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## **AN ANALYSIS OF THE COMPETITION REGIME IN THE NIGERIAN TELECOMMUNICATIONS INDUSTRY**

Competition is an essential element in the efficient working of markets. Its importance in an emerging economy such as Nigeria is central to the operation of the markets, fosters innovation, productivity and growth. In particular, competition brings important benefits to consumers by encouraging wider choice, thus enabling consumers purchase goods and services at prices which truly reflect the interplay of demand and supply. Accordingly, a government's competition policy should seek, amongst other objectives, to encourage and improve the competitive process and ensure consumers derive the resultant benefits.

### **Legal and Regulatory Regime for Competition in Nigeria**

Historically, one of the earliest recorded attempts at general regulation of competition can be traced to the common law doctrine of restraint of trade, which remains relevant in Nigerian legal jurisprudence. In general terms, this doctrine renders provisions which impose restrictions on a person's freedom to engage in trade or employment illegal, and therefore unenforceable at common law, *unless* they are demonstrated to be reasonable, both in the interests of the parties and in the interest of the public. This doctrine thus provided the foundation for an attempt by courts to reconcile the well-established principle of freedom to contract with freedom to trade, with the resultant effect of encouraging competition.

Whilst most other common law jurisdictions, where the doctrine of restraint of trade applies, have proceeded to enact specific laws dealing with competition (e.g. the 1998 Competition Act of the United Kingdom), there is yet to be a specific competition or anti-trust law in force in Nigeria. This is despite the several competition bills that have been forwarded to the National Assembly for consideration, till date. Accordingly, what operates in Nigeria is a sector-based approach to competition whereby the laws regulating certain industries or subject matter contain provisions regulating competition as far as it relates to the subject matter of such laws. Specifically, the Investments and Securities Act 2007, the Nigerian Communications Act 2003 ("**NCA**"), the Electric Power Sector Reform Act 2005, among other laws, contain provisions dealing with competition as it relates to matters within the purview of such laws.

### **Competition Regulation in the Nigerian Telecommunications Industry**

Competition in the Nigerian telecommunications industry is governed essentially by the NCA and the Competition Practices Regulations ("**Competition Regulations**") issued by the Nigerian Communications Commission ("**NCC**") in 2007.

By section 4(d) of the NCA, the NCC has responsibility for promoting fair competition in the communications industry and protecting 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. Similarly, by section 90 of the NCA, the NCC has the 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 industry. Specifically with respect to ensuring that competition continues to exist in the industry, section 91(1) of the NCA prohibits a licensee from engaging in any conduct which has the purpose or effect of substantially

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lessening competition in any aspect of the Nigerian communications market. Section 91(3) of the NCA, on its part, prohibits licensees from entering into agreements or arrangements which provide for rate fixing, market sharing, or any boycotting of a competitor, supplier or licensee, whilst section 91(4) of the NCA prohibits licensees from requiring any person that acquires communications products or services, to acquire any other product or service, either from the licensee or another person, or directing them not to acquire any other product or service either from the licensee or another person. Lastly, section 92(1) allows the NCC to determine whether a licensee is in a dominant position in any aspect of the Nigerian communications market.

Sections 91(2) and 92(2) of the NCA separately empower the NCC to publish guidelines and regulations which clarify the meaning of “substantial lessening of competition” in the Nigerian communications market and how it shall apply the test of “dominant position” to licensees, respectively. In furtherance of the referenced sections 91(2) and 92(2) of the NCA, the NCC issued the Competition Regulations which, amongst others, outline the standards and procedures which the NCC will apply in determining whether a particular conduct constitutes substantial lessening of competition for the purposes of the NCA, as well as whether a licensee has a dominant position in one or more communications markets.

### **Highlights of the Competition Regulations**

Part II of the Competition Regulations specifies the standards and procedures which the NCC should apply in determining whether, particular conducts constitute substantial lessening of competition. Specifically, Regulation 6 of the Competition Regulations identifies market circumstances and other matters that might be considered by the NCC to include the: (a) definition of the relevant market or markets; (b) impact of the conduct on existing competitors in the identified markets ; (c) impact of the conduct on further market entry; (d) impact of the conduct on consumers, including the availability and pricing of products and services; and (e) degree of interference with competition that results in identifiable injury to competitors or consumers.

Notwithstanding the provision of Regulation 6, it is instructive to note that Regulation 8 of the Competition Regulations contains deeming provisions on certain actions by licensees. Specifically, certain conducts including failing to supply interconnection or other essential facilities to a competing licensee, discriminating in the provision of interconnection or other communications services or facilities to competing licensees, offering a competing licensee more favourable terms or conditions that are not justified by cost differences, if it acquires another service that it does not require, among others; are deemed to result in substantial lessening of competition unless the applicable licensee demonstrates otherwise.

With respect to licensees holding dominant positions in the industry, Part IV of the Competition Regulations specifies the standards and procedures which the NCC will apply in determining whether a licensee has a dominant position in one or more communication markets such that it has the ability to unilaterally restrict output, raise prices, reduce quality or otherwise, act independently of competitors or consumers. As with Regulation 8 dealing with substantial lessening of competition, Regulation 20 of the Competition Regulations provides that any licensee whose gross revenues in a specific communications market exceed forty per cent (40%) of the total gross revenues of all licensees in that market, shall be deemed to be in a dominant position in that market. Regulation 21 also provides that



the NCC may determine that two or more licensees, acting jointly or collectively, are in a dominant position, notwithstanding that the licensees have no common ownership, are not parties to any formal agreement or operate in different markets.

### **Exceptions in relation to matters of National Interest**

Section 93(1) of the NCA provides that a licensee may apply to the NCC to authorise any conduct which may be construed to have the purpose or effect of substantially lessening competition in any aspect of the Nigerian communications industry; which authorisation must be obtained before engaging in the conduct. Upon such application, the NCC is conferred with discretion under section 93(2) of the NCA, to authorise the conduct if the NCC is satisfied that the authorisation is in the **national interest**. Accordingly, a licensee who would otherwise be in breach of the Competition Regulations and the NCA, may apply to the NCC for a prior approval of such anti-competition activities where it can justify same on grounds of national interest and convince the NCC accordingly.

### **Practical Application of the Competition Regulations**

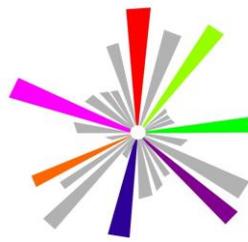
An opportunity to test the provisions of the Competition Regulations presented itself in 2012 when the NCC carried out an assessment of the level of competition in the communications industry. At the end of the said assessment, the NCC issued the Determination of Dominance in Selected Communications Market (“**DDSM**”) in Nigeria on April 23, 2013.

In terms of the DDSM, the NCC determined that the mobile voice market in Nigeria was not effectively competitive. MTN Nigeria was identified as the “Dominant Operator” as it had about 44% market share of subscribers. The NCC further determined that MTN Nigeria had a wide differential (of about 300%) between on-net and off-net calls with the effect of a likely establishment of a calling club for its subscribers. Having regard to the provisions of Regulation 20 of the Competition Regulations, it is difficult to argue with the conclusions of the NCC in relation to the DDSM.

By section 92(4) of the NCA and Regulations 25 and 34 of the Competition Regulations, where the NCC has determined that a licensee is in a dominant position in the industry, the NCC may, among other options, direct such a licensee to cease a conduct in that market which has or may have the effect of substantially lessening competition in any communications market “immediately or at a time specified in the directive”. Accordingly, the NCC resolved, under the DDSM, that the differential between MTN Nigeria’s on-net and off-net retail tariffs be immediately collapsed to bring MTN Nigeria’s tariff for on-net calls at par with its tariff for off-net calls. The NCC further resolved that the DDSM was to take effect from May 1, 2013 and remain valid and binding on MTN Nigeria until reviewed by the NCC.

These directions are contained in Paragraph 6.1 (*Determination*) of the DDSM which provides as follows:

*As a result of the determination outlined above, the Commission has resolved that the Dominant Operator in the Mobile Voice market shall be required to adhere to the following obligations:*



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- (a) *Accounting Separation: The Commission will immediately enforce and implement Accounting Separation on the dominant operator;*
- (b) *Collapse of On-net and Off-net Retail Tariffs: The differential between the on-net and off net retail tariffs will be immediately collapsed. The tariff for on-net and off net will be the same, and subject to periodic review; and*
- (c) *Submission of Required Details: The Commission may require the dominant operator to submit details on specific aspects of its operations from time to time as the need arises.*

*The determination shall take effect from May 1, 2013 and remain valid and binding on Licensees for the services specified in relevant markets segments of this Section, until further reviewed by the Commission.*

### **Conclusion**

Whilst we are not aware of any subsequent market assessment conducted by the NCC in relation to competition in the Nigerian telecommunication industry, the foregoing analysis showcases a practical example of the application of competition guidelines in an emerging economy such as ours. It is hoped that similar approach will be applied in other sectors of the economy, till Nigeria is able to develop a well-defined and generally applicable competition regime akin to what operates, in some developed countries.