

## THE EFFECT OF THE COMPETITION REGULATIONS IN NIGERIA ON THE NIGERIAN TELECOMMUNICATIONS SECTOR



### INTRODUCTION

The telecommunications sector is one of the fastest growing industries in sub-Saharan Africa, with Nigeria possessing one of the largest telecom markets on the continent. In Nigeria, the telecommunications sector is the largest segment of the Information and Communication sector, and has evolved over the years to an oligopolistic market structure (a small number of firms have the majority of market share). The sector includes a strong multinational presence with the leading players being MTN (a South African based multinational company with a large market share), Airtel (an Indian based multinational company), Globacom (a Nigerian multinational company) and 9mobile (formerly Etisalat). The telecommunications sector has contributed immensely to Nigeria's economy and the lives of Nigerians over the years. This has come about as a result of the advancement of mobile phone usage from basic phone telephony to new enhanced services and the introduction of new technology within diverse sectors of the

country which in turn has seen the sector grow massively.

### EVOLUTION OF COMPETITION IN THE NIGERIAN TELECOMMUNICATIONS INDUSTRY

In the past, the telecommunications industry was monopolistic as the Nigerian Telecommunications Limited (NITEL) was the only telecommunications provider in Nigeria under the sole administration of the Federal Government. As a result of this, the development of the telecommunications industry was stalled as services were not effective due to lack of competition. The lack of competition precipitated the need for the Government to improve the industry by privatising the sector in a bid to introduce competition and efficiency. From 2001, the telecommunications industry paved way for more operators like MTN, Globacom and ECONET into the market and since then more telecommunications service providers



emerged leading to the growth of the industry.

The success recorded so far in the Nigerian telecommunication sector can be assertively attributed to the regulatory prowess of the telecommunication industry watchdog—Nigerian Communications Commission, (NCC); which was established by Nigerian Communications Commission Act 2003. Section 4 (1)(d) of the Act provides that the NCC has the responsibility to promote fair competition in the communications industry and 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.

The NCC; as a means of preventing monopoly in the market, ensures that a licensee does not in any manner engage in a conduct that has the purpose or effect of substantially reducing competition in any aspect of the industry. The NCC has carried out the role of regulating competition practice in the industry through the aid of the Competition Practices Regulations (“Competition Regulations”) issued in 2007. Through Regulations, the NCC has been able to reduce monopoly in the telecommunications industry to an extent and also encouraged healthy competition in the industry for the protection of service providers and subscribers interests.

#### LEGAL FRAMEWORK OF TELECOMMUNICATIONS COMPETITION REGULATION IN NIGERIA

The 1999 Constitution (As Amended) of the Federal Republic of Nigeria which is the grundnorm encourages

competition to boost the Nigerian socio-economic environment, viz a viz the economy of the Nation. Thus the combined effect of the provisions of Section 16 (1)(d) and 16 (2)(c) of the Constitution is that it discourages monopoly in any industry which may lead to unequal distribution of wealth in the country.

As earlier mentioned, the NCC is the apex authority responsible for the regulation of the telecommunications industry in Nigeria as established under Section 3(1) of the Nigerian Communications Act 2003. By the provision of Sections 70 of the same Act, the NCC is conferred with the power to make Regulations for the affairs of the Telecommunications industry. In exercising of the power, the Commission enacted the “Competition Practices Regulations 2007” (the Regulation). The Regulation is intended to provide a regulatory framework for the promotion of fair competition in the communications sector, and provide for protection against the misuse of market power or other anti-competitive practices amongst other related matters. 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 reducing competition in any aspect of the Nigerian communications market.



In furtherance of improving competition in the Nigerian industries, the National Assembly is in the process of passing the "Federal Competition and Consumer Protection Bill 2017 into law. The aim of the Bill is to eliminate monopolies at all levels of the Nigerian market, prohibit abuse of dominant market position and penalise restrictive trade and business practices. The Bill further establishes the Federal Competition and Consumer Protection Commission and the Competition and Consumer Protection Tribunal. The Bill, when it receives the assent of the President and is passed into law, will further liberalise and improve competition in the telecommunications industry.

### THE EFFECTIVENESS AND LAPSES OF THE COMPETITION REGULATION USING MTN AS A CASE STUDY

In 2015, MTN placed a bid to takeover one of her competitors; Visafone, to acquire all its equity. This approach necessitated a court action by Emerging Markets Telecommunication Services Limited (E.M.T.S); formerly known as Etisalat at the Federal High Court, challenging the bid on the ground that if the bid was successful, MTN would have an unjust advantage over other Global System for Mobile Communications (GSM) operators of the telecommunications industry. E.M.T.S also stated that the takeover bid amounted to a breach of the provisions of Section 8 of the Competition Practices Regulation 2007, being an act towards reducing competition. Consequently, the suit was struck out as the Court stated that it lacked the jurisdiction to entertain the matter based on the fact that E.M.T.S had not exhausted internal measures before

approaching the court with anticompetitive claims. The Competition Practices Regulation 2007 under its Schedule provides for the procedure which an aggrieved party and the Commission must adhere to before proceeding to Court. The essence of this provision is to ensure that all internal mechanisms are sought by an aggrieved party before proceeding to court.

In January 2016, the acquisition of Visafone by MTN was approved by the NCC. The acquisition posed a means for MTN to utilise Visafone's 800MHz spectrum in its race to stay ahead of its competitors e.g. Globacom and also to launch the fourth generation long term evolution services (4G LTE). Following the acquisition by MTN, the company began to migrate CDMA (Code Division Multiple Access) to GSM forcing Visafone users to migrate at their own expense. The migration, which was without warning, resulted in frustration to consumers who had spent a fortune in the purchase of Visafone lines with CDMA network, only to be disappointed that their purchase was in futility as Visafone had become obsolete based on the fact that their Visafone phones could not work on the MTN network and MTN sim cards were unable to work on the Visafone network. This eventually led to the phasing out of Visafone modems. The result of this take over is that MTN, which is one of the biggest mobile operators on the continent, has phased out another competing network operator, and replaced its products with MTN owned products.

In our opinion, the NCC aided in the violation of its Competition Regulation by granting the approval for the acquisition of Visafone by MTN which ought to have constituted a breach of the regulation, especially in light of



the fact that as at when the acquisition occurred, MTN was already the market dominator, with a market share of about 62%. Competition is a very important concept that creates efficient markets and affords consumers with choice, therefore, the act of enabling a mobile operator in furthering its market dominance is counterproductive to efforts to encourage competition amongst market operators.

## THE WAY FORWARD

The telecommunications industry in the European Union (EU) is a liberalised one and it utilises a system of deregulation whereby the industry is self-regulated and reduces the Government's interference. The EU has been able to increase and improve competition in the telecommunications sector by giving access to new operators into the telecommunications industry. The influence of the EU has made the present telecommunications providers improve their standards of service and reduce their prices, and in conjunction applied the competition rules to maintain a competitive market between the telecommunications operators. The EU has enacted the following to aid competition law and also ensure that no single organisation has Significant Market Power; Rules Applicable to Antitrust Enforcement 2013; to prohibit anti-competitive agreements or abuse of dominant position, State aid; prohibiting certain types of State aid that distort competition, Merger; prohibiting mergers that would significantly impede competition on a market to a name a few.

The UK telecommunications industry can also be referred to as one with a free competitive environment. The UK has been able to achieve this by regulating its telecommunications industry through the Office of Communications (OFCOM). The OFCOM regulates the industry by ensuring that there is no dominant operator that would hinder effective competition. Also, to ensure a free competitive market, OFCOM carries out market reviews of the various economic markets on a regular basis. In addition, the United States of America has also been said to possess a competitive telecommunications industry. The success of the telecommunications industry of the United States of America was achieved by creating policies and regulatory framework to promote competition; the United States Telecommunications Act of 1996 was enacted to precisely foster competition in the telecommunications industry and grow the strong economy of the country.

In conclusion, there is a need for adequate regulatory framework in the telecommunications industry. The Competition and Consumer Protection Bill would be a step forward towards achieving a better and stronger competitive telecommunications market that will boost Nigeria's economy and completely eliminate monopoly in the telecommunications industry. The proposed establishment of the Federal Competition and Consumer Protection Commission and the Competition and Consumer Protection Tribunal would also assist the NCC in protecting the industry against unfair competition.

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