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“NIGERIA'S INTERNET PENETRATION AS AT DECEMBER 2018 STOOD AT 111.6 MILLION WITH 31.48% BROADBAND PENETRATION RATE. GIVEN NIGERIA'S AFFORDABILITY DRIVERS INDEX OF 58.17% IN 2018, IT IS A POINTER TO THE COUNTRY'S POSITIVE OUTLOOK IN INVESTMENT IN THE SECTOR.”

The race to increase Nigeria's internet penetration got a firm boost in July 2018 with a leading Technology Company (TechCo)'s introduction of free broadband internet access at selected spots through its Stations - to be sited at the Murtala Mohammed International Airport, major restaurants, etc. in Lagos.¹ It also planned to extend this initiative to four cities across Nigeria by 2019. According to the Nigerian Communications Commission (NCC), Nigeria's internet penetration as at December 2018 stood at 111.6 million with 31.48% broadband penetration rate.² Given Nigeria's Affordability Drivers Index (ADI) of 58.17% in 2018 (ranked 18/61),³ it is a pointer to the country's positive outlook in investment in the sector.

Facebook had introduced zero rating plans in form of 'free basics' for smart phone users in India to enable easy access of its website and other selected websites at subsidized or no data cost. However, with the passing of the regulation by the Telecom Regulatory Authority of India (TRAI) which prohibits discriminatory tariffs on internet connections sold to end-users, such 'subsidy' was declared illegal and thus endangered network or net neutrality. Nonetheless, Facebook introduced similar product in collaboration with Internet Service Providers (ISPs) including express Wi-Fi in Nigeria. However, it is pertinent to

consider the flip side – competition and antitrust issues and the role of NCC in balancing the need to deepen Nigeria's internet penetration and protecting consumers as well as smaller ISPs against restraint in trade.

Thus, this piece seeks to take a cursory look at the legal implication of granting free or subsidized internet access in a bid to increase Nigeria's internet penetration whilst considering the regulator's obligation to prevent unfair trade practices amongst licenced ISPs in Nigeria.

UNDERSTANDING COMPETITION AND ANTITRUST ISSUES IN NIGERIA'S TELECOMS SECTOR

According to Black's Law Dictionary⁴ competition is defined as “the struggle for commercial advantage; the effect or action of two or more commercial interests to obtain the same business

¹ Yomi Kazeem, 'Google is Boosting Internet Access in Nigeria's Biggest Cities with Free Public Wifi' Quartz Africa, July 26, 2018,

<<https://qz.com/africa/1336361/google-is-boosting-internet-access-and-its-bottom-line-with-free-public-wifi-in-nigeria/>> accessed 30 January 2019

² Nigerian Communications Commission, *Industry Statistics, Internet Subscriber Data (GSM) (Oct 2017 - Dec 2018) and Broadband Subscription/Penetration Data (Oct 2017 - Dec 2018)* <<https://www.ncc.gov.ng/stakeholder/statistics-reports/industry-overview#view-graphs-tables-6>> accessed 8 January 2019

³ Alliance for Affordable Internet, 'A4AI 2018 Affordability Report', <[https://a4ai.org/affordability-report/report/2018/#figure_1_affordability_of_1gb_mobile_prepaid_broadband_plan_by_region_\(2015-2017\)](https://a4ai.org/affordability-report/report/2018/#figure_1_affordability_of_1gb_mobile_prepaid_broadband_plan_by_region_(2015-2017))> accessed 8 January 2019

⁴ (9th ed.), 2009, pp 322 and 111

from third parties” whilst defining antitrust law as “the body of law designed to protect trade and commerce from restraints, monopolies, price-fixing and price discrimination.”

The origin of these two legal concepts could be traced to enactment of the *Lex Julia de Annona* by Julius Caesar around 50 BC to protect the corn trade.⁵ However, it became more pronounced with the American **Sherman Act** in 1890 (makes it illegal for competitors to make arrangements with each other that would limit competition), **Clayton Act** in 1914 (prevents mergers or acquisitions that are likely to stifle competition) and **Federal Trade Commission Act** in 1914 (US federal agency which monitors unfair business practices). Ultimately, these laws were made to prevent companies from taking advantage of the market through unfair trade practices and stiffen competition.

In the United States, cases on competition/antitrust are rife across many sectors. First with the **Standard Oil Co. of New Jersey v. United States**⁶ case, the Supreme Court of the United States found Standard Oil guilty of monopolizing the petroleum industry and in breach of the **Sherman Act**.

Consequently, Standard Oil was broken into 34 companies. In the telecoms sector, **United States v. AT&T & Ors**⁷ the Federal Trade Commission (FTC) accusing AT&T of using monopoly profits from its Western Electric subsidiary to subsidize the costs of its network contrary to US antitrust laws. The breach resulted in the break-up of AT&T into seven regional bell operating companies to serve different regions of the USA.

In Nigeria, unlike the United States or European Union there is no generally applicable and detailed competition law⁸ however, vestiges of anti-competition regulation could be gleaned from sectoral laws and policies. In the telecoms sector, the **Nigerian Communications Act (NCA)** pursuant to **section 4(1)(b) and (d)** posits that: “the Commission shall have the

following functions – (b) the protection and promotion of the interests of consumers against unfair practices including but not limited to matters relating to tariffs and charges for and the availability and quality of communications services, equipment and facilities; (d) the promotion of 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.”

This was further reiterated by **section 91(1) NCA** which prohibits a licensee from engaging in any conduct which has the purpose or effect of substantially lessening competition. Subsequently, in 2007, the Commission passed the



5 Lee McGowan, 'The Antitrust Revolution in Europe: Exploring the European Commission's Cartel Policy', (Edward Elgar, 2010), p. 26; see also, Howard Ullman, 'Ancient Rome Had Competition Law', My Distribution List, March 2, 2012, <<http://www.mydistributionlaw.com/2012/03/ancient-rome-had-competition-law/>> accessed 2 January 2019

6 221 U.S. 1 (1911)

7 461 F. Supp. 1314 (1978)

8 The **Federal Competition and Consumer Protection Bill, 2017** which seeks to improve the regulatory framework for competition in Nigeria was passed by the National Assembly in December, 2017. However, it is yet to get Presidential assent as required under **section 58 Constitution of the Federal Republic of Nigeria 1999 (as amended)** hence, spent. However, it can only be passed when reconsidered by the National Assembly whilst overriding the President's assent. See Frank Okeke, 'Regulating Market Dominance in Nigeria: Issues Arising from the Federal Competition and Consumer Protection Bill 2017', LeLaw Thought Leadership 18 December, 2018, <<http://lelawlegal.com/blog-details.php?title=regulating-market-dominance-in-nigeria-issues-arising-from-the-federal-competition-and-consumer-protection-bill-2017>> accessed 2 January 2019

9 Cap. N97 LFN 2004

Competition Practices Regulation (CPR) which sought to create an anti-competition regime whilst promoting consumer's interest.

A major case which has brought competition issues in Nigeria's telecoms sector to the fore is the transfer of Visafone's 800MHz Spectrum to MTN - currently before the NCC for approval.¹⁰ Whilst industry players believe that such approval,

operational cost which is against the intendment of the **NCA**.¹¹

Nonetheless, according to **Regulation 6(b)–(e) CPR**, the considerations used in determining whether an action constitute substantial lessening of competition include: “... *impact of the conduct on existing competitors in the identified markets; impact of the conduct on further market entry; impact of the conduct on consumers,*

Price is an important determinant in ascertaining whether an anti-competition activity exist in the market. This has often been spotted where price cutting (predatory pricing) is introduced by a major player to gain large market share to the detriment of other players and eliminate competition.

The **CPR** in recognizing this important component of competition stated in **Regulation 8(f) CPR** that “... *supplying communications services, at prices below long run average incremental costs or such other cost standard, as is adopted by the Commission.*” thus listing same as one of the conducts deemed to lessen competition. Consequently, can it be argued that by offering internet services at no cost to the TechCos, same is in breach of the antitrust/competition regulation considering the fact that it in the long run deprives ISPs of their



would substantially lessen competition in the Market (against the spirit of NCC's CPR), MTN pro-approval arguments is premised on the need to ensure that Nigerian consumers have access to affordable broadband services irrespective of their location. This is particularly important for the rural areas which have witnessed shutdown by other operators as a result of high

including the availability and pricing of products and services; and degree of interference with competition that results in identifiable injury to competitors or consumers.” It is therefore imperative to ask the question, *by offering free or subsidized internet service, would such not lessen competition by making the market unattractive to new or potential entrants in the ISP space?*

¹⁰ Following the latter's acquisition of the former which had been approved by the NCC. See NCC's *The Communicator*, 'MTN Acquires Visafone: NCC Okays Deal', Issue 16 Quarter 1, 2016, <https://www.ncc.gov.ng/thecommunicator/index.php?option=com_content&view=article&id=1123:mtn-acquires-visafone-ncc-okays-deal&catid=32&Itemid=179> accessed 30 January 2019; See also *The Communicator*, 'MTN Acquires Visafone: Pays N47.4bn', Issue 17 Quarter 2 2016, <https://ncc.gov.ng/thecommunicator/index.php?option=com_content&view=article&id=1284:finally-mtn-acquires-visafone-pays-n475bn&option=com_content&view=article&id=1284:finally-mtn-acquires-visafone-pays-n475bn> accessed 30 January 2019. In a bid to ensure that monopoly is not created through mergers, acquisitions and takeovers in the Telecoms Sector, the NCC pursuant to **Reg. 26 NCR** provides “further to the powers and functions of the Commission, regarding determinations of substantial lessening of competition and dominant position, and consistent with conditions of licences granted to public network operators, requiring prior notification and Commission approval before any change of shareholding affecting more than 100% of the total number of shares in a Licensee, the Commission may review all mergers, acquisitions and takeovers in the communications sector.” Consequently, all transactions that “... involve the acquisition of more than 10% of the shares of a Licensee; or any other transaction that results in a change, in control of the Licensee; any transaction that results in the direct or indirect transfer or acquisition of any individual licence, previously granted by the Commission pursuant to the Act” are subject to the approval procedure of the NCC, pursuant to **Reg. 27 NCR**.

¹¹ See, 'Report of the Public Inquiry on the Transfer of Licence and Resources, Including 800Mhz Spectrum from Visafone Communications Limited to MTN Nigeria Communications Limited', 28 June 2018, <<https://www.ncc.gov.ng/documents/806-public-inquiry-on-the-transfer-of-licence-and-resources-including-800mhz-spectrum-from-visafone-communications-limited-to-mtn-nigeria-communications-limited/file>> accessed 21 January 2019



“ ONE OF THE MAJOR PRINCIPLES IN INTERNET GOVERNANCE IS NETWORK OR NET NEUTRALITY ”

potential market share?

TechCos offering free or subsidized services may lay claim to helping to build Nigeria's internet architecture by increasing internet and broadband penetration across semi-urban and rural areas. However, they derive indirect benefit by commoditizing users' data which is then sold to advertisers with target marketing.

NET NEUTRALITY AND ITS APPLICATION IN NIGERIA'S TELECOMS SECTOR

One of the major principles in internet governance is Network or Net Neutrality. Simply put, the principle of Net Neutrality which evolved over time with the technical development of the internet, posits that *a public information network should treat all content, sites and platforms equally*.¹² The ISPs, through their communication networks have the ability to selectively discriminate against certain web domains by

granting tariff rebates to enable access to a competitive domain.¹³

For instance, where an ISP offers a 'free' access to website A which offers competitive products with website B, this would result in a surge in traffic to website A thus giving it an undue advantage over website B. This is against the principle of Net Neutrality geared towards ensuring freedom of expression, freedom of access to information, freedom of choice for consumers, media pluralism and effective competition and innovation.¹⁴

To avoid discriminatory pricing in Nigeria, the NCC approves tariff plans of data operators including introduction of data price floor to check anti-competitive practices by dominant operators. Surprisingly, there is currently no approved data price floor by the NCC. An attempt to re-introduce a data price floor in 2016 was misconceived by internet users as an attempt to increase data price of

mobile operators contrary to the actual intent.¹⁵ Without a price floor, big mobile operators (including ISPs) could offer internet access to millions of users at little or no cost which would arguably increase Nigeria's internet penetration.

However, such practices may promote monopolistic tendencies and therefore raise anti-competition concerns in the telecoms sector. It therefore behoves the NCC to consider putting in place adequate mechanisms that would create a balance between deepening internet access/penetration and promoting a strong and viable telecommunications sector.

One other point worth mentioning is the restriction of access to certain domains by low internet data plans of mobile operators/ISPs. Such practices undermines the principle of Net Neutrality as it restricts access to information. Again, this is a resultant effect of the absence of a

¹² T. Wu, 'Network Neutrality FAQ', <http://www.timwu.org/network_neutrality.html> accessed 23 January 2019
¹³ P.F. Docquir, 'The Challenges of Internet Neutrality', *Quaderns del CAC*, 2011, Vol. 37, pp. 33-39 <<https://ssrn.com/abstract=2017565>> accessed 23 January 2019. Also, it is instructive to note that huge fines have been handed out by the European Commission on companies in breach of the EU antitrust regulation. Notably, Google was fined 4.3 billion euros for abusing its market dominant position through Android. See, Tom Warren, 'Google Fined a Record \$5 billion by the EU for Android Antitrust Violations' *The Verge*, July 18, 2018 <<https://www.theverge.com/2018/7/18/17580694/google-android-eu-fine-antitrust>> accessed 2 February 2019
¹⁴ 'European Parliament Resolution of 17 November 2011 on the Open Internet and Net Neutrality in Europe', P7_TA (2011) 0511, <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0511+0+DOC+XML+V0//EN>> accessed 23 January 2019
¹⁵ National Communications Commission, 'Public Notice - NCC Suspends Data Directive on Data Segment Price Floor', 20 November, 2016 <https://www.ncc.gov.ng/stakeholder/media_public/public-notices/121-ncc-suspends-directive-on-data-segment-price-floor> accessed 24 January, 2019

the principle of Net Neutrality as it restricts access to information. Again, this is a resultant effect of the absence of a minimum pricing threshold in the sector. Thus, there is a race at price-cutting to deploy internet services to rural areas without an assurance on quality service delivery leading to restricted access.

The NCC could take a cue from TRAI which was faced with similar issues. In 2016, TRAI in a bid to promote free market, improvement of data services and access to information issued the **Prohibition of Discriminatory Tariffs for Data Services Regulation (PDTDSR), 2016**. Accordingly, **Regulation 3(1) and (2) PDTDSR** provides: “no service provider shall offer or charge discriminatory tariffs for data services on the basis of content. No service provider shall enter into any arrangement, agreement or contract, by whatever name called, with any person, natural or legal, that has the effect of discriminatory tariffs for data services being offered or charged to the consumer on the basis of content...”

By these provisions, the Free Basics offered by Facebook's internet.org became illegal.¹⁶ It is therefore imperative that the NCC employ similar initiatives to curb anti-


competition by big ISPs through predatory pricing which has led to access to certain domains.

CONCLUSION

To engender growth in Nigerian telecoms sector, it is important that the regulator ensure free and open market. On the operators' side, it must prevent the creation of a monopoly in the market through certain practices such as price-cutting whilst on the consumers' side, optimum service delivery including unrestricted access to information online must be guaranteed. Although the **CPR** was released in 2007, it is evident that

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there is the need to review same to make provisions restricting price discrimination by ISPs. Nonetheless, this could also be achieved through an applicable data price floor in the sector. However, recourse would be given to the country's efforts at promoting internet penetration across various urban and rural areas of Nigeria.

One way to accelerate internet penetration is the creation of public internet access point by the National Information Technology Development Agency (NITDA) in collaboration with NCC where internet services across the public access points would be offered at a discounted rate (or free) to users. However, there would be a separate and strict regulatory regime to ensure that ISPs operating in the space provide optimum services to users and compliance with Net Neutrality principles. 

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¹⁶ B. Raman, A. Gumaste, et al, 'Why Digital India Took on Facebook and Won', The Conversation, 12 February 2016, <<https://theconversation.com/why-digital-india-took-on-facebook-and-won-54530>> accessed 24 January 2019