of the service to consumers, as well as any limitations that may substantially affect the performance of the service.[702] The code also requires a service provider that advertises a 'packaged service' to ensure that all components of the service package are supplied to consumers and that appropriate information is provided to consumers where the service provider is unable to supply any

[698]Paragraph 2, NCC Guidelines on Advertisements and Promotions.
[699] Paragraph 1(b) *Ibid*.
[700] Paragraph 3 *Ibid*.
[701]Paragraph 3 NCC Guidelines on Advertisements and Promotions.
[702] Paragraph 18 Schedule to the CCPR.

component of the service.[703] A service provider that is advertising a packaged service is also required to indicate any conditions that may apply to obtaining a component of the package at a stated price.[704]

4.6.5.2 Sales Promotion

'Sales promotion' refers to "a promotional marketing technique, which generally involves providing a range of direct or indirect additional benefits usually on a temporary basis, designed to make goods, products or services more attractive to purchasers".[705] Sales promotion activities in the Nigerian telecommunications industry are regulated by instruments including: the Nigerian Code of Advertising Practice,[706] the Consumer Protection (Sales Promotions) Regulations,[707] and the NCC Guidelines on Advertisements and Promotions. Amongst these regulatory instruments, the Consumer Protection (Sales Promotions) Regulations and the NCC Guidelines sets out a more elaborate framework for the protection of consumers during sales promotion activities by service providers in the telecommunications industry.

4.6.5.2.1 The Consumer Protection (Sales Promotions) Regulations

The Sales Promotions Regulations establishes the general framework for the protection of consumers in all sales promotions in Nigeria including those that relate to the telecommunications industry. The Regulation was established by the Consumer Protection Council in the exercise of its powers under section 31 of the Consumer

[703]Paragraph 19(1) Schedule to the CCPR.
[704] Paragraph 19(2) *Ibid.*
[705]Regulation 12 Consumer Protection (Sales Promotions) Regulations 2005, *Official Gazette of the Federal Republic of Nigeria* (1 March, 2005) Vol.92, No.12.
[706] The Nigerian Code of Advertising Practice is established under the Advertising Practitioner (Registration etc) Act. *See also*, Regulation 1 Consumer Protection (Sales Promotions) Regulations 2005.
[707] Consumer Protection (Sales Promotions) Regulations 2005, *Official Gazette of the Federal Republic of Nigeria* (1 March, 2005) Vol.92, No.12.

Protection Council Act. Under the Regulations, all sales promotions are required to comply with part 5 of the Nigerian Code of Advertising Practice.[708] The Regulations also establish the powers of the Consumer Protection Council to supervise all sales promotions[709] in order to ensure that consumers are protected.[710] All sales promotion where the total value of consumer benefits or prizes exceed a value of two hundred and fifty thousand Naira (₦250,000) are required to be registered in accordance with the Regulations.[711] In this respect, a person that intends to register a sales promotion is required to make a written application to the Consumer Protection Council and also pay the appropriate registration fees.[712] The Council may issue a certificate of registration where the applicant has satisfied the requirements under the Regulations.[713]

4.6.5.2.2 The NCC Guidelines on Advertisements and Promotions

The NCC Guidelines on Advertisements and Promotions also specifies minimum standards and requirements for sales promotion by telecommunications service providers in order to ensure ethical promotional standards by service providers.[714] In order to avoid regulatory conflicts with respect to the regulation of sales promotions, the NCC and the Consumer Protection Council entered into a Memorandum of Understanding (MoU) in December 2005.[715] The MoU reserves the right of the NCC to grant approvals for sales

[708]Regulation 1 Consumer Protection (Sales Promotions) Regulations 2005.
[709]Regulation 7(1) *Ibid*.
[710]Regulation 7(2) *Ibid*.
[711]Regulation 10 *Ibid*.
[712]Regulation 2 *Ibid*.
[713]Regulation 3 *Ibid*.
[714]Paragraph 1 NCC Guidelines on Advertisements and Promotions.
[715]Memorandum of Understanding between the Consumer Protection Council and the Nigerian Communications Commission, (19 December, 2005) available at <http://www.ictregulationtoolkit.org/Documents/Document/Document/3909> last accessed on 30 March, 2016.

promotions in the telecommunications industry[716]and also affirms the responsibility of the Consumer Protection Council to register and monitor sales promotions that are targeted at consumers in the telecommunications industry.[717] Thus, under the Guidelines every telecommunications service provider is required to apply to the NCC for approval before carrying out any promotion of its products and services.[718] The Guidelines also prescribe requirements on: the duration of a sales promotion, and the date of the redemption of promotional benefits;[719] the specification of the products or services being promoted and the target consumers;[720] the capacity of the service provider's network to sustain the traffic that may be generated by the sales promotion,[721] and; the geographical balance of the sales promotion activity.[722] The Guidelines also requires service providers to ensure the communication of specific products or services in promotional offers and further prohibits the variation of rewards for participation in sales promotions.[723]

The NCC reserves the right to reject any application for sales promotion under the Guidelines.[724] Where the NCC rejects an application for a sales promotion it is also obligated to communicate the rejection and the reasons for its decision to the service provider within 7 days of receiving of the application. However, where the situation can be remedied, the NCC may request the service provider to remedy the situation within a

[716]Paragraph C (i), Memorandum of Understanding between the Consumer Protection Council and the Nigeria Communications Commission 2005.
[717]Paragraph C (i), *Ibid*.
[718]Paragraph 4 (1) NCC Guidelines on Advertisements and Promotions.
[719]Paragraph 4(x) *Ibid*.
[720]Paragraph 4(ii) *Ibid*.
[721]Paragraph 4(vi) *Ibid*.
[722] Paragraph 4(xiv) *Ibid*.
[723] Paragraph 4(xiv) *Ibid*.
[724]Paragraph 5(i) *Ibid*.

specified period.[725] In practice, there have been instances where the NCC rejected service provider's application for sales promotion due to the concerns over poor quality of service. For example in 2011, the NCC rejected an application by MTN for approvals to organize sales promotions. The NCC based its reason for the rejection on the ground that the content of the promotions and the volume of traffic it will generate will further degrade the service provider's current quality of services.[726]

Where an application for sales promotion has been approved, the NCC still reserves the right to withdraw such approval due to reasons including: network congestion; poor quality of service; consumer dissatisfaction; misrepresentation by the service provider, or; the breach of the conditions of approval by the service provider.[727] In practice, the NCC has mostly withdrawn approvals for promotions on the basis of network congestion and poor quality of service by service providers. For example, in July 2007, the NCC ordered a blanket ban on promotional activities due to the absence of network infrastructure to support such activities without causing network congestion and degrading quality of service.[728] The NCC also ordered a blanket ban on sales promotions by GSM service providers due to poor quality of service in February 2008.[729] In November 2012, the NCC ordered an indefinite ban on all sales promotion and lotteries by seven telecommunications service providers (Globacom, MTN, Intercellular, Visafone, Etisalat, Airtel, and Multilinks) due to increased network congestion and poor

[725]Paragraph 5(ii) - (iii) NCC Guidelines on Advertisements and Promotions.
[726]Z Adaramola, '10 Years of GSM-Citizens Still Long for Better Network", *Daily Trust* (25 July, 2011).
[727]Paragraph 6 (a) NCC Guidelines on Advertisements and Promotions.
[728] Editorial, 'NCC Ban Promos by GSM Providers', *The Vanguard*, 20 July, 2007. *See* 'NCC Bans GSM Promos', *TeleGeography*, 23 July, 2007, available at <https//.www.telegeography.com/products/ commsupdate/articles/2007/07/23/ncc.bans-gsm-promos/> last accessed on 30 March, 2016.
[729]*See* 'NCC Bans GSM Sales Promotion', *ThisDay*, 8 February, 2008.

services arising from incessant sales promotions and lotteries.[730] Later in April 2013, the NCC reversed the ban on six service providers after they had met the Quality of Service KPI targets for 2012, but however retained the ban on MTN.[731] The NCC has also withdrawn approvals for sales promotion activities following complaints over consumer dissatisfaction. For example, in 2010 following consumer complaints over unsolicited SMS Messages, the NCC banned service providers from sending unsolicited SMS for sales promotion to consumers.[732]

4.6.5.3 Lotteries

There is no explicit framework for the regulation of lotteries under Nigeria's telecommunications regime. However, the National Lottery Act (2005) establishes a general framework for the regulation of lotteries in Nigeria and also applies to the Nigerian telecommunications industry. The Act provides for the protection of the interest of the general public during lottery activities.[733] Hence, telecommunications service providers that violate the provisions of the Act during lottery activities are liable to sanctions by the National Lottery Regulatory Commission (NLRC).[734] To enhance the protection of consumers during lottery activities in the telecommunications industry, the

[730]NCC, 'Press Release - Ban of All Promotions and Lotteries by Telecommunications Operators', (November, 2012) available at <http://www.ncc.gov.ng/index.php?option=com.content&view=article&id=1105:ban-of-all-promotions-and-lotteries-by-telecommunications–operators&catid=73:cat.web-publicnotices&item=92> last accessed on 30 March, 2016.

[731]News Agency of Nigeria, 'MTN Left Out as NCC Lifts Suspension of Promotions on Airtel, Globacom, Etisalat', *Information Nigeria*, 13 April, 2013, available at <htt//www.informationnig.com/2013/04/mtn.left-out-as-ncc-lifts-suspension-of-promotions-on-airtel-globalcom-etisalat.htm> last accessed on 30 March, 2016.

[732] 'Communications Commission's Ban on SMS Promotions', *Daily Trust*, 5 July, 2010.

[733] National Lottery Act 2005, s. 7(d).

[734] National Lottery Act 2005, s. 34.

NCC entered into a Memorandum of Understanding (MoU) with the NLRC in 2012.[735] The MoU affirms the NCC's regulatory powers to intervene in lotteries targeted at consumers in the telecommunications industry, where such lotteries would degrade the quality of service below the NCC's KPI targets.[736] However, there is need to establish explicit regulatory guidelines that would address consumer protection during lottery activities in the telecommunications industry. This is because existing frameworks such as the NCC Guidelines on Advertisements and Promotions and the Consumer Code of Practice Regulations do not make any provisions for lotteries, and neither does the National Lottery Act or the Consumer Protection Council Act create explicit provisions for consumer protection during lotteries in the telecommunications industry.

4.6.6 Unsolicited Communications (SPAM)

Unsolicited communications refer to telecommunications which are not solicited by the recipient.[737] In this context, 'unsolicited communications' classifies telecommunications such as voice calls, and messages (SMS and MMS) which are usually transmitted with the objective of marketing commercial products or services to a recipient who has not consented to receiving such communications. Unsolicited communications are commonly known as 'spam'. The ITU defines 'spam' as "electronic information delivered from senders to receivers by terminals such as computers, mobile phones, telephones…which is usually unsolicited, unwanted and harmful for

[735]R Nweke, 'NCC Enters Pact with NLRC, Explains GSM Lotteries', *ITREALMS*, 15 February, 2012, available at <http://www.itrealms.com.ng/2012/02/ncc-enters-pact-with-nlrc-explains-gsm.html> last accessed on 30 March, 2016.
[736]*Ibid.*
[737]U J Orji, *Cybersecurity Law and Regulation* (Nijmegen, The Netherlands: Wolf Legal Publishers: 2012) pp. 58-60.

receivers".[738] Unsolicited electronic communications that are generally 'commercial' in nature are usually classified as 'spam'.[739] For example, under the European Union (EU), Directive on Privacy and Electronic Communications, the meaning of 'spam' is limited to unsolicited commercial communications including e-mails, automated calls, SMS text and fax messages.[740] However, some EU countries such as the Netherlands have also broadened the classification of what constitutes 'spam' to include unsolicited ideological and charitable electronic communications.[741]

Most unsolicited communications that are classified as 'spam' usually constitute nuisance to telecommunications consumers by flooding communication systems and drowning out the messages that consumers want to receive. Such unsolicited communications usually drain a consumer's useful time due to the time that is spent on reading and deleting such messages or answering unsolicited phone calls. Unsolicited communications may be offensive or transmitted to achieve fraudulent objectives such as misleading consumers and acquiring sensitive personal data or financial information. In particular, such communications are commonly being used by cyber criminals as vehicles

[738]ITU–T, Recommendation ITU-TX.1231 (Technical Strategies for Countering Spam). *See also* S Scarabino, 'ITU-T Standardization on Countering Spam', Joint Internet Society, CITEL and ITU Workshop on Combating Spam (Mendoza, Argentina, 7 October, 2013) p.9.

[739]Internet Society, Combating Spam: Policy, Technical and Industry Approaches, p.1, available at <http://www.internetsociety.org/doc/combating-spam-policy-technical-and-industry-approaches>.

[740]*See* Article 13 Directive 2002/58/EC of the European Parliament and the Council of 12 July 2002, Concerning the Processing of Personal Data and the Protection of Privacy in the Electronic Communications Sector (EU Directive on Privacy and Electronic Communications). *See also* Article 13, Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009, amending the EU Directive 2002/58/EC on Privacy and Electronic Communications.

[741]Internet Governance Forum, *Best Practice Forum on Regulation and Mitigation of Unsolicited Communications (e.g. 'Spam')* (Internet Governance Forum, 2014) p.9, available at < https://www.intgovforum.org/cms/documents/best-practice-forums/regulation-and-mitigation-of-unwanted-communications/411-bpf-2014-outcome-document-regulation-and-mitigation-of-unsolicited-communications-spam/file>.

for the spread of malicious computer programmes such as worms, viruses and spyware.[742] Also unsolicited communications can consume available storage space on consumer devices thereby hindering the efficient operation of such devices.[743] Generally, unsolicited communications are considered as an invasion of a consumer's right to privacy, or the 'right to be let alone'.[744]

In Nigeria, the issue of unsolicited communications has remained a major challenge to consumers in the telecommunications industry. Common forms of unsolicited communications that affect consumers in the industry include: unsolicited caller or ring tunes, unsolicited SMS advertising or promoting products or services, or lotteries, and other forms of unsolicited advertising including automated calls and unsolicited telemarketing.[745] In most cases, unsolicited communications are used by service providers to subscribe consumers to unsolicited services such as caller tunes, and daily messages[746] or lotteries, which are eventually billed on consumers and deducted from their call credit without their consent.[747]

4.6.6.1 The Regulatory Regime for Unsolicited Communications

The NCC's Consumer Code of Practice Regulations (2007) establishes the regulatory regime for the control of unsolicited communications in the Nigerian

[742]ITU-T, Resolution 52 - Countering and Combating Spam, World Telecommunications Standardization Assembly (Johannesburg, 21-30 October, 2008).
[743]U J Orji, *Cybersecurity Law and Regulation* (Nijmegen, The Netherlands: Wolf Legal Publishers, 2012) p.59.
[744]Regarding the origin of privacy as a distinct legal concept, *see* Warren S.D and Brandies L.D., 'The Right to Privacy', (15 December, 1890) IV (5) *Harvard Law Review*.
[745]Consumer Protection Council, *A Compendium of the Rights of Telecom Subscribers in Nigeria* (Abuja: Consumer Protection Council, Nigeria, 2014) p.5. *See also*, B Adewumi, 'Nigerians Want End to Unsolicited Text Messages, Calls from Telecoms Operators', *The Tribune*, 20 October, 2015.
[746] Such unsolicited daily messages usually include topics such as news, business, sports, health, romance, and religious devotion.
[747]T Enietan-Mathews, 'Reps Order NCC to Stop Unsolicited Caller Tunes, Messages', *Daily Post*, 12 August, 2015.

telecommunications industry. In this respect, the General Consumer Code of Practice that is contained in the Schedule to the Regulations prohibits telecommunications service providers from engaging in unsolicited telemarketing unless certain requirements are fulfilled. Thus, paragraph 20(1) of the Code provides that:

> No licensee shall engage in unsolicited telemarketing unless it discloses –
>
> *(a)* at the beginning of the communication, the identity of licensee or other person on whose behalf it is made and the precise purpose of the communication;
>
> *(b)* during the communication, the full price of any product or service that is the subject of the communication, and;
>
> *(c)* that the person receiving the communication shall have an absolute right to cancel the agreement for purchase, lease or other supply of any product or service within seven (7) days of the communication, by calling a specific telephone number (without any charge, and that the licensee shall specifically identify during the communication) unless the product or service has by that time been supplied to and used by the person receiving the communication.[748]

The General Consumer Code of Practice also requires telecommunications service providers to conduct telemarketing in accordance with any 'call' or 'do not call' preferences recorded by the consumer at the time of, or after entering into the contract with a service provider, or in accordance with any rules or guidelines issued by the NCC or any other competent authority.[749] However, the regulatory regime under the Code

[748]Paragraph 20(1) General Consumer Code of Practice, Schedule to the CCPR 2007.
[749]Paragraph 20(1) *Ibid*.

appears inadequate to cover most forms of unsolicited communications that affect consumers in Nigeria as its provisions are limited to 'unsolicited telemarketing'.

A broader regime for the regulation of unsolicited communications is established in the Schedule to the NCC's Quality of Service (QoS) Regulations (2012).[750] The First Schedule to the QoS Regulations establishes two targets and key performance indicators for the resolution of consumer complaints on unsolicited messages. The first target establishes an obligation on service providers to provide an option for a subscriber to 'opt out' of receiving unsolicited messages where such messages originate from the service provider or its third party business partners.[751] The second target requires service providers to make reasonable effort to identify and block or filter bulk unsolicited and offensive messages from other sources.[752] A service provider that fails to meet the above targets would be liable to compensate the affected consumer(s) in addition to paying any fines imposed by the NCC.[753]

However, the targets under the QoS Regulations do not broadly cover unsolicited communications such as unsolicited caller tunes or unsolicited automated calls. Also, the NCC appears not to have effectively enforced the prescribed targets to address the issue of unsolicited messages. Rather, the NCC has merely issued warnings that it will sanction service providers that sent unsolicited messages to consumers. For example, in the months of January and May, 2015, the NCC warned that it will sanction service providers

[750]NCC Quality of Service Regulations 2012, *Official Gazette of the Federal Republic of Nigeria* (18 January, 2012) Vol. 99, No.5, Government Notice No.4.
[751]NCC QoS Regulations 2012, Schedule 1, Table 2, at paragraph 23(i).
[752]NCC QoS Regulations 2012, Schedule 1, Table 2, at paragraph 23(ii).
[753]Regulations 8 & 14 QoS Regulations 2012.

for unsolicited messages.[754] However, such warnings have not addressed the problem. In August, 2015 following a motion by a Member of the Federal House of Representatives, the House directed the NCC to urgently address the issue of unsolicited communications by service providers including unsolicited messages caller tunes, voice calls and messages in order to enhance consumer satisfaction in the industry.[755] This type of response will also not address the problem. What is needed is an elaborate regime to regulate unsolicited communications and effective enforcement of such regime. Accordingly, it appears imperative to consider the regulatory regime for the control of unsolicited communications in some foreign jurisdictions, and under the ECOWAS framework.

4.6.6.2 Lessons from Foreign Jurisdictions and Regional Instruments

The problem of unsolicited communications has also been a challenge in more advanced telecommunications markets such as the European Union (EU) and North America.[756] In the EU, the Directive on Privacy and Electronic Communications (2009) declares that "safeguards provided for subscribers against intrusion into their privacy by unsolicited communications for direct marketing purposes by means of electronic mail *should also be applicable to SMS, MMS and other kinds of similar applications*".[757]

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[754] Editorial, 'NCC to Sanction Network Service Providers over Unsolicited Messages', *Information Nigeria*, 28 January, 2015, available at <http://www.informationng.com/2015/01/ncc-to-sanction-network-service-providers-over-unsolicited-messages.html> last accessed on 30 March, 2016. *See also*, P Osuagwu, *et al*, 'NCC Wields the Big Stick Over Unsolicited Messages', *The Vanguard*, 13 May, 2013.

[755] T Enietan-Mathews, 'Reps Order NCC to Stop Unsolicited Caller Tunes, Messages', *Daily Post*, 12 August, 2015.

[756] European Network Security Agency, 2009 Spam Survey, available at <http://www.internetsociety.org/sites/default/files/EU%202009%20spam%20survey.pdf> last accessed on 30 March, 2016.

[757] Paragraph 67, Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009, amending Directive 2002/58/EC Concerning the Processing of Personal Data and the Protection of Privacy in the Electronic Communications Sector [Hereafter EU Directive on Privacy and Electronic Communications 2009].

Article 13(1) of the Directive prohibits unsolicited commercial communications such as electronic mails and automated calling and communication systems, including automated SMS and Fax messages.[758]

In the United States, the Congress first addressed the problem of unsolicited communications by enacting the Telephone Consumer Protection Act (TCPA) of 1991.[759] The TCPA gave the United States Federal Communication Commission (FCC) the authority to adopt regulations to address unsolicited telephone communications in order to ensure the protection of the privacy rights of residential telephone subscribers.[760] The TCPA imposed certain restrictions subject to exceptions that are established by the FCC on the use of automated telephone equipment to deliver unsolicited communications.[761] In particular, the TCPA prohibits the use of a telephone, facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine in the United States except with the consent of the recipient.[762] The prohibition also applies to instances where the unsolicited advertisement is sent from a location outside the United States to a recipient in the United States.[763] One unique provision of the TCPA is that it establishes the right of consumer to institute a private action for enforcing the provisions of the TCPA.[764] In this respect, a consumer that has received more than one telephone

[758]Article 13(1) EU Directive on Privacy and Electronic Communications 2009.
[759]The United States Telephone Consumer Protection Act 1991 (47 U.S.C. Sec.227).
[760]K Lee and J Prime, 'US Telecommunications Law', in I Walden (ed) *Telecommunications Law and Regulation* (Oxford: Oxford University Press, 2012) p.267.
[761]United States Telephone Consumer Protection Act 1991, s. 227 (b) (1) (A) – (B).
[762] S. 227 (b) (1) (c) *Ibid*.
[763]*Ibid*.
[764]S. 227 (b) (3) & (5) *Ibid*.

call from a particular entity within any 12 – month period in violation of the provisions of the TCPA is entitled to sue.[765]

The FCC while establishing regulations to implement the TCPA Act in 1992, mandated the use of 'do-not call' lists that allowed consumers/subscribers to indicate whether or not they wished to receive calls on their fixed residential telephone lines from any specific company engaged in telemarketing. In order to address loopholes under the TCPA, the United States Congress enacted the Do-Not-Call implementation Act in 2003[766] which gave the United States Federal Trade Commission (FTC) the authority to implement a national 'do-not-call' registry.[767] The TCPA also applies to unsolicited mobile phone SMS that advertise the commercial availability of products or services.[768]

Nigeria may also draw useful lessons from the provisions of the ECOWAS Data Protection Act (EDPA) (2010).[769] Nigeria is a member of the ECOWAS and also a signatory to the EDPA. Article 34 of the EDPA prohibits the transmission of unsolicited electronic communications or messages for commercial, political or charitable purposes

[765]S. 227 (b) (5) *Ibid*. *See also*, *Mims v Arrow Financial Services LLC* (2012) 132 S. Ct. 740.

[766]Pub. L. No.108-10, 117 Stat 557 (2003). *See also,* K Lee and J Prime, 'US Telecommunications Law', in I Walden (ed) *Telecommunications Law and Regulation* (Oxford: Oxford University Press, 2012) p.267.

[767]K Lee and J Prime, *Ibid*.

[768]*Satterfield v Simon & Schuster, Inc*., (9th Circuit June 19, 2009) No. 07-16356. *See also,* E Goldman , 'Ninth Circuit Revives TCPA Claim–Satterfield v. Simon & Schuster', (3 July, 2009) · In August 2014, Capital One Financial Corporation, Alliance One Receivables Management Inc., Leading Edge Recovery Solutions, LLC and Capital Management Services L.P. entered into an agreement to pay 75.5 million US dollars to end a consolidated class action lawsuit pending in the United States District Court for the Northern District of Illinois which was instituted by subscribers who alleged that the companies had placed unsolicited automated calls to their mobile phones without obtaining prior consent in violation of the TCPA. *See* M Dale, 'Capital One to Pay Largest TCPA Settlement on Record', available at <http://privacylaw.proskauer.com/articles/tcpa-2/> last accessed on 30 March, 2016.

[769]Supplementary Act A/SA.1/01/10 on Personal Data Protection within ECOWAS, adopted at the 37th session of the Authority of ECOWAS Heads of State and Government, (Abuja, 16 February, 2010). [Hereafter, ECOWAS Data Protection Act].

to a person who has not consented to receiving such communications.[770] However, although Nigeria is a signatory to the EDPA, it has not yet been domesticated in Nigeria. Also, the EDPA does not have direct applicability in Nigeria due to the country's operation of a dualist legal system.[771] Under dualist legal system national law and international law are considered as "two distinct and separate categories of legal systems".[772] As such, regional or international law cannot be directly applied within the national legal system unless it has been domesticated by an Act of the legislature.[773] Consequently, there is need for the establishment of a robust regulatory regime that will address unsolicited communications in the Nigerian telecommunications industry. Such regulatory regime may borrow from some of the examples highlighted above, including the establishment of a private right of action for consumers who have been affected by unsolicited communications as seen in the United States.

4.6.7 Data Protection

The concept of data protection originates from the fundamental human right to privacy or the 'right to be let alone'.[774] Accordingly, article 12 of the Universal Declaration of Human Rights states that:

[770] Article 34 ECOWAS Data Protection Act.

[771] For an extensive discussion of the legal status and implementation of the ECOWAS Data Protection Act, *see* U J Orji, 'Regionalizing Data Protection Law: A Discourse on the Status and Implementation of the ECOWAS Data Protection Act', *9th International Conference on Computers, Privacy and Data Protection* (Brussels, Belgium: CPDP, Springer 27-29 January, 2016).

[772] E A Oji, 'Application of Customary International Law in Nigerian Courts', (2010) *Nigerian Institute of Advanced Legal Studies Law and Development Journal*, 156.

[773] S. 12 (1) of the Constitution of the Federal Republic of Nigeria (1999) which declares that: "No Treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly".

[774] Regarding the origin of privacy as a distinct legal concept, *see* Warren S.D and Brandies L.D., 'The Right to Privacy', (15 December, 1890) IV (5) *Harvard Law Review*.

> No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.[775]

In Nigeria, the Constitution establishes the fundamental right to privacy which provides that: "the privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications is hereby guaranteed and protected".[776] This provision has broad implications for data protection in telecommunications, as it establishes the legal basis to guarantee the privacy right of citizens when they utilize telecommunications services. However, Nigeria does not have a comprehensive data protection regime that adequately provides for the protection of the privacy of consumers' communications and their personal data.[777] Currently, the NCC's Consumer Code of Practice Regulations (CCPR) establishes the general framework to govern data protection in the telecommunications industry, and data protection provisions also exist under the NCC's Registration of Telephone Subscribers Regulations.

4.6.7.1 General Data Protection Principles under the Consumer Code of Practice Regulations

The Consumer Code of Practice Regulations (CCPR) establishes the general principles that govern the protection of the personal data of consumers in the

[775]Article 12 United Nations Universal Declaration of Human Rights 1948.
[776]Constitution of the Federal Republic of Nigeria 1999, s. 37.
[777] U J Orji, 'The Status of Data Protection Provisions in Nigeria', *Commonwealth and UNCTAD Global Study on Data Protection* (Unpublished) (*Commonwealth/UNCTAD*, 2015).

telecommunications industry.[778] In this respect, the CCPR provides that telecommunications service providers "may collect and maintain" the personal data of consumers where it is "required for its *business purposes*". However, the collection and maintenance personal data of consumers is also subject to data protection principles, including that such data shall be:

(a) fairly and lawfully collected and processed;

(b) processed for limited and identified purposes;

(c) relevant and not excessive;

(d) accurate;

(e) not kept longer than necessary;

(f) processed in accordance with the consumer's other rights

(g) protected against improper or accidental disclosure, and;

(h) not transferred to any party except with the consent of the consumer as permitted by approval of the NCC or as permitted or required by applicable laws and regulations.[779]

Accordingly, a service provider's collection and processing of a consumer's personal data will be unlawful and also a violation of the right to privacy where it does not comply with the above data protection principles.

The CCPR also establishes obligations on service providers to meet 'generally accepted' fair personal data processing principles which include:

[778]Part VI General Consumer Code of Practice, Schedule 1 Consumer of Code of Practice Regulations, S.1. 32 of 2007, *Official Gazette of the Federal Republic of Nigeria*, (10th July, 2007) Vol. 94, No. 87. Government Notice No. 56. [Hereafter CCPR].

[779] Paragraph 35 (1) General Consumer Code of Practice, Schedule 1 CCPR.

(a) providing notice as to what personal consumer data will be collected and its use or disclosure;

(b) indicating the choices that consumers have with regard to the collection, use and disclosure of such data;

(c) providing information as to the access that consumers shall have to such data in order to ensure its accuracy, and;

(d) providing information on the security measures taken to protect the information and the enforcement and redress mechanisms that are in place to remedy any failure to observe those measures.[780]

To some extent the general data protection principles under the CCPR are similar to the principles governing the processing of personal data under the ECOWAS Data Protection Act[781]and the EU Data Protection Directive[782] However, the CCPR's data protection principles are not elaborate and do not comprehensively address the protection of consumers' data when compared with the ECOWAS Data Protection Act and the EU Data Protection Directive. For example, the CCPR principles does not explicitly specify the rights of consumers during the processing of their personal data such as the rights to object to processing of their personal data and the rights to the rectification or erasure of inaccurate data.[783] Thus, given its limited scope, the CCPR's data protection principles do not appear adequate to address data protection concerns in the telecommunications

[780]Paragraph 35 (2) General Consumer Code of Practice, Schedule 1 CCPR.
[781]Articles 23-28 ECOWAS Data Protection Act.
[782] Article 6(1) Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with regard to the Processing of Personal Data and on the Free Movement of such Data. [Hereafter, EU Data Protection Directive].
[783]Articles 40 – 41 ECOWAS Data Protection Act. *See also*, Article 14 and 12 (b) EU Data Protection Directive. *See also*, U J Orji, 'A Comparative Review of the ECOWAS Data Protection Act', (2016) (4) *Computer Law Review International*, 108-118.

industry. The inadequacy of the CCPR's principles is also compounded by the absence of a comprehensive data protection law in Nigeria. Consequently, there is a need for the enactment of a comprehensive data protection law that would further enhance the privacy rights of consumers in the telecommunications industry. In this respect, it is imperative for such data protection law to adopt the minimum standards that are established under international data protection regimes such as the ECOWAS Data Protection Act, the EU Data Protection Directive and the recently adopted African Union (AU) Convention on Cyber Security and Personal Data Protection (2014).[784] Also, given that Nigeria is a State party to the ECOWAS Data Protection Act and the AU Convention on Cyber Security and Data Protection, the enactment of a national data protection law that adopts the standards under these two regional instruments will go a long way towards fulfilling Nigeria's positive obligations since those instruments cannot be directly applied or enforced in Nigeria unless they are domesticated by an Act of the National Assembly.[785]

4.6.8 Mandatory Registration of Mobile Subscribers

In Nigeria, the mandatory SIM card registration program is regulated by the NCC's Registration of Telephone Subscribers Regulations (RTSR) (2011).[786] Aside from establishing the regulatory framework for the registration of mobile telephone subscribers, the RTSR also provide for the NCC's establishment and administration of a central database containing the biometric and personal identification data of all registered

[784]Chapter II, African Union Convention on Cyber Security and Personal Data Protection, EX. CL/846 (XXV) adopted at the 23rd Ordinary Session of the Assembly of the African Union (Malabo, 27th June, 2014).
[785]Constitution of the Federal Republic of Nigeria 1999, s.12 (1).
[786]NCC Registration of Telephone Subscribers Regulations 2011, *Official Gazette of the Federal Republic of Nigeria* (7 November, 2011) Vol. 98, No.101, Government Notice No.229. [Hereafter RTSR 2011].

subscribers.[787] The RTSR generally apply to mobile network operators and all mobile network subscribers including corporate, private and commercial subscribers to mobile telecommunications services that utilize the SIM cards in Nigeria.[788] The RTSR also apply to subscribers of foreign mobile telecommunications operators who are roaming on the network of a mobile telecommunications operator that is licensed in Nigeria.[789] In October 2015, the NCC fined MTN ₦1.04 trillion (5.2 billon USD) for its failure to deactivate 5.2 million unregistered SIM cards on its network at the expiration of the NCC's regulatory deadline.[790] The fine was the largest penalty that the NCC has ever imposed on an operator in the Nigerian telecommunications industry. MTN subsequently challenged the fine in the Federal High Court, but later withdrew the matter and entered into negotiations with the NCC and the Federal Government of Nigeria. Following a successful negotiation, the fine was reduced to ₦330 billion which would be paid within a period of three years in six trenches.[791]

4.6.8.1 Protection of Subscribers' Personal Data and Law Enforcement Access

The RTSR establishes provisions to ensure the protection of subscribers' personal data that has been acquired during the mandatory subscriber registration program.[792] In

[787]Regulations 2, 4 & 6 RTSR 2011.
[788]Regulation 3(a) *Ibid*.
[789]Regulation 3(b) *Ibid*.
[790] C Akwaja, 'N1.04 Trillion Fine: NCC Suspends Regulatory Services To MTN' *Leadership* (27 April, 2016) available at <http://www.leadership.ng/news/470030/n1-04-trillion-fine-ncc-suspends-regulatory-services-to-mtn>. *See also*, P Ugwu, 'NCC Explains Fine on MTN, Silent on Deadline' *Nigeria Communications Week* (17 November 2015) available at <http://www.nigeriacommunications week.com.ng/telecom/ncc-explains-fine-on-mtn-silent-on-deadline#> last accessed on 30 March, 2016.
[791] E Okonji, *et al*, 'Finally, NCC, MTN Reach Truce as Fine is Reduced toN330 Billion', *ThisDay* (11 July, 2016), available at <http://www.thisdaylive.com/index.php/2016/06/11/finally-ncc-mtn-reach-truce-as-fine-is-reduced-to-n330bn-2/> last accessed on 4 February, 2017. *See also*, P Osugawu, 'N1.04 Trillion Fine: FG Reduces MTN Fine, agrees Staggered Payment Option', *Vanguard* (11 July, 2016), available at <http://www.vanguardngr.com/2016/06/n1-04trn-fine-fg-reduces-mtn-fine-agrees-staggered-payment-option/> last accessed on 4 February, 2017.
[792]Regulations 7 - 10, RTSR 2011.

this respect, Regulation 9(2) of the RTSR provides that "the subscriber information contained in the Central Database shall be held on a strictly confidential basis and no person or entity shall be allowed access to any subscriber information on the Central Database except as provided in [the] Regulations".[793] Thus, the implication of the above provision is that unauthorized access to subscriber information that is stored on the NCC's central subscriber information database is prohibited. Regulation 10 of the RTSR establishes the framework for law enforcement access to subscriber information. In this respect Regulation 10(1) of the RTSR provides that the release of a subscriber's personal information to law enforcement authorities shall be in accordance with the provisions of the NCA, or any regulations, guidelines or instruments issued by the NCC.[794] However, the NCA does not establish any explicit measures to regulate law enforcement access to a subscriber's personal data; rather the NCA only establishes provisions requiring service providers to assist law enforcement,[795] and also implement technical capabilities for the authorized interception of communications.[796]

The RTSR however provide for measures to govern law enforcement access to a subscriber's personal data in the NCC's central subscriber information database. In this respect Regulation 8(1) of the RTSR provides that:

> Notwithstanding the provisions of these Regulations restricting access to subscribers information on the Central Database and subject to the provisions of any Act of the National Assembly, subscriber information on the Central Database shall be provided *only* to security agencies; provided

[793] Regulation 9(2) *Ibid*.
[794]Regulation 10(1) RTSR 2011.
[795]NCA 2003, s. 146(2).
[796] NCA 2003, s. 147.

> that a prior written request is received by the Commission (NCC) from an official of the requesting security agency who is not below the rank of an Assistant Commissioner of Police or a co-ordinate rank in any other security agency.[797]

Regulation 8(2) of the RTSR also provides that "the written notice by the security agency…shall indicate the rank of the official of the requesting security agency and the purpose for which the information is required".[798] Thus, the above provisions establish the powers of law enforcement authorities to access a subscriber's personal information that is stored on the NCC's central subscriber information database. However, the RTSR also specifies instances where a law enforcement authority will not be allowed to access a subscriber's personal information in the central data base. In this respect, Regulation 10(2) of the RTSR provides that a subscriber's information shall not be released to a law enforcement authority or any other person including an operator "where such release of Subscriber Information would constitute a breach of the Constitution or any other Act of the National Assembly, for the time being in force in Nigeria or where such release of Subscriber Information would constitute a threat to national security".[799] Thus, the Regulations does not permit law enforcement access to a subscriber's personal information under two instances – where such access will breach the Constitution or an existing law or, where it would threaten national security.

However, the procedure for enforcing law enforcement access to a subscriber's personal information raises some human right concerns since the RTSR does not require

[797] Regulation 8 (1), RTSR 2011.
[798] Regulation 8 (2) RTSR 2011.
[799] Regulation 10(2) *Ibid*.

that such access will be enforced on the authorization of a Court of law. Rather, the RTSR only requires a written request from an official of a law enforcement authority who is not below the rank of an Assistant Commissioner of Police or an equivalent rank. Also the RSTR do not also establish any mechanisms to ensure judicial review or the independent review of law enforcement powers of access. This creates a situation where such powers could be exercised arbitrarily to the detriment of a subscriber's right to privacy.

In addition, it appears that the powers of a law enforcement authority to access a subscriber's personal information under the RTSR does not have a legal basis under the NCA or any Act of the National Assembly. On the face of it, the powers of a law enforcement authority to access a subscriber's personal information may seem to conflict with the fundamental rights to privacy under section 37 of the Nigerian Constitution.[800] However, section 45(1) of the Constitution also provides that the rights to privacy may be derogated by "...*any law* that is reasonably justifiable in a democratic society - (a) in the interest of defense, public safety, public order, public morality or public health; or (b) for the purpose of protecting the rights and freedom of other persons".[801] Accordingly, it may be argued that the powers of a law enforcement authority to access a subscriber's personal information under the RTSR are reasonably justifiable in a democratic society, since the RTSR was established to protect national security and public safety by curbing crimes that are usually perpetrated through the use of unregistered SIM cards. Also, the Regulations were made by the NCC in accordance with its regulatory powers to

[800] S. 37 of the Constitution of the Federal Republic of Nigeria (1999) provides that "the privacy of citizens, their homes, correspondence, telephone conversations and telegraph communications is hereby guaranteed and protected."
[801] Constitution of the Federal Republic of Nigeria 1999, s. 45(1).

implement the objectives of the NCA which is an Act of the National Assembly that establishes the framework for the governance of the Nigerian telecommunications industry.[802] However, while the reasons for establishing the powers of law enforcement authorities to access a subscriber's personal information is considered "reasonably justifiable in a democratic society", yet Regulations which are made by the NCC cannot be classified as a 'law' under the Constitution. On the basis of section 318(1) of the Nigerian Constitution what appears to suffice as a 'law' in the context is an Act of the National Assembly.[803] Hence, only an Act of the National Assembly can be considered as "*any law* that is reasonably justifiable in a democratic society" for the purpose of derogating the constitutional right to privacy.

Consequently, it is submitted that although the NCC has legitimate powers to make regulations for the governance of the telecommunications industry, however such powers does not extend to establishing regulations that will derogate the constitutional right to privacy. However, this position would have been different if the NCC had established the RTSR on the basis of an Act of the National Assembly that derogates the constitutional right to privacy or creates the powers of law enforcement authorities to access a subscriber's personal information. Such legal basis does not exist under the NCA which only establishes a legal basis for the interception of communications.[804] Also, the definition of 'interception' under the NCA is limited to "the aural or other acquisition of the contents of any communications through the use of any electronic, mechanical or

[802] NCA 2003, s. 1(b), 4(1) & 70(1).
[803] An 'Act of the National Assembly' refers to "any law made by the National Assembly", *see* Constitution of the Federal Republic of Nigeria 1999, s. 318(1).
[804] NCA 2003, s. 147.

other equipment, device or apparatus".[805] Hence, the legal basis for the lawful interception under the NCA does not include the powers of law enforcement authorities to access a subscriber's personal information this is held on the NCC's central subscriber information database. This state of affairs further underscores the need for the enactment of a national data protection law that will explicitly provide for instances under which a law enforcement authority can access a subscriber's personal data and also establish judicial or regulatory measures for checking the exercise of such powers. This will help to balance national security concerns and the protection of the right to privacy.

4.6.8.2 Principles Governing the Processing of Personal Data under the Registration of Subscribers Regulations

The RTSR establishes some provisions that implicitly constitute the principles governing the processing of the personal data of subscribers. For example, it provides for the right of a service provider to retain and use the personal data of subscribers on its network in accordance with Part VI of the General Consumer Code of Practice under the NCC's Consumer Code of Practice Regulations (CCPR).[806] In this respect, a service provider is required to solely utilize the personal data of its subscribers for its operations in line with the provisions of the General Consumer Code of Practice.[807] The RTSR also establishes the right of any subscriber whose personal data is stored in the NCC's central database or in a service provider's database to view the stored data and also request updates and amendments to such data.[808] In addition, the RTSR require that the

[805]NCA 2003, s. 157.
[806]Regulation 7 RTSR 2011.
[807]Regulation 9(5) *Ibid*.
[808]Regulation 9(1) *Ibid*.

subscriber data that is contained in the NCC's central database "shall be held on a strictly confidential basis".[809]

The RTSR does not establish any provisions on the treatment of the biometric and personal data of a subscriber who has deactivated his/her SIM card. The continuous retention of the biometric and personal data of a subscriber who has deactivated his/her SIM card would however raise privacy concerns. This is because the deactivation of a SIM card implies that it cannot be used by a subscriber to access telecommunications services. Hence, the reason why the subscriber's personal identification data was initially collected ceases to exist with the deactivation of a registered SIM card. Consequently, there is need for the NCC to establish provisions to ensure that the personal identification data of a subscriber who has deactivated his/her SIM card is not held indefinitely in the NCC's central subscriber information database. This position is in accord with international developments on the protection of the right to privacy.[810]

4.6.9 Lawful Interception of Communications

The general expectation of individuals that their communications will be private in accordance with fundamental human right provisions[811] is usually subject to legal

[809]Regulation 9(2) *Ibid*.

[810] For example, the European Court of Human Rights has held that the indefinite retention of biodata such as fingerprints and DNA profiles from persons suspected of, but not convicted of crimes was an intrusion into privacy that was disproportionate to the public interest which was sought to be protected. *See S. and Marper v the UK* [2008] ECtHR App. Nos. 30562/04; 30566/04, [2008]; *Vander Velden v The Netherlands* [2006] ECtHR Decision App. No. 21203/10 (2006); *M.K. v France* [2013] (No. 19522/09) *cited* in D Pokempner, 'Cyberspace and State Obligations in the Area of Human Rights', in K Ziolkowski (ed) *Peacetime Regime for State Activities in Cyberspace: International Law, International Relations and Diplomacy* (Tallinn, Estonia: NATO Cooperative Cyber Defense Center of Excellence, 2013), p.251.

[811] For example, article 12 of the Universal Declaration of Human Rights declares that: 'No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence… Everyone has right to the protection of the law against such interference". *See* Article 12 United Nations Universal

limitations that allow State authorities to carry out the lawful interception of private communications under specified conditions. Within the context 'lawful interception' refers to "a legally authorized process by which a communications network or service provider gives authorized officials access to the communications of individuals or organizations".[812] 'Lawful interception' has also been defined as "the lawfully authorized interception and monitoring of telecommunications pursuant to an order of a Government body, to obtain the forensics necessary for pursuing wrongdoers".[813] Within the context, of this work, 'lawful interception' will be defined as the legally authorized interception of private telecommunications to facilitate law enforcement and the protection of public safety. For an interception activity to be 'lawful', it must be conducted in accordance with legal provisions following proper authorization by a competent authority. Hence, an unauthorized interception activity that is conducted by a law enforcement authority will be considered unlawful and a violation of the human right to privacy.

4.6.9.1 Legal Basis for Lawful Interception

In Nigeria, the constitutional right to privacy provides that "the privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications is hereby guaranteed and protected".[814] However, the constitutional guarantee of the right to privacy is not absolute as the Constitution also provides that the right can be restricted or derogated by "any law that is reasonably justifiable in a democratic society – in the interest of defense, public safety, public order, public morality or public health; or for the

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Declaration of Human Rights (1948). *See also* Constitution of the Federal Republic of Nigeria 1999, s. 37.

[812]Frost & Sullivan, *Lawful Interception: A Mounting Challenge for Service Providers and Governments* (London: Frost & Sullivan, 2011) p.4.

[813]M Adolp and T Kelly, 'Technical Aspects of Lawful Interception', (May, 2008) *ITU-T Technology Watch Report*, 2.

[814] Constitution of the Federal of Republic of Nigeria 1999, s. 37.

purpose of protecting the rights and freedom of other persons".[815] This constitutional limitation of the right to privacy apparently creates the legal basis for the State to establish laws that would empower law enforcement or security agencies to carry out the interception of private communications. However, a law permitting interception by law enforcement or security agencies will be deemed unconstitutional where such law cannot be "reasonably justified in a democratic society" and does not meet any of the constitutional conditions for limiting the right to privacy. For example, a law that permits the massive and widespread interception of the private communications of citizens would fail the test of a "law that is reasonably justifiable in a democratic society" since such law cannot be considered as fitting into any of the constitutional limitations to the right to privacy.

Nigeria does not currently have a comprehensive legal framework that governs the interception of private communications by law enforcement or security agencies, although, there was an unsuccessful attempt to establish such a framework through the Telecommunications Facilities (Lawful Interception of Information) Bill of 2010 which was not passed by the National Assembly. However, despite the absence of a comprehensive interception regime, some legal provisions that provide for authorized interception can be found under the NCA and other laws such as the Cybercrimes Act, and the Terrorism (Prevention) Act.[816] There have also been concerns over attempts by the Government to implement an Internet surveillance program without any legal basis. In April 2013, a Nigerian Newspaper, Premium Times reported that the Nigerian

[815] Constitution of the Federal of Republic of Nigeria 1999, s. 45(1).
[816] Cybercrimes (Prohibition, Prevention etc) Act 2015 and the Terrorism (Prevention) (Amendment) Act 2013.

Government had signed a 40 million USD contract with an Israel-based firm, Elbit Systems to engage in the surveillance of Internet communications in Nigeria.[817] The Government is reported to gone ahead with the contract despite loud protests by civil society organizations and individuals as well as attempts by the House of Representatives to stop the contract.[818] However, while the Government may use the excuse of tackling terrorism to justify the need for a mass online surveillance program, the implementation of such surveillance program does not appear as a measure that is reasonably justifiable in a democratic society. Moreover, the fact that the implementation of such program does not have a legal basis under Nigerian law raises serious concerns for the respect of human rights. This state of affairs clearly calls for a judicial review of the programme to determine its legality.

4.6.9.2 Legal Provisions for Authorized Interception under the NCA

Section 147 of the NCA provides that the NCC may determine that a service provider or class of service providers "shall implement the capability to allow authorized interception of communications and such determination may specify the technical requirements for authorized interception capability".[819] Under the NCA 'interception' is defined as "the aural or other acquisition of the contents of any communications through the use of any electronic, mechanical or other equipment, device or apparatus", [820] while

[817] O Emmanuel, 'Jonathan Awards $40 Million Contract to Israeli Company to Monitor Computer, Internet Communications by Nigerians', (25 April, 2013) available at<http://www.premiumtimesng.com/news/131249-exclusive-jonathan-awards-40million-contract-to-israeli-company-to-minitor-computer-internet-communication-by-nigerians.html> last accessed on 30 March, 2016. *See also*, J Dada and T Tafida, 'Online Surveillance: Public Concerns Ignored in Nigeria', *Global Information Society Watch 2014 -Communications Surveillance in the Digital Age* (Johannesburg, South Africa: Association for Progressive Communications, 2014) pp.183-184.
[818] J Dada and T Tafida, *Ibid*, pp.183-184.
[819] NCA 2003, s.147.
[820] S. 157 *Ibid*.

'interception capability' is defined as "the capability of any network facilities or network service or applications service to intercept communications".[821] More importantly, the NCA defines 'authorized interception' as interception by service provider which is permitted under section 148 of the NCA.[822] Section 148 (1) (c) of the NCA provides that:

> On the occurrence of any public emergency, or in the interest of pubic safety, the [NCC] may order that any communication or class of communications to or from any licensee (service provider), person or the general public, relating to any specified subject shall not be communicated or shall be intercepted or detained or that any such communication or its records shall be disclosed to an authorized officer mentioned in the order.[823]

Thus, section 148 (1) (c) of the NCA establishes very broad powers that permit the NCC to order the interception of any communications during a 'public emergency' or 'in the interest of public safety'. However, the NCA does not provide that the NCC is required to obtain any form of judicial authorization from a competent Court before exercising the above interception powers. Such unrestrained powers of determining the conduct of interception could be prone to abuse in the absence of a requirement for judicial authorization. For example, due to the absence of a requirement for judicial authorization, the NCC may rely on the excuse of addressing a public emergency or protecting public safety, to make an interception order that cannot be reasonably justified in a democratic society. However, the fact that judicial authorization is not required prior to the NCC's exercise of the interception powers does not imply that the exercise of such

[821] S. 157 *Ibid*.
[822] S. 157 *Ibid*.
[823]NCA 2003, s. 148 (1) (c).

powers is entirely excluded from the jurisdiction of the Courts.[824] Accordingly, the NCC's powers to order an interception can be subjected to judicial review once they have been exercised. In such event, the Court would then have to determine whether the NCC's exercise of the interception powers is justifiable under the Constitution.

In 2013, the NCC proposed a draft Lawful Interception of Communications Regulation[825] in accordance with its powers to make regulations under the NCA.[826] The proposed Regulation aims to provide a regulatory framework for the lawful interception of communications in Nigeria and the implementation of interception provisions under the NCA.[827] The proposed Regulation has also been criticized by the human rights community. For example, a 2014 report on online surveillance in Nigeria observed that it was of concern that the NCC would opt for the establishment of a regulation on interception rather than allow the National Assembly to debate and decide on the passage of an interception Act, and that "the NCC option would be open to abuse and violation of Nigeria's 1999 Constitution".[828] However, such criticism appears to overlook that fact that the NCC is lawfully empowered to establish regulations for the interception of communications under sections 70 and 147 of the NCA. Nevertheless, such concerns from critics appear to have hindered the NCC from stating the date when the proposed Regulation would come into force. In July 2015, the NCC stated that it was fine-tuning

[824]S. 4(8) of the Constitution of the Federal Republic of Nigeria 1999 prohibits the enactment of any laws that oust the jurisdiction of a Court of law or judicial Tribunal.

[825] NCC Draft Lawful Interception of Communications Regulations, available at <http://www.ncc.gov.ng/index.php?option=com_docman&task=doc_download&gid=328&Itemid> last accessed on 30 March, 2016.

[826]NCA 2003, s. 70.

[827]Regulation 1 NCC Draft Lawful Interception of Communications Regulations.

[828]J Dada and T Tafida, 'Online Surveillance: Public Concerns Ignored in Nigeria', *Global Information Society Watch 2014 -Communications Surveillance in the Digital Age* (Johannesburg, South Africa: Association for Progressive Communications, 2014) p.184.

the proposed Regulation to ensure that "the rights and privacy of telecommunications subscribers are protected by security agencies".[829]

4.6.9.3 Legal Provisions for Authorized Interception under the Cybercrimes Act

The Cybercrimes Act[830] criminalizes unauthorized interception of 'non-public data transmissions'[831] and also establishes provisions to govern the lawful interception of computer data by law enforcement authorities. Under the Act, 'interception' is defined to include "listening to or recording of communications data of a computer".[832] The provisions governing the lawful interception of computer data by law enforcement authorities are established under section 39 of the Act which provides that:

> Where there are reasonable grounds to suspect that the content of any 'electronic communication'[833] is reasonably required for the purposes of a criminal investigation or proceedings, a Judge may on the basis of information on oath;
>
> (a) order a service provider, through the application of technical means to intercept, collect, record, permit or assist competent authorities with the

[829]M Ekpeke, 'NCC Revisits Draft Communication Interception Law', *IT Pulse* 9 July, 2015, available at <http://itpulse.com.ng/ncc-revisits-draft-communication-interception-law/> last accessed on 30 March, 2016. *See also*, P Adepoju, 'Nigeria Communications Regulator to Legalize Interception', *IT WEB Africa*, 16 July, 2015.

[830] Cybercrimes (Prohibition, Prevention etc) Act 2015. [Hereafter Cybercrimes Act].

[831]S. 12(1) of the Cybercrimes Act provides that "Any person, who intentionally and without authorization, intercepts by technical means, non-public transmissions of computer data, content, or traffic data, including electromagnetic emissions or signals from a computer, computer system or network carrying or emitting signals, to or from a computer, computer system or connected system or network; commits an offence and shall be liable on conviction to imprisonment for a term of not more than 2 years or to a fine of not more than N5,000,000.00 or to both such fine and imprisonment".

[832]Cybercrimes Act, s. 58.

[833]Within the context 'electronic communication' is defined to include communications in electronic format, instant messages, short message service (SMS), e-mail, video, voice mails, multimedia message service (MMS), Fax, and pager". *See* Cybercrimes Act, s.58.

collection or recording of 'content data'[834] and/or 'traffic data'[835] associated with specified communications transmitted by means of a 'computer system'[836], or;

(b) authorize a law enforcement officer to collect or record such data through application of technical means.[837]

Thus, under the above section, a Court can only authorize an order for interception where the content of an electronic communication is "reasonably required for the purpose of a criminal investigation or proceedings".

However, section 38 of the Cybercrimes Act establishes broad data retention provisions that could give rise to the exercise of interception powers by a law enforcement authority without judicial authorization. In this respect, section 38(1) of the Act provides that "a service provider shall keep all traffic data and subscriber information" as may be prescribed by the NCC for a period of 2 years.[838] Under section 38(2) of the Act, a service provider is required "to preserve, hold or retain any traffic data, subscriber information, non-content information, and content data", and also release such information at the request of the NCC or any law enforcement agency.[839] A request

[834]'Content data' refers to "actual information or message sent across during a communication session". *See* Cybercrimes Act, s. 58.
[835] Within the context 'traffic data' is defined "any computer data relating to a communication by means of a computer system or network, generated by a computer system that formed a part in the chain of communication, indicating the communication's origin, destination, route, time, date, size, duration, or type of underlying service". *See* Cybercrimes Act, s. 58.
[836] Under the Act a 'computer system' is defined as referring to: "any device or group of interconnected or related devices, one or more of which, pursuant to a program, performs automated or interactive processing of data. It covers any type of device with data processing capabilities including, but not limited to, computers and mobile phones. The device consisting of hardware and software may include input, output and storage components which may stand alone or be connected in a network or other similar devices. It also includes computer data storage devices or media". *See* Cybercrimes Act, s. 58.
[837]Cybercrimes Act, s.39.
[838] S. 38(1) *Ibid*.
[839] S. 38(2) *Ibid*.

for the release of such information may be made by a law enforcement agency through its authorized officer, and a service provider is required to comply with such request.[840] The Act also provides that any data that is retained by a service provider on the request of a law enforcement authority shall be utilized for legitimate purposes as provided under the Act, or any other law or regulation or order of a Court of competent jurisdiction.[841] In addition, the Act also requires that the conduct of data retention for law enforcement purposes shall have due regard to the constitutional right to privacy, and that appropriate measures should be taken to safeguard the confidentiality of the retained data.[842] However, the absence of judicial authorization as a condition for the exercise of data retention powers by a law enforcement authority raises concerns about the abuse of such powers in manner that could result to violation of privacy rights.[843] Consequently, there is need for a review of section 38 of the Act in order to include judicial authorization as a requirement for law enforcement authorities to access data that has been retained by a service provider.

4.6.9.4 Legal Provisions for Authorized Interception under the Terrorism (Prevention) Act

The Terrorism (Prevention) Act 2011 establishes a legal framework for the prohibition and prevention of terrorism in Nigeria. The 2013 amendment of the Act establishes the powers of law enforcement authorities to carry out the authorized interception of communications during the course of gathering intelligence to tackle

[840] S. 38(3) *Ibid*.
[841] Cybercrimes Act, s. 38(4).
[842] S. 38(5) *Ibid*.
[843] U J Orji, 'Substantive and Procedural Legislation in Nigeria to Combat Webcam-Related Child Sexual Abuse', *Sweetie 2.0 Project* (The Hague, Netherlands: Terre des Hommes/University of Leiden (eLaw) and the University of Tilburg (TILT), 2016) (Unpublished).

terrorism. In this respect, section 29(1) of the Terrorism (Prevention) (Amendment) Act of 2013 provides that:

> Without prejudice to any other law, the relevant law enforcement agency with the approval of the Attorney General of the federation may, with the approval of the Coordinator on National Security, for the purpose of the prevention of terrorist acts or to enhance the detection of acts related to the preparation of a terrorist act or the prosecution of offenders under the Act, apply *ex parte* to a Judge for an interception of communication order.[844]

Where an application for interception has been made to a Judge, the Judge may issue an order requiring a service provider to intercept and retain a specified communication or communications.[845] Any interception order that is issued by a Judge in this regard is also required to specify the maximum period during which a service provider would retain the intercepted communications data.[846]

4.6.10. Regulation of Consumer Devices

The challenge of addressing the influx of sub-standard consumer devices in the Nigerian telecommunications market has been a major consumer protection issue.[847] The Standard Organization of Nigeria Act establishes the framework for the regulation of consumer devices in the telecommunications industry. The Act establishes the Standard Organization of Nigeria (SON)[848] which is responsible for functions including: (a) conducting tests and taking necessary measures to ensure compliance with standards

[844]Terrorism (Prevention) (Amendment) Act 2013, s. 29(1).
[845]S. 29(2) (a) *Ibid*.
[846] S. 29(3) *Ibid*.
[847] Consumer Protection Council, *A Compendium of the Rights of Telecom Subscribers in Nigeria* (Abuja: Consumer Protection Council, 2014).
[848]Standard Organization of Nigeria (SON) Act, Cap.59 LFN 2004, s. 1.

approved by the Standard Council of Nigeria; (b) undertaking investigation into the quality of products in Nigeria, and; establishing a quality assurance system for the certification of products.[849] These regulatory functions grant the SON a broad mandate to regulate the standard of consumer devices (such as mobile phones) in the telecommunications industry.

The SON Act also establishes the special powers of the Director General (DG) of the SON to regulate hazardous products. In this respect, section 17(1) of the Act provides that where the DG of the SON is satisfied that a product is hazardous to life and property that the DG may apply to the Magistrate that has jurisdiction in the area where is found for an order to:

(a) seize, destroy or prohibit any person from selling or offering such product for sale;

(b) seal up the premises where such products are manufactured or stored, or;

(c) direct the manufacturer to rectify the deficiency in the product.[850]

For example, the above powers can be applied to stop the manufacturing of sub-standard phones. The powers can also be applied to compel a phone manufacturer to rectify any identified product deficiencies that are deemed to be hazardous to life. However, although the powers could be applied to prevent the sale of defective phones within a particular Magisterial jurisdiction, it would not be possible to apply those powers to effectively prevent the sale of defective phones across the Nigeria since a Magistrate Court does not have the jurisdiction to make an order that will be enforced by the SON across Nigeria. This creates challenges for the SON in the regulation of sub-standard phones and related telecommunication devices, and makes it possible for persons who are

[849]SON Act, 2004, s. 5(1).
[850] S. 17 (1) *Ibid*.

selling sub-standard telecommunication devices to engage in forum shopping to evade sanctions by the SON. Consequently, there is need for section 17(1) of the SON Act to be reviewed to substitute the order of a Magistrate Court with that of a Federal High Court. Also, although the SON has been making efforts to tackle the influx of substandard telecommunication devices in Nigeria,[851] the organization however has been challenged by factors including lack of adequate manpower, lack of awareness on the hazardous effects of sub-standard devices by consumers, the cheapness of sub-standard devices and Nigeria's porous borders.

4.7 Regulatory Mechanisms for Consumer Redress

4.7.1 The Consumer Affairs Bureau

Prior to the enactment of the NCA in 2003, the NCC had already established a Consumer Affairs Bureau (CAB) in September, 2001.[852] However, the NCA also recognized the need for the establishment of an industry forum for addressing consumer affairs. Accordingly, the NCA provides that the NCC "may designate an industry body to be a consumer forum and to prepare a Consumer Code" for the purpose of protecting consumers in the telecommunications industry.[853] Thus, the establishment of the CAB addresses the NCA's requirement in this context. The CAB has a mandate to protect, and

[851] E Aginam, 'SON Give Dealers 7 Days Ultimatum to Mop Up Fake Phones', *Vanguard*, 24 July, 2014, available at <https://niipw.com/tag/standards-organiztion-of-nigeria>. *See also*, T Agboola, 'SON Confiscates N200 Million Substandard Handsets', *The Nation*, 15 July, 2014, available at <http://thenationonlineng.net/son-confiscates-n200m-substandard-handsets/> last accessed on 30 March, 2016.

[852] E Ndukwe, 'The Place of the Consumer in the Nigerian Telecoms Industry', A Keynote Address presented at the Third Stakeholders Forum organized by the IT & Telecom Digest (Golden Gate Restaurant, Ikoyi, Lagos, 9th June, 2008) p.4.

[853] NCA 2003, s. 106(1).

inform/educate telecommunication consumers in Nigeria.[854] The CAB's mandate is considered an "irrevocable social contract between the NCC and telecommunications consumers in Nigeria".[855]

The CAB executes its mandate through various interactive consumer enlightenment programmes where service providers, consumer rights groups, the NCC, and consumers regularly meet to share information, and resolve complaints and also suggest best approaches to meeting consumer aspirations. CAB's consumer enlightenment programmes include the Telecom Consumer Parliament, the Consumer Outreach Programme and Consumer Town Hall Meetings.

(a) The Telecom Consumer Parliament (TCP)

The TCP is a monthly consumer forum which is convened by CAB and held at State capitals across the six geo-political zones of Nigeria. The first edition was launched in August 2003, and several editions of the programme have been held since then. The TCP provides an interactive platform for consumers and service providers with the aims of providing solutions to consumer complaints and concerns. In particular, the TCP aims to educate and inform consumers and service providers on their rights and obligations. A very important aspect of the TCP is the panel discussion session which is used to address burning tropical industry issues. The panel usually comprises of members drawn from service providers, regulators, intellectuals and consumers.[856] In 2014, the TCP programme was repackaged with a view to enhancing its strategies on addressing

[854] <http://www.consumers.ncc.gov.ng>.
[855] E Ndukwe, *Ibid.*
[856] NCC, 'Consumer Enlightenment Programmes', available at <http://www.consumers.ncc.gov.ng/pagelist.asp?pageid=251>.

consumer complaints on poor quality of services. The repackaged TCP is meant to show evidence of what service providers are actually doing to address consumer complaints on poor quality of service.[857]

(b) The Consumer Outreach Programme (COP)

The first edition of the programme was held in March 2002, and several editions have been held subsequently. The programme is held on a bi-monthly basis in semi-urban areas across the six geo-political zones of Nigeria, and it is meant to provide a platform for bringing consumers and service providers together with a view to enhancing the resolution of consumer complaints.[858]

(c) Consumer Town Hall Meetings (CTM)

The first edition of the CTM was launched in November 2009. The CTM is regarded as a 'third tier' consumer outreach programme of the NCC and it is targeted at educating and empowering telecommunications consumers in rural areas. The CTM is organized by consumer advocacy groups in rural communities across the six geo-political zones of Nigeria.[859]

In addition to the above programmes, the CAB also maintains a consumer help desk at various branch offices across the country to facilitate the timely resolution of consumer complaints.[860] The CAB is also responsible for administering the General

[857]E Okonji, 'Protecting Subscribers through the Telecom Consumer Parliament', *ThisDay*, 20 November, 2014 available at<http://www.ncc.gov.ng/index.php?option=com_content&view=article&id=1509:thisday-20th-november-2014-protecting-subscribers-through-telecom-consumer-parliament&catid=86:cat-mediapr-headlines> last accessed on 30 March, 2016.
[858]NCC, 'Consumer Enlightenment Programmes', available at <http://www.consumers.ncc.gov.ng/pagelist.asp?pageid=251> last accessed on 30 March, 2016.
[859]NCC, Consumer Enlightenment Programmes, *Ibid*.
[860]NCC, Consumer Affairs Bureau <http://www.consumers.ncc.gov.ng/>.

Consumer Code of Practice including monitoring the compliance of service providers with the Code.[861] However, the CAB has been criticized for not effectively informing and integrating consumers in its consumer enlightenment programmes, and thus making such programmes unpopular amongst consumers. In particular, the repackaged TCP has been criticized for appearing elitist and limiting opportunities for broad and effective consumer representation and participation.[862]

4.7.2 The Consumer Protection Council

The Consumer Protection Council (CPC) was established by the Consumer Protection Council Act of 1992[863] and supervised by the Federal Ministry of Industry, Trade and Investment.[864] The Act establishes a general legal framework for the protection of consumers across all economic sectors in Nigeria, including the telecommunications industry and also provides mechanisms for redressing consumer issues.[865] Section 2 of the Act establishes the mandates of the CPC to include:

(a) providing speedy redress to consumers complaints through negotiations, mediation and conciliation;

(b) seeking ways and means of removing or eliminating hazardous products from the market;

(c) causing/compelling an offending company, association or individual to protect, compensate or provide relief to injured consumers;

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[861]Paragraph 4(2) General Consumer Code of Practice, Schedule to the Consumer Code of Practice Regulations (2007).

[862] L Ajanku, 'A Consumer Parliament without its Soul', *The Nation*, 24 July, 2014.

[863]The Consumer Protection Council (CPC) Act No.66 of 1992. [Hereafter CPC Act].

[864]CPC Act, s. 1(2), 1(6), 4(2), 4(3), 4(4), 24(2), 25(3), 26(1), 27(1), 29, 30, 31 & 32.

[865]F Monye, *et al*, *Research Report on the State of Consumer Protection in Nigeria: A Review of Consumer Protection in the Telecommunications Sector in Nigeria* (Consumer International: January, 2014) pp.16-17, available at <http://www.consumersinternational.org/media/1532727/consumer-protection-in-nigeria-research-report-eng.pdf> last accessed on 30 March, 2016.

(d) providing redress to the obnoxious practices of service providers, and;

(e) encouraging the adoption of appropriate measures to ensure that products are safe for their intended use.[866]

In the exercise of the above mandates, the CPC is entitled to apply to the Court to prevent the circulation of any product which constitutes an imminent public hazard and also compel a manufacturer to certify that its products has met all safety standards. The CPC also has powers to carry out quality tests on a consumer product.[867]

The Act also provides for the establishment of committees that will assist the CPC in each State of the federation and which are also subject to the general supervision of the CPC.[868] Basically, a State Committee is responsible for investigating and acting on consumer complaints.[869] Thus, the mandate of a State Committee includes: (a) receiving and inquiring into the causes of any injury suffered by a consumer; (b) negotiating with the consumer and the offending party to bring about a settlement, and; (c) making a recommendation where appropriate to the CPC for the payment of compensation by offending party to the injured consumer.[870] A consumer that has suffered injury or loss as a result of the use of any product or service (including those related to telecommunications) may seek redress by making a written complaint to a State Committee.[871] The State Committee may investigate the complaint and where it is proved that a consumer right has been violated or that a consumer has suffered injury, the State Committee subject to the approval of the CPC may impose measures to redress the

[866]CPC Act, s. 2.
[867]CPC Act, s. 3.
[868] S. 4 (1) *Ibid.*
[869] S. 4(1) & 5 *Ibid.*
[870] S. 5 *Ibid.*
[871] S. 6(1) *Ibid.*

consumer's right or the injury suffered.[872] In addition, the consumer will also be entitled to a right of civil action for compensation or restitution in any competent Court.[873]

The CPC has established its offices in the six geo-political zones of Nigeria; however, it lacks operational presence in most States as the State Committees that are required to operate at the State level have not been established in most States.[874] As a part of its consumer education initiative, the CPC launched a Compendium of the Rights Telecommunications Subscribers in Nigeria[875] on the world's consumer rights day in 2014, which it celebrated with the theme: "fix our phone rights".[876] The compendium aims to educate telecommunications consumers by providing a simple, concise and easily accessible compilation of consumer rights in the telecommunications industry. In March 2015, the CPC also threatened to adopt a strategy of instituting criminal proceedings against the executives of telecommunications service providers that offered poor quality of service to consumers.[877] However, the CPC has been challenged by lack of funds and manpower, as well as a lack of operational presence in a large number States and rural areas which appears to have hindered many consumers from effectively accessing remedies through the CPC Act. Also, the CPC appears not to have developed the

[872] S. 8 *Ibid.*

[873] S. 8 *Ibid*. *See also*, E E. Ekanem, 'Institutional Framework for Consumers Protection in Nigeria', (April 2011) 2 (1) *International Journal of Advanced Legal Studies and Governance*, 36; F Monye, 'Enforcement of Consumer Protection Laws in Nigeria', (2007) 3 (1) *Delta State University Law Review*, 89.

[874] M Hailiru, 'The Development of Consumerism in Nigeria: Prospects and Challenges', (2012) 1 (4) *International Journal of Arts and Commerce*, 284.

[875]Consumer Protection Council, *A Compendium of the Rights of Telecom Subscribers in Nigeria* (Abuja: Consumer Protection Council, 2014).

[876] 'Consumer Protection Council Intensifies Effort Against Breaches', *ThisDay*, 3 May, 2015, available at <http://allafrica.com/stories/201505042064.html> last accessed on 30 March, 2016.

[877]A Tarantola, 'Nigeria Telecoms to Face Jail Time Over Shody Cell Service', (26 March, 2015), available at <http://www.engadget.com/2015/03/26/nigerian-telecoms-to-face-jail-time-over-shoddy-cell-service/> last accessed on 30 March, 2016.

requisite sector specific knowledge to effectively address consumer concerns in the telecommunications industry.

4.8 An Overview of Challenges to Effective Consumer Protection in the Telecommunications Industry

A major challenge to effective consumer protection in the Nigerian telecommunications industry is the issue of poor public awareness about related consumer rights. Many telecommunications consumers have little or no knowledge about their rights and the legal or regulatory frameworks that are established to guarantee the enforcement of such rights. This lack of awareness can also be traced to poor consumer education due to ineffective and poorly disseminated consumer enlightenment programmes. The problem lack of awareness is further compounded by low levels of technology literacy. Another major challenge is the issue of lack of access to consumer redress institutions. For example, many consumers do not stay in areas where they can easily access the CPC's consumer redress mechanisms, and the option of traveling long distances to lay complaints that involve small claims usually discourages consumers from seeking redress. Another cause for concern is that consumers may have to wait long periods during the dispute resolution process. This further compounded by the cost of seeking redress. For example, a consumer that intends to resolve a dispute through the NCA dispute resolution procedure may require the services of a legal expert to build a case before making a submission to the NCC. A consumer that intends to sue a service provider for compensation under the CPC Act will also need the services of lawyer. This is also the case where a consumer intends to bring an action under contract law or where the consumer is seeking a judicial review of the NCC's decision on a matter. However,

when the costs of redress is weighed against a small consumer claim and the time that will be spent on the dispute resolution process, consumers are usually more inclined to abandon the option of seeking redress.

In addition to the above challenges is the failure of regulatory authorities such as the NCC and the CPC to effectively enforce their mandates in a way that will promote consumer protection as their core regulatory objective. For example, the failure of the NCC to enforce the QoS Regulations in a manner that will result to the compensation of telecommunications consumers appears to have lowered consumer trust in the NCC.[878] This state of affairs is further compounded by the fact that NCC appears not to have taken steps to effectively address consumer complaints in the telecommunications industry. On the other hand, the CPC have also not taken any concrete steps to enforce the consumer remedies under the CPC Act. Rather the CPC appears to have limited its regulatory response to issuing warnings that it would impose sanctions on erring service providers. This state affair appears to lower consumer trust, while also increasing apathy and less consumer reliance on existing redress mechanisms.

Addressing the above challenges will require more effective and widely disseminated consumer enlightenment programmes. In particular, it will be helpful if consumer enlightenment programmes are used to constantly keep telecommunications consumers aware of their rights. Such programmes may be executed through mass media and telecommunications platforms such SMS messages and social networks. In addition, the NCC may establish obligations on service providers to provide regular consumer

[878]A Adepetun, 'Poor Telecoms Services: Subscribers Clamor for Compensation', *The Guardian*, 13 September, 2015, available at <http://www.ng.guardiannews.com/2015/09/poor-telecoms-services-subscribers-clamour-for-compensation/> last accessed on 30 March, 2016.

education programmes to the subscribers on their networks. There is also need for the NCC and the CPC to effectively address consumer complaints in order to ensure consumers that their rights will be always protected. This can be achieved through the imposition of punitive sanctions that will serve as deterrent to the arbitrary infringement of consumer rights. More importantly, given that consumer disputes in the telecommunications usually involve small claims, it is imperative for the CPC and the Government to encourage civil right organizations to promote consumer rights through the institution of class action suits that seek to address common consumer complaints such as poor quality of service.

CHAPTER FIVE

THE COMPETITION AND INTERCONNECTION REGULATION

5.1. The Concept of Competition and its Regulation

When viewed from the context of trade and commerce, the concept of 'competition' generally refers to "the struggle for commercial advantage" between two or more commercial interests or "the effort or action of two or more commercial interests to obtain the same business from third parties".[879] Thus, 'competition' implies the process of rivalry that exists between two or more enterprises as they struggle for commercial advantage in a liberalized market economy. Accordingly, the existence of competition between businesses is one of the basic features of a liberalized market. Basically, the existence of competition enhances the efficiency of businesses in a liberalized market by encouraging businesses to provide innovative responses to the demands of the market and thereby offering consumes a wider choice of products and services at affordable prices.

5.2 Competition Regulation in the Telecommunications Industry

Following liberalization and the introduction of competition in most telecommunications markets, the need for regulatory intervention in order to guarantee the competitiveness of such markets also became paramount. The need for regulatory intervention to guarantee sustainable competition in liberalized telecommunications markets is underscored by the fact that incumbent telecommunications operators that have a dominant position in the market have incentive to resist competition in order to maintain their monopoly as long as possible. Thus, while the liberalization of a

[879] B A Garner (ed), *The Black's Law Dictionary* (9th edn, St Paul MN, United States: West Publishing Co, 2009) p.322.

telecommunications market is a necessary measure to stimulate competition and market expansion, there is however a need to regulate market competition to ensure a 'level playing' field for new operators given that an incumbent operator usually has more commercial advantage over new operators and could likely engage in acts that could lessen competition in order to retain its position in the market. For example, an incumbent operator that has a large subscriber base may refuse to interconnect with a new operator in order to prevent the new operator from acquiring a significant subscriber base in the market and thereby frustrating it out of the market.

To a large extent, the regulation of competition in a liberalized telecommunications market is to prevent market failure and the undesirable outcomes that may follow, such as higher prices, poor quality of services, lack of innovation, poor market expansion, lack of alternatives for consumers and poor consumer welfare. Apparently, the need for such regulation is because a failed market may not be able to independently correct itself in a timely and sustainable manner without the State's direction. Also competition regulation in telecommunications markets is seen as a more viable alternative to monopoly regulation in terms of achieving public policy goals such as increasing the availability of telecommunications services, decreasing prices and encouraging private sector investments.[880] Just like generic competition regimes, competition regimes that specifically apply to the telecommunications industry also seek to achieve similar objectives such as prohibiting anti-competition practices, preventing the abuse of dominance and regulating merger and acquisition arrangements that may likely lessen competition.

[880] E Lie, 'Competition Policy in Telecommunications', *Background Paper ITU Workshop on Competition Policy in Telecommunications* [Document: CPT/04], (Geneva: ITU, 20-22 November, 2002) p.7.

5.2.1 Approaches to Competition Regulation in the Telecommunications Industry

Competition regulation in telecommunications markets is usually undertaken through the *ex ante* regulatory approach or the *ex post* regulatory approach.

5.2.1.1 The *Ex Ante* Approach

The *ex ante* approach to competition regulation adopts "regulatory measures that proactively control the structure and/or behavior of market players going forward".[881] Under the *ex ante* approach, competition regulation takes a 'forward looking' or anticipatory approach to address market competition concerns by explicitly prohibiting specified business conducts. In this respect, specific regulatory measures that govern market competition are established on the basis of assumption and prediction on how things appeared beforehand.[882] Accordingly, the *ex ante* approach adopts an anticipatory regulatory intervention that applies specified measures to control market competition with a view to preventing market failure and directing market activity towards desirable economic and social outcomes. *Ex ante* competition regulation is usually concerned with the governance of market structures including the number of firms, the level of market concentration, conditions for market entry and the degree of product differentiation.[883] *Ex ante* competition regulation also entails the establishment of a competition regime that is specific to telecommunications and a telecommunications regulator that will administer such regime. To a large extent, the implementation of *ex ante* competition regulation

[881] I Walden, 'Telecommunications Law and Regulation: An Introduction', in I Walden (ed) *Telecommunications Law and Regulation* (Oxford: Oxford University Press, 2012) p. 19.
[882] B A Garner (ed), *The Black's Law Dictionary* (9th edn, St Paul MN, United States: West Publishing Co, 2009) p.642.
[883] C Blackman and L Srivastava, *Telecommunications Regulation* (Washington DC: The World Bank, 2011), p.31.

helps to reduce fears of regulatory uncertainty and further minimizes opportunities for regulatory intervention in the market.

5.2.1.2 The *Ex Post* Approach

The *Ex post* approach basically operates a 'harm based' approach to competition regulation.[884] The approach adopts regulatory measures in reaction to the decisions and activities of market operators.[885] Thus, while the *ex post* approach does not impose sector specific competition restrictions on the conduct of businesses, operators however face the risk of being penalized if their business conduct is found to be an abuse of dominant position or market power.[886] Such intervention would normally take place on the basis of a Court order since the *ex post* approach does not envisage the establishment of a specialist regulatory agency to execute such intervention. As such, the *ex post* approach adopts a 'reactive' application of traditional competition law principles to regulate market competition in the telecommunications sector.[887]

New Zealand remains the only example of a country that has attempted to regulate telecommunications market competition through the *ex post* approach when it solely relied on the application of traditional competition law principles to govern the liberalization of its telecommunications market starting from 1989. However, it has been widely accepted that the approach failed to effectively address related competition

[884] P–A Buigunes, 'Competition Policy Versus Sector-Specific Regulation in Network Industries: The EU Experience', A Submission to the 7th Session of the UNCTAD Intergovernmental Group of Experts on Competition Law and Policy (Geneva: UNCTAD, 30 October– 2 November, 2006) p.6.

[885] I Walden, 'Telecommunications Law and Regulation: An Introduction', in I Walden (ed) *Telecommunications Law and Regulation* (Oxford: Oxford University Press, 2012) p. 19.

[886] P– A Buigunes, *Ibid*, p.6.

[887] I Walden, 'Telecommunications Law and Regulation: An Introduction', in I Walden (ed) *Telecommunications Law and Regulation* (Oxford: Oxford University Press, 2012) p. 20.

issues,[888] but rather "led to delays in the process of liberalization through the need for the lengthy and ineffective recourse to judicial intervention".[889] Following these challenges, New Zealand enacted a Telecommunications Act in 2001. The Act established the Office of the Telecommunications Commissioner within the New Zealand Commerce Commission to regulate the telecommunications sector, and in 2006 further regulatory and enforcement powers were granted to the Commissioner including powers to resolve disputes relating telecommunications services.[890] Thus, it has been observed that while *ex post* competition regulation may provide effective remedies to 'blatant anti-competitive practices' such as refusals to provide interconnection, that such regulatory approach is however "less effective against minor but persistent obstructive tactics, such as delaying negotiations, or where ongoing oversight of commercial relationships is required".[891] Also, solely relying on the *ex post* approach to regulate competition in the telecommunications industry may give rise to an undesirable situation whereby Courts may have to assume the functions that should be meant for a specialized regulatory agency. In this respect, it has been aptly observed by the United States Supreme Court in *Verizon Communications Inc. v Law Offices of Curtis V. Trinko LLP*[892] that "No Court should impose a duty that it cannot explain or adequately and reasonably supervise. The problem should be deemed irremedia[ble] by anti-trust law when compulsory access

[888] D Geradin and M Kerf, *Controlling Market Power in Telecommunications* (New York: Oxford University Press, 2003) p.12. *See also*, D Geradin and M Karf, 'Controlling Market Power in Telecommunications: Antitrust vs Sector Specific Regulation: An Assessment of the United States, New Zealand and Australia Experiences', (1999) 14 (3) *Berkeley Technology Law Journal*, 965-988.

[889] I Walden, *Ibid*, p.20. *See also, Telecom Corporation of NZ Ltd v Clear Communications Ltd* (1992) 4 NZBLC.

[890] I Walden, *Ibid*, p. 20.

[891] *Ibid*.

[892] *Verizon Communications Inc. v Law Offices of Curtis V. Trinko LLP* (02-682). 540 US 398 (2004) at 15 *cited* in I Walden, *Ibid* p.20.

requires the Court to assume the day-to-day controls characteristics of a regulatory agency".

5.3 The Competition Regime under the NCA

Nigeria does not have a generic competition law, although there were several notable but unsuccessful attempts to introduce such a law between 2002 and 2012.[893] There are also no case laws developing any generic principles on competition law. However, the NCA establishes an *ex ante* competition regime that specifically applies to the telecommunications industry. Thus, the NCA declares that one of its primary objectives is "ensure 'fair competition' in all sectors of the Nigerian communications industry".[894] In furtherance of this objective, the NCA also provides that the functions of the NCC shall include "the promotion of fair competition in the communications industry and [the] protection of communications services and facilities providers from misuse of market power or anti-competitive and unfair practices by other service or facilities providers or equipment suppliers".[895]

The NCA also declares the exclusive competence of the NCC to administer competition laws in the telecommunications industry. In this regard section 90 of the NCA provides that:

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[893] Communiqué on the Round Table on a Case for Competition Law in Nigeria (22 March, 2012) available at <http://www.nials-nigeria.org/round_tables/COMMUNIQUE%20ON%20COMPETITION%20LA.pdf> last accessed on 30 March, 2016. *See also*, L Ani, 'Rethinking Competition Law and Policy: Building a Framework for Implementation in Nigeria', (2012) *NIALS Journal of Business Law*, 6; Consumers Empowerment Organization of Nigeria, *Competition Regime Scenario in Nigeria* (CUTs 7Up 4 Project, November 2008) p.23; B A Adedeji, 'Towards a Competition Law in Nigeria: Why the New Federal Competition and Consumer Protection Bill May not Fly', *CUTS 7UP4 Project* No.6 (June 2009), pp.1.3; N Dimgba, 'The Need and the Challenges to the Establishment of a Competition Law Regime in Nigeria', p.9, available at <http://www.academia.edu/8822080/The_Need_and_the_Challenges_to_the_Establishment_of_a_Competition_Law_Regime_in_Nigeria> last accessed on 30 March, 2016.

[894] NCA 2003, s. 1(e).

[895] S. 4(1) (d) *Ibid*.

> Notwithstanding the provisions of any other written law, the [NCC] *shall have exclusive competence* to determine, pronounce upon, administer, monitor and enforce compliance of all persons with competition laws and regulations, whether of a general or specific nature, as it relates to the Nigerian communications market.[896]

The implication of the above provision is that the NCC is the only regulatory institution that is qualified to regulate competition in the Nigeria telecommunications industry. As such, the NCC has the sole powers to enforce both sector-specific and generic competition laws that affect the telecommunications industry to the exclusion of other regulatory institutions. This implies for example, that even if a generic competition law were to be successfully enacted in Nigeria that the regulatory powers of the competition authority that would be established under such law would not extend to the telecommunications industry. Rather, the NCC will be responsible for the enforcing any provisions of such generic competition law that affects the telecommunications industry. Apparently, the aim of granting NCC the exclusive powers to regulate competition in the telecommunications industry might have been to prevent multiple regulation and also reduce the potential of regulatory conflicts between the NCC and any other regulatory institution that has a mandate to enforce any generic competition law in Nigeria. Also, granting the NCC such exclusive powers has the advantage of ensuring the production of well reasoned regulatory decisions on competition due to the fact that the NCC has more knowledge about the telecommunications industry when compared to a generic competition authority.

[896] NCA 2003, s. 90.

The NCA's competition regime establishes provisions for the control of anti-competition practices and market dominance[897] which are further elaborated by the NCC's Competition Practices Regulations of 2007.[898] The Competition Practices Regulations (CPR) establishes a framework for promoting fair competition in the telecommunications industry. The CPR also provides for the control of the abuse of market power and other anti-competitive practices in the industry.[899] It also establishes explicit provisions addressing issues such as the substantial lessening of competition, anti-competitive agreements and practices, the determination of dominant position, the abuse of dominant position, and the regulation of mergers, acquisitions and takeovers.[900] In addition, operators are also bound to comply with any competition obligations that are set out in their licenses.[901] The relevant provisions of the competition regime under the NCA and CPR will be discussed in the sections below.

5.3.1 Prohibition of Anti-Competition Practices

The NCA prohibits anti-competition practices in the telecommunications industry. In this respect, section 91(1) of the NCA provides that an operator "shall not engage in any conduct which has the purpose or effect of 'substantially lessening' competition in any of the Nigerian communications market".[902] This provision establishes a broad scope for regulating anti-competition practices by telecommunications operators. However, an implication of the provision is that an anti-competition conduct by an operator will only the deemed unlawful under the NCA where such conduct has the "purpose or effect of

[897] NCA 2003, s. 91 & 92.
[898] NCC Competition Practices Regulations 2007, Official *Gazette of the Federal Republic of Nigeria* (7 December, 2007) Vol. 94, Government Notice No.70. [Hereafter CPR 2007].
[899] Regulation 1, CPR 2007.
[900] Regulations 4 -32, *Ibid*.
[901] Regulation 3, *Ibid*.
[902] NCA 2003, s. 91 (1).

substantially lessening competition" in the telecommunications industry. In other words, an anti-competitive conduct that is trivial would not be considered unlawful under NCA. The NCA does not define the meaning of 'substantial lessening of competition' however the NCA establishes the powers of the NCC to establish guidelines or regulations to clarify the meaning of the term.[903] In clarifying the meaning of a conduct that conduct that constitutes a 'substantial lessening of competition', the NCC may include references to factors such as: the relevant economic market; global trends in the relevant market; the impact of the conduct on the number of competitors in a market; the impact of the conduct on barriers to entry into the market; the impact of the conduct on the range of services in the market; the impact of the conduct on the cost and profit structures in the market, and; any other matters that the NCC may consider relevant.[904]

Regulation 8 of the CPR identifies business practices that are deemed to result in a 'substantial lessening of competition' in telecommunications markets. These include:

(a) Failure to supply interconnection – This refers to an operator's failure to supply interconnection or other essential facilities to a competing telecommunications operator in accordance with any interconnection agreement between the parties or any direction or order issued by the NCC pursuant to the NCA or the Interconnection Regulations.[905] However, an operator's failure to supply interconnection or other essential facilities to a competing operator will not be deemed to constitute a 'substantial lessening of competition' under circumstances

[903]NCA 2003, s. 91 (2).
[904] S. 91 (2) *Ibid.*
[905] Regulation 8(a) CPR 2007.

that are objectively justified based on supply conditions such as where there is shortage of available facilities.[906]

(b) Discriminatory provision of interconnection – This implies a situation whereby an operator is discriminatory in the provision of interconnection or other communications services or facilities to competing operators. However, such discrimination is permitted under circumstances that are objectively justified based on supply conditions such as where the discrimination is based on difference in the costs of supply.[907]

(c)Bundling of telecommunications services – This implies a situation whereby an operator requires a competing operator to acquire another service that it does not require as a condition for supplying a service to that competing operator;[908] or where an operator offers a competing operator more favorable terms or conditions that are not justified by cost differences if it acquires another service that it does not require.[909]

(d) Preemptive acquisition of essential facilities to hinder the entry of competing operators – This implies a situation whereby an operator engages in the preemptive acquisition or securing of scarce facilities or resources including rights of way which are also required by other operators with the effect of denying other operators the use of such facilities or resources.[910]

[906]Regulation 8(a) CPR 2007.
[907] Regulation 8(b) *Ibid*.
[908] Regulation 8(c) *Ibid*.
[909] Regulation 8(d) *Ibid*.
[910] Regulation 8(e) *Ibid*.

(e) Predatory or exclusionary pricing - This implies a situation whereby an operator supplies telecommunications services at prices below average incremental costs or below other cost standards adopted by the NCC.[911]

(f) Cross-subsidization – This implies a situation whereby an operator uses revenues or allocates costs from one telecommunications service to cross-subsidize another telecommunications service. However, the practice of cross-subsidization is permitted where it is approved by the NCC.[912]

(g) Failure to comply with interconnection or access obligations – This implies a situation whereby an operator fails to comply with interconnection or access obligations under the Interconnection Regulations and any other interconnection or access obligations approved by the NCC or any interconnection or access related decisions, directions or guidelines of the NCC.[913]

(h) Failure to comply with the NCC's direction on competition – This implies a situation whereby an operator fails to comply with any decision, direction, or guideline issued by the NCC regarding either prohibited or required competitive practices.[914]

(i) Performing actions that have the effect of 'impeding or preventing' a competing operator for entering or expending in a telecommunications market – Within this context, specific actions that are deemed to constitute a 'substantial lessening of competition' by an operator include:

[911]Regulation 8(f) CPR 2007
[912] Regulation 8(g) *Ibid.*
[913] Regulation 8(h) *Ibid.*
[914] Regulation 8(j) *Ibid.*

(i) deliberately reducing the margin of profit that is meant to be available to a competing operator that requires wholesale telecommunications services by increasing the prices for such services or decreasing the prices of telecommunications services in retail markets where both the competing operator and supplying operator compete;[915]

(ii) requiring or inducing a supplier to refrain from selling to a competing operator, and ;[916]

(iii) adopting technical specifications for networks or systems to deliberately prevent interconnection or interoperability with a network or system of a competing operator.[917]

5.3.2 Prohibition of Anti-Competitive Agreements and Arrangements

The NCA prohibits operators from entering into agreements or arrangements that likely to lessen competition in the telecommunications industry. In this respect, section 91 (3) of the NCA provides that an operator "shall not enter into any understanding, agreement or arrangement, whether legally enforceable or not, which provides for: rate fixing; market sharing; boycott of another competitor; boycott of a supplier of apparatus or equipment; or boycott of any other [operator]".[918] The NCC is generally precluded from reviewing an agreement or arrangement that is prohibited under sections 91 (3) and 91(4) of the NCA.[919] However, the NCC has the powers to review other forms of

[915]Regulation 8(i) (i) CPR 2007.
[916] Regulation 8(i) (ii) *Ibid*.
[917] Regulation 8(i) (iii) *Ibid*.
[918] NCA 2003, s. 91(4).
[919] Regulation 12(1) & (2) CPR 2007.

agreements or arrangements that could substantially lessen competition.[920] Such powers of review may be exercised by the NCC on its own initiative or on the application of an interested person.[921] Agreements or arrangements that the NCC may review include:

(a) Price-fixing agreements by which competing operators agree on or otherwise manipulate consumer prices;[922]

(b) Bid-rigging arrangements by which competing operators manipulate the prices or conditions in a tender process that is meant to be competitive;[923]

(c) Market allocation agreements by which competing operators allocate geographic or product markets amongst themselves;[924]

(d) Resale price maintenance arrangements by which an operator that supplies another competing operator with products or services attempts to impose restrictions on the prices charged by the competing operator to consumers,[925] and;

(e) Exclusive dealing agreements by which an operator enters into an agreement with another party for the supply of products or services on an exclusive basis in a related telecommunications market.[926]

The NCC also has the powers to review any other agreements or arrangements between operators, or between operators and third parties including joint ventures[927]or

[920] Regulation 12(1) CPR 2007.
[921] Regulation 12(1) *Ibid*.
[922] Regulation 13(a) *Ibid*.
[923] Regulation 13(b) *Ibid*.
[924] Regulation 13(c) *Ibid*.
[925] Regulation 13(d) *Ibid*.
[926] Regulation 13(e) CPR 2007.
[927] Telecommunications joint ventures usually raise three broad types of competition concerns: (a) the potential for collusion among parties in the joint venture; (b) a loss of competition potential; and (c) the

similar collaboration agreements in order to determine whether they can substantially lessen competition.[928] In order to determine whether an agreement or arrangement constitutes a substantial lessening of competition, the NCC is required to apply the standards established under Regulations 6 and 7 of the CPR.[929] In addition, the NCA establishes the powers of the NCC to regulate agreements between foreign telecommunications operators and operators that are licensed under the NCA with a view to preventing or mitigating any conduct by the foreign operator that is likely result to a substantial lessening of competition or the misuse of market power in any aspect of the Nigerian telecommunications industry.[930]

5.3.3 Control of Dominance

The concept of 'dominance' or 'dominant position' is not explicitly defined under the NCA or the CPR, and neither has the concept been judicially defined in Nigeria. However, the concept has been defined elsewhere. In the European case of *United Brands v. Commission*[931] the European Court of Justice defined 'dominant position' as

> a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition from being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers.

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potential for market exclusion and access discrimination. *See* C Blackman and L Srivastava, *Telecommunications Regulation* (Washington DC: The World Bank, 2011) p.50.

[928] Regulation 14 CPR 2007.

[929] Regulation 14 *Ibid*.

[930] NCA 2003, s. 95.

[931] *United Brands v Commission* [1978] ECR 207, 277.

The above definition appears to have become a standard for the determination of dominance in many cases.[932] A firm that is in a 'dominant position' in a market is usually regarded as having 'market power'.[933] The concept of 'market power' is used to define "the ability of a firm to raise prices above competitive levels, without promptly losing a substantial portion of its business to existing rivals or firms that have become rivals as a result of the price increase".[934] The mere fact that a firm possesses dominance or market power does not really damage market competition unless the concerned firm abuses such position or power by hindering competition, or engaging in acts that harm consumer interests such as setting prices above competitive levels. However, once a firm has acquired dominance or market power in a relevant market, competition law usually imposes a higher standard of responsibility with respect to its economic behavior in such market. This is regarded as the 'special responsibility' of the dominant firm since its conduct may constitute an abuse, whereas a similar conduct of a non-dominant firm would not be classified as such.[935]

The legal regime for the regulation of dominance in the Nigerian telecommunications industry is established under section 92 of the NCA. The section establishes the powers of the NCC to determine if an operator is a 'dominant position' in

[932] *Hoffman La Foche v Commission ('Vitamins')*, Case 85/76, [1976] ECR 461, p.524; *Michelin v. Commission* [1983] ECR 3461, p.3503; *Telemarketing v CLT* [1985] ECR 3261, p.3275. *See also*, J Wolfgang, 'The Application of EC Competition Rules to Telecommunications – Selected Aspects: The Case of Interconnection', (1999/2000) 4 *International Journal of Communications Law and Policy*, 38; Office of Fair Trading, *Abuse of a Dominant Position* (United Kingdom: Office of Fair Trading, 2004) p.13.

[933] C Blackman and L Srivastava, *Telecommunications Regulation* (Washington DC: The World Bank, 2011) p.35.

[934] *Ibid.*

[935] E Pitt and V Smith, 'Competition Law in Telecommunications', in I Walden (ed) *Telecommunications Law and Regulation* (Oxford: Oxford University Press, 2012) p.500.

any aspect of the industry.[936] It also establishes the powers of the NCC to publish guidelines and regulations to clarify how it would apply the test of 'dominant position' to operators.[937] Such guidelines and regulations are meant to specify the factors which the NCC may take into account in determining if an operator is in a dominant position including: (a) the relevant economic market; (b) the global technology and commercial trends affecting market power; (c) the market share of the operator; (d) the operator's power to make independent rate setting decisions; (e) the degree of product or service differentiation and sales promotion in the market, and; (f) any other matters that the NCC considers relevant.[938] The NCA's provisions on the control of dominance are further elaborated by the CPR.[939] Thus, the CPR provides further guidance with respect to the standards and processes that are to be applied by the NCC in determining whether an operator has acquired a dominant position in one or more telecommunications markets.[940]

5.3.3.1 Criteria for the Determination of Dominance

An abuse of a dominant position does not necessarily have to occur before the NCC can make a determination on dominance.[941] As such, the NCC can determine that an operator is in a dominant position without the existence of any abusive conduct on the part of the operator. Where such situation arises, additional regulation could be applied to the dominant operator to prevent it from abusing its position or hindering competition in any aspect of the telecommunications industry.[942] Accordingly, the CPR's standard for

[936] NCA 2003, s. 92(1).
[937] S. 92(2) *Ibid*.
[938] S. 92(3) *Ibid*.
[939] Parts IV and V CPR 2007.
[940] Regulation 17 CPR 2007.
[941] Regulation 20 *Ibid*.
[942] For example, once an operator is determined to be in a 'dominant position', such operator would be required to comply with additional obligations under the Telecommunications Network Interconnection

the determination of dominance is focused on identifying operators "that have a position of economic strength in one or more specifically defined communications markets, such that they have the ability to unilaterally restrict output, raise prices, reduce quality or otherwise, act independently of competitors or consumers".[943] Thus, the CPR's standard appears to be modeled on the European Court of Justice's definition of 'dominance' in *United Brands v. Commission*.[944]

In order to determine whether an operator is in a dominant position in a relevant telecommunications market, the NCC is required to consider one or more of the following factors:

(a) the market share of the operator determined by reference to its revenues, numbers of subscribers or volume of sales;[945]

(b) the overall size of the operator in compression to competing operators, and any resulting economies of scale or scope that permits the larger operator to produce products or services at lower costs;[946]

(c) the control of network facilities or other infrastructure, which competitors require access to, but which cannot be duplicated by competitors due to commercial or technical reasons;[947]

Regulation, 2007. Such obligations include compliance with special interconnection principles and accounting separation. *See* Regulations 10-12, NCC Telecommunications Network Interconnection Regulations, 2007.

[943] Regulation 18(1) CPR 2007.

[944] [1978] ECR 207, at 277.

[945] Regulation 18(2) (a) CPR 2007.

[946] Regulation 18(2) (b) *Ibid*.

[947] Regulation 18(2) (c) *Ibid*.

(d) the absence of buying power or negotiating position by customers or consumers, including substantial barriers to the switching of service providers;[948]

(e) the ease of market entry, and the extent to which actual or potential market entry protects against the exercise of market power such as raising prices;[949]

(f) the rate of technological or other change in the market, and related effects for market entry or the continuation of a dominant position.[950]

In addition to the above six factors, the NCC may also consider 'a range of market circumstances or criteria' when making a determination on dominance.[951] Thus, the NCC appears to have a considerable degree of discretion on how it applies the six factors that are listed above and other market circumstances in the assessment of a relevant market. In practice the NCC has also considered all the above six factors in its determination on dominance.[952]

Before making a determination on dominance, the NCC is required to first define the relevant telecommunications market or markets.[953] Regulation 19(2) of the CPR also establishes the criteria which the NCC is required to comply with when making an assessment and definition of a relevant market. In this respect, the NCC is required to determine the relevant market by analyzing the products or services that make up a

[948] Regulation 18(2) (d) *Ibid*.
[949] Regulation 18(2) (e) *Ibid*.
[950] Regulation 18(2) (f) *Ibid*.
[951] Regulation 18(2) *Ibid*.
[952] C B Opata, 'Looking Towards Europe: Regulation of Dominance in Nigerian Telecommunications', p.25, available at <http://www.ssrn.com/abstract= 2145781>.
[953] Regulation 19(1) CPR 2007.

specific market, as well as the geographic scope of the market.[954] The NCC is also required to "assess demand side substitutability" in order to measure the extent to which consumers are prepared or able to substitute other products or services for the products or services supplied by the operator in question.[955] There is also a further requirement for the NCC to "assess supply-side substitutability" to determine the extent to which other suppliers can supply products or services that provide a competitive alternative to consumers.[956]

However, the criteria for the assessment and definition of relevant markets under Regulation 19(2) of the CPR has been criticized for not making provision or guidance with regard to the prior selection of markets for dominance analysis. In this respect, it has been observed that "neither Regulation 19 nor the CPR Schedule contains any specific guidance on how the NCC will arrive at specific products or services that are subject to demand-side and supply-side substitutability assessment to ascertain the scope of the relevant market".[957] While the Regulation 19(2) of the CPR appears to have adopted a broad formulation of the test of interchangeability or substitutability established in the European Union's case law,[958] the specific reference to objective characteristics, as well as intended use and prices which are usually made by the EU Courts are omitted in the CPR. As such, the criteria under Regulation 19(2) appears very broad without any indication as to how it will the applied in practice. In particular, there are no indications

[954] Regulation 19(2) (a) CPR 2007.
[955] Regulation 19(2) (b) *Ibid*.
[956] Regulation 19(2) (c) *Ibid*.
[957] C B Opata, 'Looking Towards Europe: Regulation of Dominance in Nigerian Telecommunications', p.11, available at <http://www.ssrn.com/abstract= 2145781>.
[958] *Europeballage and Continental Can v Commission* [1973] ECR 215, paragraph 32; *Tetra Pak v Commission* [1996] ECR 1-5951, paragraph 13; *Tierce Ladbroke v. Commission* [1997] ECR 11-925, paragraph 81; *Kish Glass v Commission* [2000] ECR 11-1885 paragraph 62; and *Ambulanz Glocker and Landkreis Sudwestpfalz v Commission* [2001] ECR 1-0000, *cited* in C B Opata, *Ibid*.

of the factors that the NCC will have to consider in the assessment of a geographic market. There is also insufficient regulatory indication on the assessment of substitutability as well as its definition with respect to the relevant product and geographic market.[959] Consequently, it has been observed that Regulation 19(2) of the CPR "gives the NCC substantial room to use its discretion without any indication or guidance as to how this discretion will be exercised",[960] thus, causing a lack of clarity which does not create room for reasonably predicting the outcome of the NCC's decisions on dominance. This state of affairs underscores the need for a regulatory response that will elaborate the criteria for the assessment and definition of relevant markets under Regulation 19(2) of the CPR.

5.3.3.2 Presumption of Dominance

The CPR establishes the powers of the NCC to presume that an operator is in a dominant position where certain factors exist. In this respect, Regulation 20 of the CPR provides that the NCC is entitled to presume that any operator "whose gross revenues in a specific communications market exceed forty percent (40%) of the total gross revenues of all [operators] in that market, is in a dominant position in that market".[961] However, such presumption of dominance can be rebutted on the basis of an NCC determination on dominance or where the affected operator satisfactorily demonstrates to the NCC that such presumption should not apply.[962] Apparently, the provision for the presumption of dominance under Regulation 20 of the CPR indicates that an abuse of a dominant

[959] C B Opata, 'Looking Towards Europe: Regulation of Dominance in Nigerian Telecommunications', p.12.
[960] *Ibid.*
[961] Regulation 20 CPR 2007.
[962] Regulation 20 *Ibid*.

position is not required as a condition before the NCC can make a determination on dominance.

5.3.3.3 Determination of Dominance

As noted earlier, the NCC can determine that an operator is in a dominant position without the existence of any form of abusive conduct on the part of the operator. Thus, the regulation of dominance in the Nigerian telecommunications industry is not triggered by an operator's abuse of a dominant position, but rather by the need to prevent a potential abuse of such position and also to curtail an operator's ability to substantially lessen competition in a given market. The NCC also has the powers to determine that two or more operators 'acting jointly or collectively' are in a dominant position.[963] Such determination of a joint or collective dominance may also be made in situations where the affected operators have no common ownership; or where they are not parties to any formal agreement or where they operate in different markets.[964] Apparently, the broad scope of the above instances under which the NCC can make a determination on collective or joint dominance serves to address the possibility of collective dominance through tacit collusion amongst operators.

Generally, once the NCC has determined that an operator is in a dominant position without finding any abusive conduct on the part of the operator, such operator will be subject to some special obligations in order to reduce the potential for the abuse of its dominance. The CPR does not explicitly provide for the special obligations of a dominant operator however, the NCC's Telecommunications Networks Interconnection

[963] Regulation 21 CPR 2007.
[964] Regulation 21 *Ibid*.

Regulations (2007) provides for such obligations.[965] Under the Interconnection Regulations an operator who the NCC has determined to be in a dominant position will be required to comply with special obligations which include:

(a) meeting all reasonable requests for access to its telecommunications network;

(b) adhering to the principle of non-discrimination when offering interconnection to operators;

(c) making available on request to other operators all necessary information and specifications that are required to facilitate the conclusion of an interconnection agreement;

(d) submitting its reference interconnection offer to the NCC for approval and also publishing such offers, and;

(e) providing access to the technical standards and specifications of it telecommunications network in order facilitate interconnection with another operator.[966]

The Interconnection Regulations also require a dominant operator to set interconnection charges using an objective criterion and observing the principles of transparency and cost orientation.[967]In addition, a dominant operator is required to maintain accounting separation for interconnection services.[968]

[965]NCC Telecommunications Networks Interconnection Regulations, S.I. 33 of 2007. [Hereafter Interconnection Regulations 2007].
[966] Regulation 10(1) Interconnection Regulations 2007.
[967] Regulation 11(1) *Ibid*.
[968]Regulation 12(1) *Ibid*. The objective of 'accounting separation' is to separate the costs of an operator's competitive and non-competitive products.

5.3.3.4 Abuse of Dominance

Abuse of dominance occurs where an operator that is in a dominant position engages in predatory or exclusionary business practices with the aim of eliminating or substantially lessening market competition and excluding competitors.[969] Examples of practices that may constitute an abuse of dominance include: refusals to supply interconnection to a competitor; discriminatory provision of interconnection to competitors; bundling or tying of telecommunications services; exclusive dealing arrangements; predatory pricing; failure to comply with interconnection obligations; cross-subsidization; customer lock-in; misuse of information, and; the preemptive acquisition of essential facilities to hinder the entry of competing operators into the market.[970] In order to determine whether any conduct of a dominant operator constitutes a 'substantial lessening of competition' or an 'abuse of dominance' in a relevant market, the NCC is required to consider factors including: (a) the definition of the relevant market or markets; (b) the impact of the conduct on existing competitors in the identified markets; (c) the impact of the conduct on further market entry; (d) the impact of the conduct on consumers, including the availability and pricing of products and services; (e) the degree of the conduct's interference with competition that results in identifiable injury to competitors or consumers,[971] and; the degree of the operator's market power.[972] However, the NCC is not required to determine cases where the degree of the lessening of competition is 'trivial' or 'minimal'.[973]

[969] C Blackman and L Srivastava, *Telecommunications Regulation* (Washington DC: The World Bank: 2011) p.38.
[970] Regulation 8 CPR 2007.
[971] Regulation 6 *Ibid*. *See also* Regulation 24 *Ibid*.
[972] Regulation 7 (b) *Ibid*.
[973] Regulation 7 (a) *Ibid*.

An abuse of dominance occurs where the NCC determines that an operator that has a dominant position in the telecommunications market is engaging in a conduct that is likely to substantially lessen competition in any aspect of the market. Following such determination, the NCC may direct the dominant operator to cease the conduct which constitutes an abuse of dominant position and also implement appropriate remedies. [974]

5.3.3.5 The NCC's Determination of Dominance in Selected Telecommunications Markets – 2010/2013

The CPR's provisions on the control of dominance were first applied in practice when the NCC carried out a Determination of Dominance in 2010.[975] The 2010 determination considered two telecommunications markets (the telephony market and the international Internet connectivity market) with a view to finding whether certain telecommunications operators were in a position of dominance in the selected markets. Following the conclusion of the study, the NCC determined that based on the available evidence and the submissions of stakeholders, that no operator held a position of dominance in the mobile telephone services markets. The NCC also determined that no group of two or more operators held a position of joint or collective dominance in the mobile telephone services market. With respect to Internet connectivity market, the NCC determined that although the market had been traditionally dominated by NITEL; that NITEL was however not in a dominant position given the proposed entrance of four operators that were expected to land international submarine cables in Nigeria between

[974] NCA 2003, s. 93 (4). *See also*, Regulation 25 CPR 2007.
[975] NCC, *Determination of Dominance in Selected Communications Markets in Nigeria* (Abuja: NCC, 2010) available at <http://www/ncc.gov.ng/index.php?option=com_content&view=article&id=1029 &Itemid =210> last accessed on 30 March, 2016.

2009 and 2011, with substantially larger bandwidth capacity than that of NITEL. On this basis, the NCC concluded that the international Internet connectivity market was becoming highly competitive and will remain so on a prospective basis. It also concluded that NITEL was not in a dominant position in the international Internet connectivity market and that there was no evidence of collective dominance between NITEL and any or all of the new entrants into the market.[976]

The second application of the CPR's dominance control provisions commenced in June 2012, when the NCC embarked on a Study of the Assessment of the Level of Competition in the Nigerian Telecommunications Industry. The study sought to achieve specific objectives including:

(a) to define the market structure of the Nigerian telecommunications industry including relevant market segments which may be subject to *ex ante* regulation;

(b) to review and assess the level of competition within each of the identified markets;

(c) to determine the existence of dominance in one or more markets;

(d) to review the performance of the identified markets in order to identify any anti-competitive practices, and;

(e) to determine the markets that will be subject to revised and/or additional *ex ante* regulations.[977]

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[976] NCC, *Determination on Dominance in Selected Communications Markets in Nigeria* (2010). *See also* NCC, *Determination of Dominance in Selected Communications Markets in Nigeria* (Abuja: NCC, 25 April, 2013) p.1. For a critical analysis of the NCC's 2010 Dominance Determination, *see* C B Opata, 'Looking Towards Europe: Regulation of Dominance in Nigerian Telecommunications', p.11, available at <http://www.ssrn.com/abstract= 2145781>.

[977] NCC, *Determination of Dominance in Selected Communications Markets in Nigeria* (25 April, 2013) pp.1-2.

In furtherance of the above objectives the NCC reviewed the telecommunications markets using certain segmentation variables such as technology, products and services, customer profiles and geographical locations, and also considered the demand and supply substitutability of the markets resulting from the use of these variables.[978] The NCC also adopted the 'Structure – Conduct – Performance (SCP)' model to assess competition in the defined markets of the telecommunications industry.[979]

The key findings of the NCC's final determination which were published on 25 April, 2013, include:

(a) That the mobile voice market is not effectively competitive with MTN holding a 44 percent market share of subscribers within that market, and that available evidence indicates the likely establishment of a 'calling club' for MTN subscribers;[980]

(b) That although Starcomms had about 33 percent of the market share of subscribers in the fixed voice market, that it was not considered to have significant market power in that market, as it had consistently lost its market share following the rapid decline of the fixed voice market which had lost 70 percent of its market since 2008;[981]

(c) That no operator had a dominant position in the mobile data market. The study however noted that the major competition concern was that the wholesale

[978] *Ibid*, p.3.
[979] The SCP model postulates that the structure of a market determines to a large extent the conduct of the participants in the market, which in turn, influences the performance of the firms within the market with respect to profitability and efficiency. *See* NCC, *Determination of Dominance in Selected Communications Markets in Nigeria* (25 April, 2013), p.5.
[980] NCC, *Determination of Dominance in Selected Communications Markets in Nigeria* (25 April, 2013) p.7.
[981] *Ibid*, p.7.

providers of bulk bandwidth also participate in the retail market for mobile data, and that such state of affairs could potentially stifle competition in the market;[982]

(d) That fixed line broadband access was severely limited and accounted for about 1 percent of the total data subscription, and that Internet Service Providers that utilized fixed wireless data solutions were fast going out of business due to their inability to directly compete with the suppliers of wholesale data access;[983]

(e) That MTN and Globacom jointly control about 62 percent of the public terrestrial transmission infrastructure which is a bottle neck resource in the provision of voice and data services. The study also noted that there were concerns that operators participating in the wholesale and retail sub-segments of those markets have the leverage to 'squeeze' the margins of their competitors who are also their customers.[984]

Following the above findings, the NCC determined that MTN had a dominant position in the mobile voice market segment of the Nigerian telecommunications industry.[985] This led the NCC to impose special obligations on MTN, including: the implementation of accounting separation; the collapse of on-net and off-net retail tariffs to achieve the same tariff for both, and; the submission of required details of specific aspects of its operations to the NCC.[986] The NCC also determined that Globacom and MTN had a joint dominant position in the wholesale leased lines and transmission capacity sub-segment of the telecommunications industry. Consequently, the NCC

[982] NCC, *Determination of Dominance in Selected Communications Markets in Nigeria* (25 April, 2013) pp.7-8.
[983] *Ibid*, p.8.
[984] *Ibid*, p. 8.
[985] *Ibid*, p.13.
[986] *Ibid*, p.13.

imposed special obligations on both operators to comply with the NCC's price cap for wholesale services and the price floor for retail services. Both operators were also required to implement accounting separation, and submit details of specific aspects of their operations to the NCC whenever such details were required.[987]

5.4 Control of Mergers and Acquisitions

Merger and acquisition arrangements in the Nigerian telecommunications industry are regulated under the CPR, the Investment and Securities Act and the Companies Income Tax Act. Within the context a 'merger' refers to the legal amalgamation or consolidation of two or more companies to form one new legal entity. Accordingly, the Nigerian Investment and Securities Act defines a 'merger' as "any amalgamation of the undertakings or any part of the undertakings or interest of two more companies..."[988] On the other hand, an 'acquisition' occurs where one company takes over another company and completely establishes itself as the new owner of that company. An acquisition can occur through a 'takeover' which implies a situation whereby one company acquires sufficient shares in another company to give the acquiring company control over that other company.[989]

Generally, the essence of controlling merger and acquisition arrangements is to ensure that such arrangements do not lessen or hinder competition in a market. As such, concerns with merger and acquisition arrangements in the telecommunications industry largely arise from concerns over anti-competitive behavior. In effect, the control of merger and acquisition arrangements in the telecommunications industry is based on the

[987] *Ibid*, p.14.
[988] Investment and Securities Act 2007, s. 119(1).
[989] S. 117 *Ibid*.

need to prevent the excessive concentration of market power which usually increases the potential for abusive behavior by an operator that has a dominant position in the market. However, while merger or acquisition arrangements can create potential for abusive and anti-competitive practices, it is also widely recognized that such arrangements can yield significant benefits such as economies of scale or scope or savings through vertical integration.[990] Such benefits in some cases may also appear to outweigh any effects arising from a reduction in market competition.[991]

Factors that are usually taken into consideration when determining whether a merger or acquisition arrangement can substantially reduce or harm competition include: (a) the market shares and market concentration that will arise from the merger or acquisition; (b) the likelihood that the merger or acquisition would enable the merged company or acquiring company to significantly and sustainably increase profits either unilaterally or through coordinated interaction; (c) the extent to which the merger or acquisition can likely constitute an effective barrier to the entrance of other competitors into the market, and; (d) the dynamic characteristics of the market, including growth, innovation and product differentiation.[992]

5.4.1 Regulation of Mergers and Acquisitions under the CPR

Regulation 26 of the CPR establishes the powers of the NCC to review all mergers, acquisitions and takeovers in the telecommunications industry.[993] The NCC's powers to

[990] E Lie, 'Competition Policy in Telecommunications', *Background Paper ITU Workshop on Competition Policy in Telecommunications* [Document: CPT/04], (Geneva: ITU, 20-22 November, 2002) p.28.
[991] C Blackman and L Srivastava, *Telecommunications Regulation* (Washington DC: World Bank, 2011) p.48.
[992] E Lie, *Ibid*, p.29.
[993] Regulation 26 CPR 2007.

review mergers, acquisitions and takeovers arises from its powers to regulate competition in the telecommunications industry and also from license conditions which require an operator to notify and also obtain prior approval from the NCC before making any change of shareholding that will affect more than 10 percent of its total shares.[994]

Regulation 27 (a) – (c) of the CPR establishes procedures to govern the review of mergers, acquisitions and takeovers in the industry. The CPR's review procedure also applies in situations where the NCC determines that based on the preliminary information provided by an operator in its initial transaction notification, that a transaction "may result in the substantial lessening of competition in one or more communications markets" or "may, result in the [operator] or any successor company having a dominant position in one or more communications markets".[995] An operator is required to notify the NCC and also obtain its approval prior to completing any proposed merger, acquisition or takeover transaction that is covered under any of the instances under Regulation 27 (a) to (c) of the CPR.[996]

5.4.2 Regulation of Mergers and Acquisitions under the Investment and Securities Act

The Investment and Securities Act (ISA) establishes the Nigerian Securities and Exchange Commission (SEC)[997] and also provides for the regulation of mergers, acquisitions and takeovers in Nigeria. Section 13 (q) of the ISA establishes the powers of the SEC to "review, approve and regulate mergers, acquisitions, takeovers and all forms

[994] Conditions 15.1 -15.2, NCC Unified Access Service License; Conditions 13.1–13.2 International Data Access Gateway License.
[995] Regulation 27(d) CPR 2007.
[996] Regulation 28 (1) *Ibid*.
[997] S. 1 Investment and Securities Act 2007. [Hereafter ISA 2007].

of business combinations and affected transactions of all companies" incorporated in Nigeria.[998] The above regulatory powers of the SEC broadly extend to the telecommunications industry despite the existence of a telecommunications specific merger and acquisition regime under the CPR. Thus, section 118 (1) of the ISA declares that "notwithstanding anything to the contrary contained in any other enactment, every merger acquisition or business combination between or among companies shall be subject to the prior review and approval of the Commission (SEC)".[999] Section 118 (4) of the ISA also provides that "any transaction consummated pursuant to authority given by any Federal Government owned agency under any statutory provisions vesting such powers in the agency, shall in addition be subject…to the [SEC's] approval".[1000] Apparently, the effect of the above provisions is that the SEC has powers to regulate merger and acquisition arrangements in the telecommunications industry and that such powers are not superseded by the NCC's powers to regulate telecommunications merger and acquisition arrangements under CPR 2007. The regulatory powers of the SEC also extend to situations whereby a holding company acquires shares in another company and uses such acquisition to cause or attempt to cause "a substantial restraint of competition or…to create a monopoly in any line of business enterprise".[1001] In addition, the ISA establishes the powers of the SEC to order the 'break-up' of a company.[1002]

[998]ISA 2007, s. 13 (q). *See also*, s. 117 of the ISA which provides that "without prejudice to the provisions of the Companies and Allied Matters Act, 'Company' as used in this Act means anybody corporate and includes a firm or association of individuals". *See also* s. 315 of the ISA which provides that 'company' has the meaning as defined in the Companies and Allied Matters Act 1990. Under Section 567 of the Company and Allied Matters Act a 'company' is defined as "a company formed and registered in Nigeria under this Act, or as the case may be, formed and registered in Nigeria before and in existence on the commencement of this Act".
[999]ISA 2007, s. 118 (1).
[1000] S. 118 (4) *Ibid.*
[1001] S. 118 (3) *Ibid.*
[1002] S. 128 (1) *Ibid.*

A major concern however, is that the SEC's broad powers to regulate mergers and acquisitions in Nigeria appears to overlap with the powers of the NCC to regulate competition in merger and acquisition arrangements in the telecommunications industry. There is currently no legal provision either under the NCA or the ISA that addresses these conflicting regulatory mandates. The NCA declares the exclusive powers of the NCC to regulate competition in the telecommunications industry.[1003] On the other hand, the ISA in addition to establishing the powers of the SEC to regulate merger and acquisition transactions also establish the powers of the SEC to regulate competition issues in such transactions.[1004] Section 312 (3) of the ISA also declares that:

> Apart from the Constitution of the Federal Republic of Nigeria, if the provisions of any other law in relation to capital market matters…are inconsistent with the provisions of this Act, the provisions of this Act shall prevail and the provisions of that other law shall, to the extent of the inconsistency, be void.[1005]

While, the regulatory mandates of the NCC and the ISA have not had the opportunity of clashing in practice, it nevertheless imperative for both regulators to streamline their mandates to reduce the potential for a future regulatory conflict. In this respect, it will be helpful for both regulators to establish a Memorandum of Understanding that will address the extent of each regulator's powers to regulate competition in merger and acquisition transactions in the telecommunications industry. Apparently, the NCC's special technical

[1003]S. 90 of the NCA provides that: "Notwithstanding the provisions of any other written law the [NCC] shall have exclusive competence to determine, pronounce upon, administer, monitor and enforce compliance of all persons with competition laws and regulations, whether of a general or specific nature, as it relates to the Nigerian communications market".
[1004]ISA 2007, s.13 (q), 118 (4) & 121(1).
[1005] S. 312(3) *Ibid*.

and regulatory knowledge of the telecommunications industry when contrasted with the SEC's general knowledge of the industry indicates that NCC would be in the best position to regulate competition issues in merger and acquisition transactions in the industry.

5.5 The Concept of Telecommunications Interconnection

'Interconnection' basically refers to the linkage of the networks of two telecommunications operators in order to achieve a state of seamless exchange of traffic and communications between the two networks. The NCA defines 'interconnection' as "the physical and logical linking and connection of communications systems used or operated by the same or different [operators] in order to convey messages to and from the respective systems for the provision of services".[1006] The NCA's definition enshrines the core elements of the World Trade Organization's (WTO) definition of 'interconnection'.[1007]

5.5.1 Regulation of Interconnection Arrangements in Nigeria

The NCA establishes the general framework for the governance of interconnection arrangements[1008] and the powers of the NCC to make interconnection regulations that may specify the terms and conditions for interconnection arrangements between operators.[1009] Interconnection regulations that are made by the NCC are also meant to address issues including: the time frame and procedures for negotiating and concluding

[1006] NCA 2003, s. 157.
[1007] Paragraph 2.1, WTO, GATS Telecommunications Reference Paper (1996) available at <http://www.wto.org/wto/ english/tratop_e/serv_e/telecom_e/tel23_e.htm> last accessed on 30 March, 2016.
[1008] NCA 2003, s. 97-100.
[1009] S. 99 (1) *Ibid*.

interconnection arrangements; the quality and levels of service; rate methodologies; the protection of intellectual property; the protection of commercial information; the provision of facilities; and the sharing of technical information.[1010] In the exercise of its regulatory powers the NCC established the Telecommunications Networks Interconnection Regulations and the Guidelines on Interconnection of Telecommunications Networks in 2003. However, both the Regulations and the Guidelines were repealed by the NCC in August, 2007 and replaced by the Telecommunications Networks Interconnection Regulations of 2007.[1011] The Interconnection Regulations are also supplemented by the Guidelines on Collocation and Infrastructure Sharing.[1012]

5.5.1.1 Interconnection Rights and Obligations

Section 96 of the NCA establishes the right of a telecommunications operator to request interconnection from another operator. Upon the receipt of a request for interconnection from another operator, the requested operator "shall have an obligation to interconnect" its telecommunications system or network with that of the requesting operator at 'technically feasible locations'.[1013] Such interconnection is meant to be provided in accordance with the terms and conditions negotiated by the parties in good faith,[1014] and also in accordance with the principles of neutrality, transparency, non-discrimination, fair competition, universal coverage, access to information, equality of

[1010]NCA 2003, s. 99 (2).
[1011]The Telecommunications Networks Interconnect Regulations, S.I. 33 of 2007. [Hereafter Interconnection Regulations 2007].
[1012] Paragraph 2, NCC Guidelines on Collocation and Infrastructure Sharing available at <http://www. ncc.gov.ng/files/Legal-Guidelines_Collocation_and_Infrastructure_Sharing.pdf> last accessed on 30 March, 2016.
[1013] NCA 2003, s. 96. *See also* Regulation 1(1) Interconnection Regulations 2007.
[1014] NCA 2003, s. 96.

access and equal terms and conditions.[1015] Interconnection arrangements are also required to comply with the provisions of the Interconnection Regulations and any other Interconnection Guidelines that has been adopted by the NCC.[1016] However, the NCC may agree to limit an operator's obligation to provide interconnection where it determines that an interconnection agreement is prohibited by law; or that an operator's license does not authorize the services for which interconnection is requested; or that it is impossible for a requested operator to render interconnection due to technical specifications; or where such interconnection would endanger life or safety, or result in injury or harm to the requested operator's property or hinder the quality of services provided by the operator.[1017]

Interconnection rights and obligations under the NCA and the Interconnection Regulations generally accrue to all telecommunications operators including 'network services providers', 'network facilities providers'[1018] and 'interconnect exchange operators'.[1019] Within the context a 'network services provider' is defined as "a person who provides network services", while a 'network facilities provider' is defined as "a person who is an owner of any network facilities".[1020] On the other hand, an 'interconnect exchange operator' refers to a person that is licensed to provide interconnection exchange services.[1021] Thus, interconnection rights and obligations are also accorded to operators that do not provide downstream telecommunications services. Hence, operators that do

[1015] NCA 2003, s. 96 & 97 (1) (b). *See also* Regulation 1(1) Interconnection Regulations 2007.
[1016] Regulation 1(1) Interconnection Regulations 2007.
[1017] Regulation 1(5) *Ibid*.
[1018] NCA 2003, s. 96.
[1019] Regulations 1(1) and 19 Interconnection Regulations 2007.
[1020] NCA 2003, s. 157.
[1021] The NCC Interconnect Exchange Operator License, available at <http://www.ncc.gov.ng/index.php?option=com_docman&task=doc_download&gid=33&Itemid=53> last accessed on 30 March, 2016.

not provide public telecommunications services are also entitled to exercise the right to request for interconnection.

In *Interconnect Clearing House Nigeria Limited v. MTN Nigeria Communications Limited*,[1022] Interconnect Clearing-house Limited (ICN), an interconnect exchange operator filed a complaint against MTN before the NCC. ICN contended that it was a network facilities provider by virtue of sections 96 and 157 of the NCA and that consequently, other network facilities providers including MTN owned it an obligation to interconnect upon request. MTN however, contended that its obligation to interconnect was only accorded to operators of switched networks. MTN also contended that by virtue of the terms of ICN's Interconnect Exchange License that ICN lacked the right to demand interconnection of its exchange with other operators; and that ICN was only obliged to interconnect with requesting operators and that it lacked the *locus standi* to require mandated interconnection with non-requesting operators since it was not a public switched network or an operator. Consequently, MTN claimed that it was lawful for it to decline interconnection with ICN. A major issue for determination by the NCC was "whether an Interconnect Exchange License was a proper license of the NCC that is owed an obligation to interconnect with network services and facilities providers?" The NCC found that ICN as an interconnect exchange licensee was a network facilities provider under sections 96 and 157 of the NCA. It also found that there was no ambiguity or mischief in a strict interpretation of section 96 of the NCA which mandates all network services providers and all network facilities providers to interconnect with other network

[1022] *Interconnect Clearing House Nigeria Limited v MTN Nigeria Communications Limited* [NCC Decision, 9 May, 2006 available at <http://www.ncc.gov.ng/Headlines/decision_on_Interconnect _mtn.htm> last accessed on 30 March, 2016.

services providers and network facilities providers licensed under the NCA. The NCC rejected MTN's argument that the conditions that were attached to the Interconnect Exchange License limited the scope of the provisions of the NCA. The NCC also distinguished a facilities provider from a network facilities provider and held that a network facilities provider under section 157 of the NCA includes licensed operators and owners of networks used principally for or in connection with the provision of telecommunications services. Consequently, the NCC decided that MTN has failed to discharge its interconnection obligation under sections 96 and 157 NCA due to its failure to interconnect with ICN and then directed both parties to commence negotiations on an interconnection agreement.[1023]

5.5.1.2 General Interconnection Principles

Operators are required to comply with the general interconnection principles under the Interconnection Regulations. The principles address essential requirements for interconnection;[1024] collocation and facility sharing;[1025] technical standards[1026]and; the publication of interconnection arrangements.[1027] The principle on essential requirements for interconnection establishes obligations on operators to maintain the highest level of service and meet any priorities set by NCC, and also take full account of their emergency obligations under their licenses when requesting and providing interconnection or when designing and implementing their interconnection arrangements.[1028] The principle on

[1023] B C Opata, 'Transplantation and Evolution of Legal Regulation of Interconnection Arrangements in the Nigerian Telecommunications Sector', (2011) 14 *International Journal of Communications Law and Policy*, 15-16.
[1024] Regulation 13 Interconnection Regulations 2007.
[1025] Regulation 14 *Ibid*.
[1026] Regulation 15 *Ibid*.
[1027] Regulation 16 *Ibid*.
[1028] Regulation 13(1) *Ibid*.

collocation and facility sharing requires that the terms and conditions for the collocation and sharing of telecommunications facilities shall be subject to a commercial and technical agreement between the concerned parties, and also establishes the powers of the NCC to intervene to resolve disputes relating to such agreements.[1029] The principle on technical standards requires operators to publish details of technical interfaces for interconnection and also provide such interface in accordance with legal requirements and standards currently in force in Nigeria.[1030]

5.5.1.3 Termination of Interconnection Agreements

Interconnection agreements are meant to be terminated in accordance with the terms and conditions agreed by the parties.[1031] Where an operator that is providing interconnection desires to terminate the agreement, it will have to provide the other party with a six months written notice of its intention to terminate the agreement and also specify the grounds for terminating the agreement.[1032] In situations where the terms of an interconnection agreement has been breached by the operator who is requesting interconnection, the operator that is providing the interconnection is required to give the requesting operator a three months written notice to remedy the breach, and if the requesting operator fails to remedy the breach within the specified period, the operator that is providing the interconnection agreement would be entitled to terminate the interconnection agreement without giving further notice.[1033] However, an operator is

[1029] Regulation 14(2) Interconnection Regulations 2007.
[1030] Regulation 15 *Ibid*.
[1031] Regulation 4(5) *Ibid*.
[1032] Regulation 4 (6) *Ibid*.
[1033] Regulation 4 (7) *Ibid*.

generally prohibited from terminating an interconnection agreement without obtaining the prior written consent of the NCC.[1034]

Under the NCA, a party to an interconnection agreement cannot be disconnected without the prior approval of the NCC. In this respect section 100 of the NCA provides that "notwithstanding the terms and conditions of any interconnection, a party thereto shall not at any time and in any circumstance disconnect or discontinue interconnection to any interconnecting party without the prior written approval of the [NCC]".[1035] The NCC Guidelines on Disconnection (2012) establishes the procedure for obtaining the NCC's approval to disconnect an interconnected operator.[1036] Under the Guidelines 'disconnection' is broadly defined as "not only the mere absence of physical connection between operators previously interconnected, but also the reduction of bandwidth in both directions; parity bit marking to deny access or flow; allowing only uni-directional flow as against bi-directional flow and the general restriction of traffic however called".[1037] The Guidelines establishes the right of every operator to apply to the NCC for an approval to disconnect an interconnected operator where such operator fails to settle its interconnect debt after it has become due, or where such operator is engaged in acts that are contrary to the terms of its license with respect to the interconnection; or where an interconnection agreement has been terminated; or where there is a fundamental breach

[1034] Regulation 4 (8) *Ibid*.
[1035] NCA 2003, s. 100.
[1036] NCC, Guidelines on Procedure for Granting Approval to Disconnect Telecommunications Operators, 30 November, 2012, available at <http://www.ncc.gov.ng/index.php?option=com_docman&task= doc_ download&gid=330&Itemid> last accessed on 30 March, 2016. [Hereafter NCC Guidelines on Disconnection].
[1037] Paragraph 16 (2) NCC Guidelines on Disconnection 2012.

of an interconnection agreement; or for any other reasons established under the NCA or any subsidiary legislation of the NCC.[1038]

However, an operator is precluded from unilaterally disconnecting another party even on the grounds of non-payment of interconnection charges without the prior approval of the NCC. In the matter of *Intercellular Nigeria Plc v. MTN Nigeria Communications Ltd*,[1039] Intercellular brought a complaint before the NCC alleging that MTN had unilaterally disconnected it from MTN's network. Consequently, the NCC set up a panel that found that Intercellular actually owed interconnect debts to MTN and also had a history of the persistent late payment of such debts to MTN. However, the NCC found that MTN's disconnection of Intercellular was done unilaterally without the prior written approval of the NCC, and decided that such unilateral disconnection violated section 100 of the NCA. Consequently, it ordered MTN to immediately reconnect Intercellular, and also ordered Intercellular to pay MTN the outstanding interconnect debt.[1040]

5.5.2 Collocation and Infrastructure Sharing

The NCC's Guidelines on Collocation and Infrastructure Sharing regulates collocation and infrastructure sharing in the Nigerian telecommunications industry.[1041]

[1038] Paragraph 3(1) NCC Guidelines on Disconnection 2012.

[1039] *Intercellular Nigeria Plc v MTN Nigeria Communications Ltd*, (3 March, 2006) available at <http://ncc.gov.ng/headlines/ncc_decision_in_intercellular_mtn_matter.htm> last accessed on 30 March, 2016.

[1040] B C Opata, 'Transplantation and Evolution of Legal Regulation of Interconnection Arrangements in the Nigerian Telecommunications Sector', (2011) 14 *International Journal of Communications Law and Policy*, 16.

[1041] Paragraph 2, NCC Guidelines on Collocation and Infrastructure Sharing, available at <http://www.ncc.gov.ng/files/Legal-Guidelines_Collocation_and_Infrastructure_Sharing.pdf>.

The Guidelines create a framework under which operators can negotiate collocation and infrastructure sharing arrangements.[1042]

5.5.2.1 Collocation

NCC's Guidelines on Collocation and Infrastructure Sharing defines 'collocation' as "the placement of transmission equipment owned by [an] interconnection demanding operator in the premises of the interconnection providing operator for [the purpose of] interconnecting to that operator's network."[1043] The Guidelines classify 'collocation' as an element of the interconnection of networks and also declares that collocation "shall constitute part of the negotiations for interconnection and be governed by [the] provisions of the Telecommunications Network Interconnection Regulations".[1044] The Guidelines establish obligations on major operators and dominant operators to include an offer for the facilities that available for collocation including a price list for the different components of collocation in their Reference Interconnection Offers (RIO).[1045] An operator that desires to interconnect with another operator is entitled to choose the type of collocation that is suitable for its operation.[1046] Where an operator has made a request for physical collocation but such collocation is not deemed feasible, the interconnection providing operator will be under an obligation to offer the requesting operator virtual collocation.[1047] However, where virtual collocation is not feasible, the interconnection providing operator will be required to provide remote collocation.[1048] An interconnection

[1042] Paragraph 3 (1) NCC Guidelines on Collocation and Infrastructure Sharing.
[1043] Paragraph 18 *Ibid*.
[1044] Paragraph 8(1) *Ibid*.
[1045] Paragraph 8(1) *Ibid*.
[1046] Paragraph 8(3) *Ibid*.
[1047] Paragraph 8(4) *Ibid*.
[1048] Paragraph 8(5) *Ibid*.

providing operator is required not to reject any request for remote interconnection on any grounds.[1049]

5.5.2.2 Infrastructure Sharing

'Infrastructure sharing' is defined under the Guidelines as "the joint use of network facilities by two or more operators subject to [an] agreement specifying relevant technical and commercial conditions".[1050] Infrastructure sharing is classified into passive infrastructure sharing and active infrastructure sharing. 'Passive infrastructure sharing' includes the sharing of all civil engineering and non-electronic elements of telecommunications network infrastructure such as poles, masts, ducts, fiber optic cables, power supplies, premises and base stations. On the other hand, 'active infrastructure sharing' includes the sharing of all electronic elements of telecommunications network infrastructure such as lit fiber, access node switches, and broadband remote access servers.[1051] One major advantage of infrastructure sharing is that it reduces the cost of network deployment[1052] by minimizing the unnecessary duplication of telecommunications infrastructure by competing operators.[1053] Other advantages of infrastructure sharing include reduced environmental impact of telecommunications infrastructure, reduced investment requirements and the effective utilization of scare resources such as rights of way.

[1049]Paragraph 8(6) NCC Guidelines on Collocation and Infrastructure Sharing.
[1050] Paragraph 18 *Ibid*.
[1051] C Blackman and L Srivastava, *Telecommunications Regulation* (Washington DC: World Bank, 2011) p.128.
[1052]Deloitte LLP and the Association for Progressive Communications, *Unlocking Broadband for All: Broadband Infrastructure Sharing Policies and Strategies in Emerging Markets*, (South Africa: Association for Progressive Communications, 2015), available at <https://www.apc.org/en/system/files/APC%20-%20Unlocking%20broadband%20for%20all%20Full%20report_1.pdf> last accessed on 30 March, 2016.
[1053]G Hasbani, *et al, Telecom Infrastructure Sharing: Regulatory Enablers and Economic Benefits* (USA: Booz & Co, 2007) p.4.

Under the NCC Guidelines on Collocation and Infrastructure Sharing, the concept of 'infrastructure sharing' is defined as having a more general scope than collocation. Thus, the Guidelines classify infrastructure sharing as "the sharing of facilities that are not feasible for collocation".[1054] Telecommunications facilities that are amenable to sharing are classified as those facilities that can be shared without the risk of lessening competition in the telecommunications industry.[1055] Facilities that can be shared include rights of way, masts, poles, antenna, mast and tower structures, ducts, trenches, space in buildings and electric power supply.[1056] Facilities that are not meant to be shared under the Guidelines include complete network structures, switching centers, radio network controllers and base stations.[1057]

Generally, all negotiations for infrastructure sharing are meant to be carried out in good faith, and the owner of the facility is also required to provide information that will facilitate the agreement including information that is necessary to identify the facility to be shared and cost of sharing.[1058] An operator is obligated to respond to infrastructure sharing requests on a 'first-come, first-served" basis.[1059] However, an operator is entitled to refuse a request for infrastructure sharing where there is insufficient capacity, or where facilities are incompatible, or on grounds of safety and general engineering considerations.[1060] Where an operator refuses a request for infrastructure sharing it will have to specify the reasons for the refusal and also communicate same in writing to the

[1054]Paragraph 18 NCC Guidelines on collocation and Infrastructure Sharing.
[1055]Paragraph 4(1) *Ibid.*
[1056] Paragraph 4(2) *Ibid.*
[1057] Paragraph 5(1) *Ibid.*
[1058] Paragraph 6(2) *Ibid.*
[1059] Paragraph 7(1) *Ibid.*
[1060] Paragraph 7(2) *Ibid.*

operator that made the request.[1061] The NCC has the powers to reverse a refusal and impose infrastructure sharing arrangements on the parties. [1062] In this respect any decision of the NCC will be deemed to be final until it is not aside by a Federal High Court. [1063]

[1061] Paragraph 7(3) NCC Guidelines on collocation and Infrastructure Sharing.
[1062] Paragraph 16(1) *Ibid*.
[1063] Paragraph 16(3) *Ibid*.

CHAPTER SIX

THE LEGAL REGIME FOR DISPUTE RESOLUTION IN THE TELECOMMUNICATIONS INDUSTRY

6.1 Defining Telecommunications Disputes

The Black's Law Dictionary defines 'dispute' as "a conflict or controversy, especially one that has given rise to a particular law suit".[1064] This definition however appears to narrowly restrict the classification of a dispute to a conflict or controversy that has originated a law suit without including other dispute resolution mechanisms. However, 'dispute' has been defined in more broad terms as:

> A class or kind of conflict which manifests itself in distinct justiciable issues [and]…involves disagreement over issues capable of resolution by negotiation, mediation or third-party adjudication. The differences inherent in a dispute can usually be examined objectively, and a third party can take a view on the issues to assess the correctness of one side or the other.[1065]

Generally, an actual dispute will not exist until a claim that is asserted by one party is disputed by another party.[1066] Accordingly, a 'telecommunications dispute' refers to a justiciable conflict or disagreement that originates from a matter in the telecommunications industry. Such dispute may involve a disagreement between a service provider and a consumer, or between service providers, or between a service

[1064]B A Garner, *Black's Law Dictionary* (9th edn, St Paul, MN, USA: West Publishing Co, 2009) p.540.
[1065]H Brown and A Marriott, *ADR Principles and Practice* (London: 2nd edn, Sweet & Maxwell, 1999) p.2.
[1066] *Ibid*.

provider and the industry regulator. Telecommunications disputes can be resolved through traditional litigation or through alternative dispute resolution mechanisms such as arbitration, negotiation, mediation, or conciliation.

6.2 Forms of Telecommunications Disputes

Common forms of telecommunications disputes include: disputes related to the liberalization of telecommunications markets; investment disputes; interconnection disputes; competition related disputes; disputes between regulators and service providers; consumer disputes, and; disputes related to international trade.

6.2.1 Disputes Related to the Liberalization of Telecommunications Markets

Most times the process of liberalizing a country's telecommunications market and transitioning to a competition driven market creates disputes that involve market players such as incumbent service providers that have significant economic interests that conflict with the need for market liberalization. For example, in some cases the incumbent service provider may have been granted legal rights that hinder the implementation of market liberalization. In some cases, proponents of market liberalization may seek to terminate the exclusive monopoly rights of an incumbent service provider by initiating legal proceedings either seeking the application of general competition rules to the telecommunications sector,[1067] or by seeking the invalidation of the original grant of monopoly rights by the government. This argument has been made in some countries on the basis that the original grant of monopoly rights to a service provider violated a legal or constitutional provision that has precedence over the telecommunication legislation or

[1067]H Ungerer, *Use of EC Competition Rules in the Liberalization of the European Union's Telecommunications Sector – Assessment of Past Experience and Conclusions for Use in Other Utility Sectors* (European Commission, Brussels, 6 May, 2001, COMP/C/2/HU/rdu) pp.1-2.

license that granted such exclusive monopoly rights. For example, in the Dominica Republic case of *Cable and Wireless (Dominica) Ltd v Marpin Telecoms and Broadcasting Co. Ltd*,[1068]it was successfully argued that the grant of monopoly rights over local telecommunications services constituted a violation of the constitutionally protected right to freedom of expression, and on that basis the monopoly itself was invalid. However, disputes relating to telecommunication liberalization usually disappear after a market has fully become competitive.

6.2.2 Investment Disputes

Telecommunications disputes may arise where regulatory reforms diminish the value of private sector investments in the industry. For example, the process of liberalizing telecommunications markets may give rise to disputes between the investors in telecommunications companies and the regulatory institution or government ministry that introduced the regulatory reform where the regulatory reform diminishes the value of an investor's stake in the industry.[1069]

6.2.3 Interconnection Disputes

Interconnection disputes are usually one of the most common forms of dispute between operators that operate in a liberalized telecommunications market. Interconnection is very important in newly liberalized markets that were previously dominated by a single dominant operator. Thus, new operators in the market would want interconnection to an incumbent's network in order to provide services that are affordable and competitive to that of the incumbent operator. However, an incumbent operator

[1068] [2001] W.L.R. 1123.
[1069] R R Bruce, *et al*, *Dispute Resolution in the Telecommunications Sector: Current Practices and Future Directions* (Geneva: ITU and World Bank, 2004) p.27.

usually has a huge economic incentive to refuse interconnection or either make interconnection difficult and costly for new operators so as to retain its dominant position in the market. This state of the inequality in the bargaining power between the incumbent and the new operator is usually a major factor in interconnection disputes.

6.2.4 Competition Related Disputes

Disputes also tend to arise from competition related issues in the telecommunications industry given that dominant operators usually have an incentive to engage in practices that may substantially lessen market competition. Examples of competition related issues that may give rise to disputes include: refusal or failure to supply interconnection; discriminatory provision of interconnection; bundling of telecommunications services; acquisition of essential facilities to hinder the entrance of competing operators into the market, and; predatory or exclusionary pricing of telecommunications services.

6.2.5 Disputes between Regulators and Service Providers

Disputes between telecommunications a regulator and service provider may arise were the service provider claims that a regulator has failed to exercise its regulatory functions, or where the regulator has exceeded its regulatory mandate, or where the regulator claims that the service provider has failed to comply with its obligations under a license and regulatory instrument. Examples of such disputes include: the challenge of new or existing regulations or license terms by service providers.

6.2.6 Consumer Disputes

Generally, disputes between consumers and service providers are broadly classified as ‘consumer disputes’. Consumer disputes occur where a consumer claims that a service provider has failed to fulfill its contractual obligations under a telecommunications service contract with the consumer or where the service provider has failed to fulfill specified legal obligations to a consumer under a legislation or regulatory instrument. Issues that are usually the cause of disputes between consumers and service providers include: service charges and billing, quality of services, privacy concerns and advertisements.

6.3 Approaches to the Resolution of Telecommunications Disputes

6.3.1 Regulatory Adjudication

Regulatory adjudication refers to methods applied by a telecommunications regulatory authority to resolve industry disputes in the exercise of its regulatory mandate. The process usually involves that the regulatory institution will reach a decision on a dispute that has been submitted to it by parties after hearing the arguments of the parties. Decisions that are reached through regulatory adjudication may be subject to judicial review at the instance of a party that is aggrieved with the decision.

6.3.2 Court Adjudication

Court adjudication refers to the resolution of disputes through the judicial mechanism of the Courts. In the telecommunications context, disputes can come before the Court for determination either where a party seeks to determine a dispute that has not been originally determined through any other dispute resolution procedure, or where a

party seeks the Court undertake the judicial review of a decision that was earlier reached through regulatory adjudication or through an alternative dispute resolution procedure. Court adjudication usually has the advantage of bringing finality to a decided dispute and also results in the availability of precedents that would guide future decisions. However, Court adjudication also has several disadvantages including: high costs of litigation, procedural delays, undue reliance on technicalities, and a lack of expertise to deal with many complex disputes in the industry.

6.3.3 Alternative Dispute Resolution

The term 'Alternative Dispute Resolution' (ADR) generally describes the methods and procedures that are used to resolve disputes either as alternative to the traditional dispute resolution mechanism of the Court or in some cases as a supplement to that mechanism.[1070] Examples of ADR mechanisms include negotiation, mediation, conciliation, arbitration and hybrid processes involving a combination of any of the mechanisms.

(a) Negotiation

Negotiation is an ADR mechanism that involves direct communications between parties to a dispute with the aim of arriving at a mutually accepted agreement without the involvement of a third party.[1071]

(b) Conciliation and Mediation

Conciliation is a non-binding ADR mechanism in which a neutral third party who is known as the 'Conciliator' assists the disputing parties to settle their differences and

[1070] J O Orojo and M A Ajomo, *Law and Practice of Arbitration and Conciliation in Nigeria* (Lagos: Mbeyi & Associates, 1991) pp.4-8, & 9-11.

[1071] U J Orji, 'Technology Mediated Dispute Resolution: Challenges and Opportunities for Dispute Resolution in Nigeria', (2012) 5 *Computer and Telecommunications Law Review*, 124.

achieve reconciliation.[1072] Thus, a conciliator assists the parties to settle their differences and may if necessary deliver a non-binding opinion on the merits of the dispute; however, in some contracts, the parties may agree that a conciliator's recommendation is binding unless challenged by a party within a specified period.[1073] The terms 'conciliation' and 'mediation' are usually used interchangeably, however, there are different views on whether the terms can be used as such.[1074] However, UNCITRAL Model Law on International Commercial Conciliation[1075] uses both terms interchangeably.[1076]

(c) Arbitration

Arbitration is an ADR mechanism whereby one or more neutral third parties (known as the arbitrator or arbitrators) adjudicate a dispute and impose a binding decision on the parties to the dispute.[1077] As such, parties who rely on arbitration to resolve a dispute intend that the decision (arbitral award) that is issued at the end of the process shall be enforceable against the unsuccessful party.[1078] Thus, the party in whose favor the arbitral award has been made is entitled to apply to the Court to recognize the

[1072]U J Orji, 'Law and Practice of Conciliation in Nigeria', (2012) 56(1) *Journal of African Law*, 88. *See also* B A Garner, *Black's Law Dictionary* (9th edn, St Paul, MN, USA: West Publishing Co, 2009) p.329, where 'conciliation' is defined as "(1) a settlement of a dispute in an agreeable manner; (2) A process in which a neutral person meets with the parties to a dispute and explores how the dispute might be resolved…".

[1073] K Nwosu (ed) 'Commentary', (2004) 1 (1) *Negotiation and Dispute Resolution Journal*, 119.

[1074]G Ezejiofor, *The Law of Arbitration in Nigeria* (Lagos, Nigeria: Longman Publishers, 1997) p.7. *See also* A Redfern and M Hunter, *Law and Practice of International Commercial Arbitration* (2nd edn, London: Sweet & Maxwell, 1991) p.26.

[1075]UNCITRAL Model Law on International Commercial Conciliation, A/RES/57/18.

[1076] Article 1(3) *Ibid*.

[1077] B A Garner, *Black's Law Dictionary* (9th edn, St Paul, MN, USA: West Publishing Co, 2009) p.119.

[1078] G C Nwakoby and C E Aduaka, 'The Recognition and Enforcement of International Arbitral Awards in Nigeria: The Issue of Time Limitation', (2015) 37 *Journal of Law, Policy and Globalization*, 116.

award and declare it valid and binding on the other party to the arbitration proceedings.[1079]

Globally, the use of ADR mechanisms for the resolution of disputes has become very popular within and outside the Court system. With respect to telecommunications regulation, many regulators are increasingly turning to ADR mechanisms to help them deal with excess pressure and demands on their limited resources that are available for the resolution of industry disputes.[1080] Thus, in many instances, telecommunications regulators now require parties to a dispute to first utilize ADR mechanisms as a condition precedent before seeking the application of other dispute resolution processes such as regulatory adjudication or judicial review. The advantages of ADR include that they enable parties to reach a mutually satisfactory solution to their dispute through private processes and negotiated agreements, rather than through contentious public litigation or regulatory adjudication.

6.4 Dispute Resolution under the NCA

6.4.1 Regulatory Adjudication

The NCA establishes the powers of the NCC to undertake the regulatory adjudication of telecommunication disputes. In this respect, section 4 (1) (q) of the NCA declares that one of the functions of the NCC includes: "examining and resolving…disputes between licensed operators, subscribers or any other person involved in the communications industry, using such dispute resolution methods as the [NCC] may

[1079] G C Nwakoby, *The Law and Practice of Commercial Arbitration in Nigeria* (2nd edn, Enugu: Snap Press, 2014) pp.215 – 216.
[1080] R R Bruce, *et al*, *Dispute Resolution in the Telecommunications Sector: Current Practices and Future Directions* (Geneva: ITU and World Bank, 2004) p.vi.

determine from time to time including mediation and arbitration".[1081] Section 73 of the NCA also establishes the powers of the NCC to resolve disputes between persons who are subject to the NCA with respect to any matter under the NCA or any of its subsidiary legislation.[1082] However, two requirements must be fulfilled before the NCC can exercise its dispute resolution powers. Firstly, the parties to the dispute must have first made an unsuccessful attempt to resolve the dispute through negotiation.[1083] Secondly, the NCC must have been notified of the dispute (in writing) by a party and also requested by either or both parties to intervene in resolving the dispute.[1084] Thus, except in instances where the NCC is permitted to unilaterally intervene in telecommunications disputes on public interest grounds, the NCC cannot unilaterally intervene to resolve a telecommunications dispute except on the formal invitation of a party or parties to the dispute. This implies that parties to a telecommunications dispute can also decide not to request the intervention of the NCC in the dispute and independently pursue other dispute resolution processes including litigation or ADR. However, where the NCC's intervention would have more prospects to reduce delays in the dispute resolution process and also produce a more reasonable decision, then it would be in the interest of the parties to seek such intervention.

Where the NCC receives a formal notification requesting intervention in a dispute from one or both parties to the dispute, it will be obliged to decide the dispute "as soon as practicable".[1085] The NCA does not prescribe any specific time frames that would be used

[1081] NCA 2003, s. 4(1) (q).
[1082] S. 73 *Ibid*.
[1083] S. 74 (1) *Ibid*.
[1084] S. 75 (1) *Ibid*.
[1085] S. 75(3) *Ibid*.

to classify when the resolution of a dispute will be considered 'practicable' by the NCC. However, the NCC's Dispute Resolution Guidelines prescribes time frames under which the NCC may resolve disputes through ADR mechanisms such as arbitration and mediation. The NCC is entitled to decide a dispute where it is satisfied that:

(a) an agreement will not reached by the disputing parties within a reasonable time;

(b) the notification of the dispute is not trivial or frivolous, and;

(c) the resolution of the dispute would promote the objectives of the NCA or any of its subsidiary legislations.[1086]

The NCC is also entitled to resolve the dispute in any manner it deems fit including through the use of ADR processes subject to the objectives of the NCA and the provisions of the NCC's Dispute Resolution Guidelines.[1087]

Where the NCC has resolved a dispute, it is obligated to formally state the terms and conditions, as well as the reasons for its decision in writing and also provide the parties to the dispute with a copy of its decision.[1088] The NCC's decision is generally binding on the parties to the dispute, and the NCC may also direct a party to the dispute to abide by its decision.[1089] Such decision may also be enforced by the NCC in accordance with its enforcement powers under the NCA[1090] and the Nigerian Communications (Enforcement Process etc) Regulations.[1091] For example, the NCC may impose fines on a party that fails

[1086]NCA 2003, s. 75(4).
[1087] S. 76(1) *Ibid*.
[1088] S. 76(3) *Ibid*.
[1089] S. 78(1) *Ibid*.
[1090] S. 55 & 78(3) *Ibid.*
[1091]Regulation 4 Nigerian Communications (Enforcement Processes etc) Regulations 2005, *Official Gazette of the Federal Republic of Nigeria* (June, 2005) Vol. 92, No.37, Government Notice No.81.

to comply with its decision on a dispute.[1092] The NCC's decision can also be enforced by the Federal High Court as if it is a judgment of that Court, however, the NCC must issue a certificate of leave to a party to enforce the decision in the Court.[1093] The NCC is also required to register all its decisions including details such as the names of the parties to the dispute, the general description of the matter pertaining to the decision and the date of the decision.[1094]

6.4.2 Judicial Review of Decisions

Where a party to a dispute that has been resolved by the NCC is not satisfied with the decision of the NCC on the dispute, such party may seek a judicial review of the decision.[1095] In this respect, the NCA provides that a party who is aggrieved by any decision of the NCC may request the NCC (in writing) to provide a statement of the reasons for the decision.[1096] Upon receiving such request from the aggrieved party, the NCC is obliged to provide the aggrieved party with a copy of the statement of reasons for its decision and any other relevant information that was taken into account in reaching the decision.[1097] The NCA exempts the NCC from disclosing the reasons for its decision where such will result to the disclosure of confidential information, or prejudice the fair trial of a person, or where it would involve the unreasonable disclosure of personal data.[1098] However, the NCA does not specify a time frame within which the NCC would provide a statement of the reasons for its decision to an aggrieved party. This creates a

[1092]Paragraph 12, Second Schedule to the Nigerian Communications (Enforcement Processes etc) Regulations 2005.
[1093] NCA 2003, s. 78(2).
[1094] S. 77 *Ibid*.
[1095] S. 86-88 *Ibid*.
[1096] S. 86(1) *Ibid*.
[1097] S. 86(2) *Ibid*. *See also* s. 76 (3) *Ibid.*
[1098] S. 86 (3) *Ibid*.

vacuum that could be used in delaying the NCC's response to an aggrieved party. Thus, given the absence of a time frame, the NCC can take "as long as it likes"[1099] to provide an aggrieved party with a statement of the reasons for its decision on a dispute. This can create a problem especially where time is of the essence for a party who is not satisfied with the NCC's decision on a dispute. Accordingly, it has been aptly argued that the NCA should be amended to provide a specified time frame within which the NCC should provide a statement of the reasons for its decision to an aggrieved party, as the provision of such time frame "will remove the possibility of the NCC being perceived as stalling the review process".[1100] Thus, "since the NCC is presumed to have arrived at a reasoned decision, mere disclosure or communication of the reasons for its decision cannot in reality take forever".[1101]

However, pending the specification of a timeframe under the NCA, it is imperative for the NCC to provide an aggrieved party with a statement of reasons for its decision within a 'reasonable time'. Within the context, the construction of what constitutes a 'reasonable time' should take into account the urgency that is required by an aggrieved party to take steps towards reviewing the decision before the matter in issue becomes overtaken by subsequent events. Thus, the NCC's failure to take cognizance of the urgency of each situation in communicating the reasons for its decision may cause the aggrieved party suffer adverse effects. For example, the aggrieved party could technically lose the need to invoke judicial review if the NCC's delay has allowed new developments to overtake the issues that were conversed in the dispute. The need for the NCC to take

[1099] C B Opata, 'Regulatory Accountability in the Nigerian Telecommunications Sector', p.13, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2338106> last accessed on 30 March, 2016.
[1100] *Ibid*, p.14.
[1101] *Ibid*, p.14.

cognizance of the urgency of each situation in order to communicate the reasons for its decision within a reasonable time is further underscored by the dynamic nature of the telecommunications industry where technological innovations tend to emerge faster than the ability of regulators to keep up.

Where the NCC has finally communicated a statement of the reasons for its decision on a dispute to an aggrieved party and such party is still not satisfied with the NCC's final decision and the reasons for the decision, such party may then appeal to the Federal High Court for a judicial review of the decision.[1102] However, an aggrieved party is precluded from seeking a judicial review of the NCC's decision on dispute unless such party has first exhausted the pre-action processes under the NCA.[1103] Accordingly, the Courts have held in several cases that compliance with the above pre-action processes under the NCA is condition precedent that must be fulfilled before an aggrieved party can seek the judicial review of the NCC's decision in a Court.[1104] Also, the NCC's decision

[1102]NCA 200, s. 88(1).
[1103] S. 88(3) *Ibid*.
[1104] *ORAKUL Resources Ltd & another v NCC & Others*, Unreported, Appeal No. CA/A/96/2005. In that case, the plaintiffs brought an action at the Federal High Court seeking relief against the NCC and other defendants for the NCC's failure to comply with its legal obligations including the invitation of all stakeholders to a public inquiry as a pre-condition to the exercise of its regulatory powers on the determination of interconnection rates for telecommunications networks. However, the plaintiffs did not fulfill the provisions of sections 86-87 of the NCA which provides for the initiation the NCC's administrative review mechanism before the recourse to judicial review. The defendants filed their objections asking the Court to strike out the suit on the basis that the plaintiffs did not first exhaust the NCA's internal review mechanism before approaching the court for a judicial review of the NCC's decision. The Court upheld the objections and struck out the suit for being pre-emptive and incompetent. On appeal to the Court of Appeal, the plaintiffs/appellants argued that a literal interpretation of the world 'may' in sections 86 and 87 of the NCA meant that the procedures established therein were merely directional and optional and therefore not obligatory for a party that is dissatisfied with the NCC's decision. The Court of Appeal dismissed the appeal and also held *inter alia* that sections 86-88 were meant to be read together and that parties were not at liberty to chose which section to rely on to the exclusion of others. The Court also affirmed that the exhaustion of the remedies in sections 86-88 of the NCA was a condition precedent for courts to lawfully exercise jurisdiction. *See also ECONET Wireless Nigeria Ltd v NCC*, [2005] Unreported, Appeal No. CA/A/83/2004; *Bluechip Communications Nigeria Ltd v NCC* [2008] Unreported, Appeal, No. CA/A/108/2004; *NCC v MTN Communications Nigeria Ltd*,

which is being appealed through a judicial review will subsist and continue to be binding on the parties in dispute until it is expressly reversed in a final judgment or order of the Court.[1105]

6.4.3 Initiation of Legal Proceedings against the NCC

The NCA establishes the procedure for instituting legal proceedings against the NCC[1106] and the procedure generally applies to all types of legal proceedings brought against the NCC. Under section 142 (1) of the NCA, the officials and employees of the NCC are protected by the virtue of the provisions of the Public Officers Protection Act[1107] from legal proceedings for any act done in the execution of the NCA and also for any alleged neglect or default in the execution of the NCA.[1108] However, the protection of a public officer or government employee under the Public Officer Protection Act does not extend to criminal conduct or acts done outside scope of employment.[1109] Section 142 (2) of the NCA also provides that a law suit can only be commenced against an official of the NCC (including any Commissioner or Secretary of the NCC or any of its employees), within three months after the act or default complained of.[1110] However, in situations where the complaint concerns a continuation of damage or injury, a plaintiff/complainant

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[2005] Unreported, Appeal No.CA/A/25/2004; *CELTEL Nigeria Ltd and MTN Communications Nigeria Ltd v NCC*, [2008] Unreported, Suit No FHC/C/CS/909/2007.

[1105] NCA 2003, s. 88(2).

[1106] NCA 2003, s. 142 – 145.

[1107] The Public Officers Protection Act, Cap. P.41 LFN 2004.

[1108] NCA 2003, s. 142(1).

[1109] *Yabugbe v C.O.P* [1992] 4 NWLR (Pt 234) 152; *Ekeogu v Aliri* [1991] 3 NWLR (Pt. 179) 258. *See also*, V B Ashi, 'Limitation of Actions under the Public Officers Protection Act: Evaluation of *Jus Dicere* and the Poverty of the Declaratory Theory of Judicial Methodology', (2007 - 2010) *Nigeria Current Law Review*, 257-258, available at<http://www.nials-nigeria.org/pub/NCLR9.pdf> last accessed on 30 March, 2016.

[1110] NCA 2003, s. 142(2) (a).

will only be entitled to institute a suit against an official or employee of the NCC within six months after the cessation of the damage or injury being complained of.[1111]

In addition, a plaintiff/complainant that intends to commence a suit against an official or employee of the NCC is required to serve the NCC a notice of his/her intention to commence the suit at least one month before commencing the suit.[1112] Such pre-action notice is required to clearly state the cause of action, the particulars of claim, the name and place of abode of the intending plaintiff and the relief(s) being claimed.[1113] The NCA does not state the reason for the requirement of a pre-action notice. However, the existence of pre-action notices under Nigerian law has been judiciary justified in several cases. For example, in *Mobile Producing (Nig) Unlimited v LASEPA*[1114] the Court held that the purpose of a pre-action notice is to enable the person or agency that is to be sued to decide what to do in the matter - whether it should negotiate, compromise or contest the issue in Court.[1115] Generally, the attitude of Nigerian Courts has been that the plaintiff must ensure that every condition precedent to litigation is complied with.[1116] Hence, the failure of a plaintiff to properly serve the NCC with a pre-action notice prior to commencing a suit may result in the dismissal such suit by the Court.[1117]

[1111] NCA 2003, s. 142(2) (b).
[1112] S. 142(3) *Ibid*.
[1113] S. 142(4) *Ibid*.
[1114] *Mobile Producing (Nig) Unlimited v LASEPA* [2002] 18 NWLR (Pt 798), 1CA.
[1115] *See also Katsina Local Government v Makudawa* [1971] 1 NWLR 100, where the Supreme Court held (*per* Coker JSC) that the purpose of giving a pre-action notice of a claim to the Local Government was to ensure that it is not taken by supprise and has adequate time to deal with the claim in its defense. *See* P N Okoli, (2012) 20 (1) 'Access to Justice and Fair Hearing: An Evaluation of Pre-Action Notice in Nigerian Jurisprudence', *African Journal of International and Comparative Law*, 73.
[1116] *Aribisila v Ogunyemi* [2005] 6 NWLR (Pt 921), 212, CA; *Nnonye v Ayichie* [2005] 2 NWLR (Pt 910), 623 SC.
[1117] *Umukoro v NPA* [1997] 4 NWLR (Pt 502) 667 SC; *Amadi v NNPC* [2000] 10 NWLR (Pt 674), 76 SC. For a critical discussion on the requirement of pre-action notice under Nigerian law, *see* P N Okoli, 'Access to Justice and Fair Hearing: An Evaluation of Pre-Action Notice in Nigerian Jurisprudence', (2012) 20 (1) *African Journal of International and Comparative Law*, 70-86.

6.5 ADR Processes under the NCC Dispute Resolution Guidelines

The NCA establishes the powers of the NCC to publish guidelines that would set out principles and procedures that it may take into account in resolving disputes.[1118] In the exercise of these powers, the NCC established the Dispute Resolution Guidelines in September 2004.[1119] The guidelines establish ADR procedures for resolving disputes in the telecommunications industry. These ADR procedures include: the Short Form Procedure for Small Claims Consumer Dispute Arbitration, the Arbitration Rules, the Mediation Procedure Rules, and the Rules for the Arbitration of Interconnection Issues and Disputes. The Guidelines also establish a Code of Conduct for Arbitrators and Guidelines of Good Practice.[1120]

6.5.1 The Short Form Procedure for Small Claims Consumer Disputes Arbitration[1121]

The Short Form Procedure is an NCC ADR framework that provides for the use of arbitration for the timely resolution of consumer disputes that involve small claims.[1122] Thus, the Short Form Procedure principally provides an arbitration framework that is "simple, quick, informal and inexpensive"[1123] for the resolution of consumer disputes that involve claims not exceeding one million Naira (₦1,000,000) or consumer dispute that do not involve complicated issues of law or the examination of witnesses.[1124] However,

[1118] NCA 2003, s. 75(2).
[1119] NCC Dispute Resolution Guidelines (September, 2004) available at <http://www.ncc.gov.ng/index.php?option=com_docman&task=doc_download&gid=61&Itemid=53> last accessed on 30 March, 2016.
[1120] Code of Conduct for Arbitrators and Guidelines of Good Practice, NCC Dispute Resolution Guidelines, (September 2004), at Chapter 5.
[1121] The Short Form Procedure Applicable for Small Claims Consumer Disputes Arbitration, NCC Dispute Resolution Guidelines (September, 2004) at Chapter 1. [Hereafter Short Form Procedure].
[1122] Explanatory Notes, Short Form Procedure.
[1123] Explanatory Notes, Short Form Procedure.
[1124] Rules 1.4, Short Form Procedure.

before a consumer can rely on the Short Form Procedure for the resolution of a dispute with a service provider that consumer must have first exhausted the service provider's internal consumer dispute resolution procedures without a successful resolution of the dispute.[1125] Thus, a consumer is precluded from utilizing the Short Form Procedure until a services provider's internal consumer dispute resolution procedures have been exhausted without a resolution of the dispute. Apparently, this requirement serves to reduce the chances of bringing frivolous consumer complaints through the Short Form Procedure.

The NCC is responsible for administering the arbitration process under the Short Form Procedure and the arbitrators are selected by appointment from the NCC's panel of experienced arbitrators.[1126] The Short Form Procedure is designed to provide for a "documents only" determination, however, "any other required additional evidence" may be submitted.[1127] The parties claim and defense documents are required to contain the following: (a) all allegations of facts or matters of opinion; (b) the evidence in proof of the facts; (c) the law to be relied upon; (d) signed and dated affidavits containing statement of the evidence of any witness; (e) the relief or remedies claimed, and; (f) the detailed calculation of any sums claimed.[1128] However, the arbitration process under Short Form Procedure is not meant to comply with the provisions of the Evidence Act or any rules of law relating to the admissibility of evidence.[1129]

[1125] NCA 2003, s. 105 (2). Rule 2.1, Short Form Procedure.
[1126] Rule 1.6, Short Form Procedure.
[1127] Rule 1.5, *Ibid*.
[1128] Rule 4.2, *Ibid*.
[1129]Rule 5.1, Short Form Procedure.

6.5.2. The Arbitration Rules[1130]

The Arbitration Rules is principally designed to provide a forum for the use of an inexpensive arbitration process for the resolution of telecommunications disputes in an impartial and effective manner.[1131] The Rules does not restrict its application to any class of telecommunications disputes. This implies that the Rules would apply to all types of telecommunications disputes including consumer disputes that involve claims exceeding the sum of one million Naira (₦1,000,000.00). A party that intends to resolve a dispute through the Arbitration Rules is not explicitly required to exhaust existing dispute resolution mechanism established by the respondent. However, where the contract between the claimant and the respondent provides for the exhaustion of internal dispute resolution procedures then the claimant will have to fulfill such requirement as a condition precedent before seeking arbitration under the Rules. Also, where the claimant is a consumer that seeks to resolve a consumer dispute that involves a claim of over one million Naira (₦1,000,000.00), the claimant will be required to exhaust the service provider's internal dispute resolution procedures before relying on the Arbitration Rules.[1132]

6.5.3 The Mediation Procedure Rules[1133]

Parties by mutual agreement may agree to submit any existing or future telecommunications dispute for resolution through the NCC's Mediation Procedure

[1130] The Arbitration Rules, NCC Dispute Resolution Guidelines (September, 2004) at chapter 2. [Hereafter Arbitration Rules].
[1131] Rule 1.2, Arbitration Rules.
[1132] NCA 2003, s. 105 (2) Arbitration Rules.
[1133]Mediation Procedure Rules, NCC Dispute Resolution Guidelines (September, 2004) at Chapter 3. [Hereafter Mediation Procedure Rules].

Rules.[1134] In this respect, the parties may commence mediation by submitting a written request for mediation to the NCC.[1135] However, where there is no prior mediation agreement between the parties, a party to the dispute may seek the NCC to request the other party to participate in a mediation process to resolve the dispute.[1136] The NCC upon the receipt of such request may seek the agreement of the other party or parties to join in the mediation process; and upon the approval of the other party or parties all the disputing parties will execute the NCC's Model Mediation Agreement.[1137] The NCC is responsible for appointing a mediator that will conduct the mediation.[1138]

6.5.4 Rules for the Arbitration of Interconnection Issues and Disputes[1139]

The Interconnection Arbitration Rules are meant to govern the arbitration of unresolved interconnection issues arising under the NCA.[1140] Thus, the procedure under the Interconnection Arbitration Rules is available to any party that is participating in an interconnection negotiation. Any party to an interconnection negotiation that intends to rely on the Rules is required to file a 'Petition for Arbitration' with the NCC where the interconnection negotiation fails to reach an agreement with a period of ninety (90) days.[1141] The petition for arbitration is required to contain details including: a statement indicating the position of each of the parties concerning unresolved issues including proposed remedies, as well as the interconnection agreement that is being negotiated by

[1134]Rule 1.1 Mediation Procedure Rules.
[1135] Rule 2.1, *Ibid*.
[1136] Rule 2.2, *Ibid*.
[1137] Rule 2.2, *Ibid*.
[1138] Rule 3, *Ibid*.
[1139] Rules for the Arbitration of Interconnection Issues and Disputes, NCC Dispute Resolution Guidelines (September, 2004) at Chapter 4. [Hereafter, Interconnection Arbitration Rules].
[1140] Rule 1.1, Interconnection Arbitration Rules. *See also* Sections 96 – 103 NCA.
[1141] Rule 2.1, Interconnection Arbitration Rules.

the parties.[1142] The arbitration process is deemed to commence on the date when the petition for arbitration is filed with the NCC.[1143] After the petition for arbitration has been filed with the NCC, the other party is required to respond to the petition within 21 days.[1144] However, where the other party fails to respond to the petition, the arbitrator is entitled to determine the matter on the basis of the documents submitted by the petitioner and also in accordance with the NCA and applicable NCC regulations and guidelines.[1145] The NCC is responsible for appointing an arbitrator for the parties.[1146] In addition, the NCC may also appoint a consultant to serve as a technical adviser to the arbitrator.[1147] The NCC may also appoint an expert in arbitration and procedure to act as a consultant to the arbitrator.[1148]

[1142] Rule 2.4, *Ibid*.
[1143] Rule 2.2, *Ibid*.
[1144] Rule 3.1, *Ibid*.
[1145] Rule 3.2, *Ibid*.
[1146] Rule 5, *Ibid*.
[1147] Rule 6.1, *Ibid*.
[1148] Rule 6.2, *Ibid*

CHAPTER SEVEN

CONCLUSION AND RECOMMENDATIONS

7.1 Conclusion

Following liberalization, the Nigerian telecommunications industry has continued to grow in phenomenal proportions. Thus, Nigeria has grown from having one of the world's lowest teledensity rates in 2000 to having over 150 million telecommunications subscribers by 2016,[1149] which makes the country the largest telecommunications market in Africa and also one of the largest in the world. However, despite the phenomenal growth of the Nigerian telecommunications industry between 2001 and 2016, the industry appears not have achieved its full potential in many respects. The International Telecommunications Union still classifies Nigeria as one of the 'least connected countries' with a low ICT development index and telecommunications access being mainly characterized by the predominant usage of basic voice telephony services and low speed data services due to very low broadband Internet access.[1150] Thus, access to the Internet and ICTs still appears limited for many Nigerians. To some extent, access to ICTs and the Internet appears to be characterized by an urban-rural divide, with a concentration of ICT and Internet user populations in urban areas. More importantly, as seen from the research in this dissertation, there are still several areas of the industry where the existing legal regulation has been inadequate towards addressing the challenges of the industry.

[1149] Nigerian Communications Commission, *Subscriber Statistics* (22 March, 2016) available at<http:// www.ncc.gov.ng/index.php?option=com_content&view=article&id= 125&itemid=73> last accessed on 30 March, 2016.
[1150] ITU, *Measuring the Information Society* (Geneva: ITU, 2013) pp. 24, 42, 46, 50 and 54.

In particular, the dissertation found that the powers of the President to suspend or remove a Commissioner of the NCC from office appears to be absolute without any provisions for checks by the National Assembly or the judiciary and that this could to some extent create challenges in terms of guarantying the political independence of the NCC's Governing Board to act in the best interests of the public and the telecommunications industry. It also found that although the use of the judicial review as an accountability mechanism enhanced the independence of the NCC more than other accountability mechanisms, that there were still factors that constitute obstacles to the judicial review of the NCC's regulatory decisions.

The dissertation also found that several challenges were affecting the installation of telecommunications network infrastructure in Nigeria. Such challenges included: multiple and conflicting regulation by state actors, multiple taxation, inconsistencies in the administration of 'right of way' permits, lack of power supply, poor urban planning, vandalization and theft of telecommunications infrastructure, and poor coordination of infrastructure deployment. It also found that these challenges were hindering the timely and widespread deployment of telecommunications infrastructure and services while also increasing operational costs and consumer costs. In addition, it was found that the highlighted challenges were impacting negatively on consumers in form of poor quality of services in the industry and limited and expensive consumer access broadband. Thus, the above challenges generally increase the costs of maintaining telecommunications facilities, while also reducing the quality of service that is available to consumers, and also increasing the cost of telecommunications services. For example, the average cost of telecommunications in Nigeria is currently twice or thrice higher than the average cost in

most African States.[1151] The dissertation also found that another negative implication of the above challenges is that they limit the entrance and survival of small operators in the Nigerian telecommunications industry, thereby reducing the prospects of effective and sustainable competition in the industry.[1152]

The dissertation also found that while there is was no doubt that several regulatory strides have been made to protect telecommunications consumers, that the desired outcomes have not been achieved due to several factors such as lack of awareness and access to justice. It was also found that consumer privacy issues have not been adequately addressed in the industry, when compared with international standards and standards in foreign jurisdictions. Regarding the regulation of competition in the telecommunications industry, the dissertation found that there was a duplication of powers in terms of the powers of the NCC and the SEC to regulate competition in the telecommunications industry. The dissertation also found that while there was a sustainable level of market competition in the mobile voice segment of the industry, there was no such level of competition in the terrestrial transmission infrastructure segment due to the ineffective enforcement of the NCA's competition regime in the industry and also due to bottlenecks arising from the administration right of ways. It was found that this state of affairs impacted negatively on consumers in terms of the quality and cost of broadband services while also hindering the widespread deployment of broadband infrastructure.

[1151] Editorial, 'Nigerian Telcos Spend N10 Billion Yearly on Diesel to Power Base Stations – Airtel Boss', *Daily Independent*, February, 2014, available at <http://www.dailyindependentng.com/2014/02/nigerian-telcos-spend-n-10b-yearly-on-diesel-to-power-base-stations-airtel-boss/> last accessed on 30 March, 2016.

[1152] C Okereocha, 'Saving the Small Telecoms Players', (18 April, 2011) 15 *Broad Street Journal*, 33-35.

Generally, the effect of regulatory failure in responding to most current challenges of the Nigerian telecommunications industry are interlinked because regulatory failure in one aspect of the industry will either produce negative effects on consumers or hinder service providers from effectively delivering reliable and affordable services to consumers. This state of affairs underscores the need for a holistic approach towards addressing the highlighted challenges of the industry. Also the fact that some of the regulatory gaps that have been identified in Nigeria's telecommunications regime could create potential for the violation of the right to privacy in a democratic society further underscores the need for timely responses.

7.2 Recommendations

Having reached the above conclusions, this section will propose recommendations to address the issues that were identified in the dissertation. Most of the recommendations will be brief given that they have earlier been extensively discussed in the body of the dissertation.

7.2.1 Limiting the Powers of the President to Suspend or Remove a Commissioner of the NCC from Office

The power of the President to suspend or remove a Commissioner of the NCC appears absolute under the NCA without any provisions for checks by the National Assembly or the judiciary. This to some extent may create challenges in terms of guarantying the political independence of the NCC's Governing Board to act in the best interests of the public and the telecommunications industry. This state of affairs is also compounded by the fact that the NCA does not explicitly establish any provisions to

guarantee its political neutrality. There is need for legal reforms that will establish provisions to guarantee the political neutrality of the NCC's Governing Board by limiting the power of the President to suspend or remove a Commissioner of the NCC. This will enhance the capacity of the NCC to act in the public interest and also enhance the public acceptability of the NCC's decisions.

7.2.2 Enhancing the NCC's Regulatory Accountability

There is need for legal reforms that will establish a reasonable time frame under which the NCC's will have to provide an aggrieved party with a statement on the reasons for its regulatory decision so as to enhance the timely judicial review of such regulatory decisions. Such reform would enhance the NCC's regulatory accountability and also minimize the possibility of executive interference in the NCC's regulatory process.

7.2.3 Establishing Judicial Safeguards to balance the Protection of a Subscriber's Rights to Privacy and the Exercise of Law Enforcement Powers

The existing legal regime under the NCA and its regulations for the exercise of law enforcement powers provides a broad basis for law enforcement authorities to access a subscriber account details or communications data without judicial authorization. This can result to the arbitrary exercise of law enforcement powers in a manner that may violate a subscriber's rights to privacy. Hence, there is need for reforms that will establish judicial safeguards that will guarantee the protection of privacy rights by regulating the access of law enforcement authorities to subscriber account details or communications data. In particular, it is necessary that any exercise of law enforcement powers to access subscriber account details or communications data are derived from an Act established by

the National Assembly and also that such powers are exercisable on the basis of a judicial authorization.

7.2.4 Regulation of Unsolicited Communications

The NCC's Quality of Service Regulations does not broadly cover unsolicited communications such as unsolicited caller tunes or unsolicited automated calls. Consequently, there is need for the establishment of a comprehensive legal framework that would address issues of unsolicited communications in the industry. In particular, there is need for Nigeria to domesticate the ECOWAS Data Protection Act. Another approach is for the NCC to exercise its regulation making powers to establish regulations that will adequately address the issue of unsolicited communications including unsolicited caller tunes or unsolicited automated calls. It will also be helpful if such regulations impose deterrent penalties on service providers that transmit unsolicited communications to subscribers.

7.2.5 Regulation of Data Protection

The need to ensure the protection of the privacy rights of consumers remains a major issue in telecommunications. However, the existing data protection regime under the NCC's Consumer Code of Practice Regulations (CCPR) does appear adequate to address data protection concerns in the telecommunications industry. This is also compounded by the absence of a comprehensive data protection law in Nigeria. Consequently, there is a need for the enactment of a comprehensive data protection law that would further enhance the privacy rights of consumers in the telecommunications industry. In this respect, it is imperative for such data protection law to adopt the minimum standards that

are established under international data protection regimes such as the ECOWAS Data Protection Act, the EU Data Protection Directive and the recently adopted African Union (AU) Convention on Cyber Security and Personal Data Protection. Also, given that Nigeria is a State party to the ECOWAS Data Protection Act and the AU Convention on Cyber Security and Data Protection, the enactment of a national data protection law that adopts the standards under these two regional instruments will go a long way towards fulfilling Nigeria's positive obligations since those instruments cannot be directly applied or enforced in Nigeria unless they are domesticated by an Act of the National Assembly.

Another approach to address data protection concerns in the telecommunications industry is for the NCC to amend the CCPR in order to broaden its scope in a manner that will reflect the minimum standards that exist under international data protection regimes such as the ECOWAS Data Protection Act, the EU Data Protection Directive and the AU Convention on Cyber Security and Personal Data Protection. In addition, the National Assembly may consider amending the Nigerian Cybercrimes Act (2015) to include personal data protection provisions that will enshrine the standard principles under international data protection regimes.

7.2.6 Addressing Multiple and Conflicting Regulation of the Telecommunications Industry by State Actors

There is need for a national harmonization of regulations governing telecommunications infrastructure deployment with a view to addressing the multiple regulation of the industry. In this respect, it is imperative for all the tiers of Government to work with the NCC and NESREA as well as industry stakeholders to jointly develop a

uniform framework that will guide States and Local Governments in regulating telecommunications infrastructure deployment in a manner that also ensures compliance with urban development plans. This approach will require the harmonization of site development approvals or permits to promote uniform standards and procedures for the governance of infrastructure deployment. There is also need for the NCC and NESREA to legally challenge State and Local Government urban development regimes that conflict with the technical and environmental specifications issued by NCC and NESREA. In this respect, there is need for the Supreme Court to determine whether the regulation of urban development can validly alter the technical and environmental specifications for telecommunications infrastructure deployment which have been validly issued by NCC and NESERA.

7.2.7 Addressing Multiple and Illegal Taxation in the Telecommunications Industry

In order to address the challenge of multiple and illegal taxation in the telecommunications industry, it will be necessary for all the three tiers of government to harmonize applicable taxes in a single regime in order to ensure that they are levied uniformly. This would have the effect of increasing transparency and providing more legitimacy to taxes that operators would have to pay and also curtail the imposition and collection of illegal taxes. It will also help in checking arbitrariness in tax assessment while also eliminating the chances for corruption and harassment in tax collection process.[1153] In this respect, the step taken by the Federal Ministry of Communications Technology to establish Memorandum of Understandings with some State Governments

[1153] M Pitigala and M Hope, 'Impact of Multiple Taxation on Competitiveness in Nigeria', 16 (March, 2011) *Africa Trade Policy*, 8-9.

in order to reduce multiple taxations and standardize operational costs is commendable, and requires to be sustained.[1154]

More importantly, there is need for the Federal Government to address equitable revenue distribution amongst the States and Local Governments. Thus, aside from licensing telecommunications operators and collecting other forms of taxes from the industry, the Federal Government also appears to have exclusive jurisdiction to legislate on more lucrative taxes.[1155] On the other hand, States and Local Governments are left with relatively unviable revenue sources.[1156]Also under the current revenue allocation arrangement in Nigeria, the Federal Government is entitled to 32.7 percent of the Federation Account revenues, while the States and Local Governments are entitled to 26.7 percent and 20.6 percent respectively, thus bringing the total allocation to the States and Local Governments to 47.3 percent.[1157] This state of affairs is noted to have deprived the States and Local Governments of some of the 'lucrative tax bases' amidst the growing need to increase internally generated revenue, and thus giving rise to multiple taxation.[1158] Hence, addressing the issue with require a comprehensive review of the current tax regime and revenue sharing arrangement to promote equitable revenue distribution.

[1154] E Okonji, 'Ending Multiple Taxes in Telecoms', *ThisDay*, 18 September, 2014.
[1155] Part 1, Taxes and Levies (Approved List for Collection) Act 1998. *See also*, Items 66, 39 & 59, Exclusive Legislative List, Constitution of the Federal Republic of Nigeria, 1999.
[1156]Part II & III Taxes and Levies (Approved List for Collection) Act 1998. *See also* O Nwolise, 'How Military Ruined Nigeria's Federation', in E Onuwudiwe and R Suberu, *Nigerian Federalism in Crisis: Critical Perspectives and Political Options* (Ibadan: PEFS, 2005) pp.114-126.
[1157] E Okpanachi, 'Federation and Economic Growth: the Importance of Context in Nigerian Public Finance Reform', (2010) 41 (2) *Publius: The Journal of Federalism*, 316.
[1158]E Okpanachi, *Ibid*, 318-319.

7.2.8 Enhancing the Security of Telecommunications Infrastructure

There is need for the government to ensure the special protection of telecommunications facilities in order to reduce vandalization and other malicious acts against telecommunications infrastructure. In particular, there is need for the government to enact a law that will explicitly classify telecommunications infrastructure as 'critical infrastructure' that are vital to the economy and national security of Nigeria and also provide for their protection.

7.2.9 Harmonizing the Administration of 'Right of Way' Issues through the 'Dig Once' Approach

There is need for the harmonization of the administration of 'right of way' permits at all tiers of government in Nigeria in order to reduce the cost of broadband infrastructure development. This would require the enactment of a harmonized law that will govern the administration of right of way permits in Nigeria. There is also need to establish a legal framework that will promote the '*dig once*' approach in order to effectively reduce challenges arising from right of way issues. This approach would also entail the construction of a specially designed underground conduit along public roads which would allow operators to simply pass their fiber cables through the conduit without going through the process of excavating the ground, and thus reducing the need to obtain a right of way permit.

7.2.10 Regulation of Lotteries in the Telecommunications Industry

There is no explicit framework for the regulation of lotteries under Nigeria's telecommunications regime. However, although the National Lottery Act (2005)

establishes a general framework for the regulation of lotteries in Nigeria and also applies to the Nigerian telecommunications industry, there still a need to establish explicit regulatory guidelines that would address consumer protection during lottery activities in the telecommunications industry. This is because existing frameworks such as the NCC Guidelines on Advertisements and Promotions and the Consumer Code of Practice Regulations do not make any provisions for lotteries, and neither does the National Lottery Act or the Consumer Protection Council Act create explicit provisions for consumer protection during lotteries in the telecommunications industry.

7.2.11 Enhancing Consumer Redress Mechanisms

There is need to build capacities for consumer redress in the telecommunications industry. In particular there is need to enhance the capacity of the Consumer Protection Council (CPC) to address consumer disputes in the telecommunications industry. This will require the CPC to develop operational presence across all States and also in rural areas in order to enhance easy consumer access to the remedies under the CPC Act. There is also need to promote public awareness about related consumer rights in the telecommunications industry by establishing regulatory mechanisms to improve consumer education. This will also require more effective and widely disseminated consumer enlightenment programmes. In particular, it will helpful for the NCC to establish obligations on service providers to provide regular consumer education programmes to the subscribers on their networks. There is also need for the imposition of punitive sanctions that will serve as deterrent to the arbitrary infringement of consumer rights. Also, given the fact that consumer disputes in the telecommunications usually involve small claims, it is imperative for the CPC and the Government to encourage civil

right organizations to promote consumer rights through the institution of class action suits that seek to address common consumer complaints such as poor quality of service.

7.2.12 Harmonizing the Control of Mergers and Acquisitions

The powers of the SEC to regulate mergers and acquisitions in Nigeria overlap with the powers of the NCC to regulate competition in merger and acquisition arrangements in the telecommunications industry. There is currently no legal provision either under the NCA or the ISA that addresses these conflicting regulatory mandates. Although, the regulatory mandates of the NCC and the ISA have not had the opportunity of clashing in practice, it nevertheless imperative for both regulators to streamline their mandates to reduce the potential for a future regulatory conflict. In this respect, it will be helpful for both regulators to jointly establish a Memorandum of Understanding that will address the extent of each regulator's powers to regulate competition in merger and acquisition transactions in the telecommunications industry. Apparently, the NCC's special technical and regulatory knowledge of the telecommunications industry when contrasted with the SEC's general knowledge of the industry indicates that NCC would be in the best position to regulate competition issues in merger and acquisition transactions in the industry.

7.2.13 Effective Enforcement of Competition Regulations

While a significant level of competition has been achieved in terms of voice telephony, the NCC's (2013) finding of dominance in the terrestrial transmission infrastructure segment of the telecommunications industry indicates that there are still obstacles to effective competition in the industry. Consequently, there is need to ensure a

timely removal of bottlenecks that hinder the deployment of such infrastructure such as rights of way permits in order to enhance competition in the terrestrial transmission infrastructure segment of the Nigerian telecommunications market. More importantly, there is need to ensure the effective enforcement of competition regulation to address prices for access to terrestrial transmission infrastructure in order to enhance competition and effective last mile distribution to end-users especially for Internet and broadband services.

7.2.14 Enforcing Telecommunications Infrastructure Sharing Regulations

Despite the existence of an elaborate regime for the governance of telecommunications interconnection and network access in Nigeria, operators still face several challenges especially relating to infrastructure sharing. This has increased the cost of rolling out telecommunications services, while also increasing the duplication of telecommunications infrastructure. Hence, there is need to ensure the effective enforcement of collocation and infrastructure sharing regulations in order to minimize the duplication of telecommunications facilities and also reduce their environmental impact.

7.2.15 Enhancing the Judicial Review of Disputes Adjudicated through the NCC's Administrative Process

The NCA does not specify a time frame within which the NCC would provide a statement of the reasons for its decision on a dispute to an aggrieved party. This creates a vacuum that could be used in delaying the NCC's response to an aggrieved party and thus, stalling the judicial review of disputes resolved by the NCC. Hence, there is need for the NCA to be amended to provide a specified time frame within which the NCC

should provide a statement of the reasons for its decision on a dispute to an aggrieved party. The provision of such time frame will remove the possibility of the NCC being perceived as stalling the judicial review process.

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