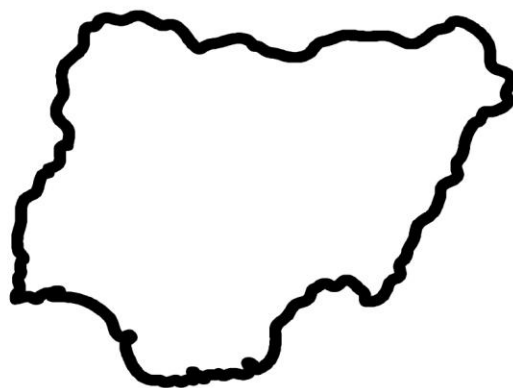


A PRACTICAL ASSESSMENT OF COMPETITION REGULATION AS A VIABLE OPTION FOR PROTECTING NET-NEUTRALITY IN NIGERIA



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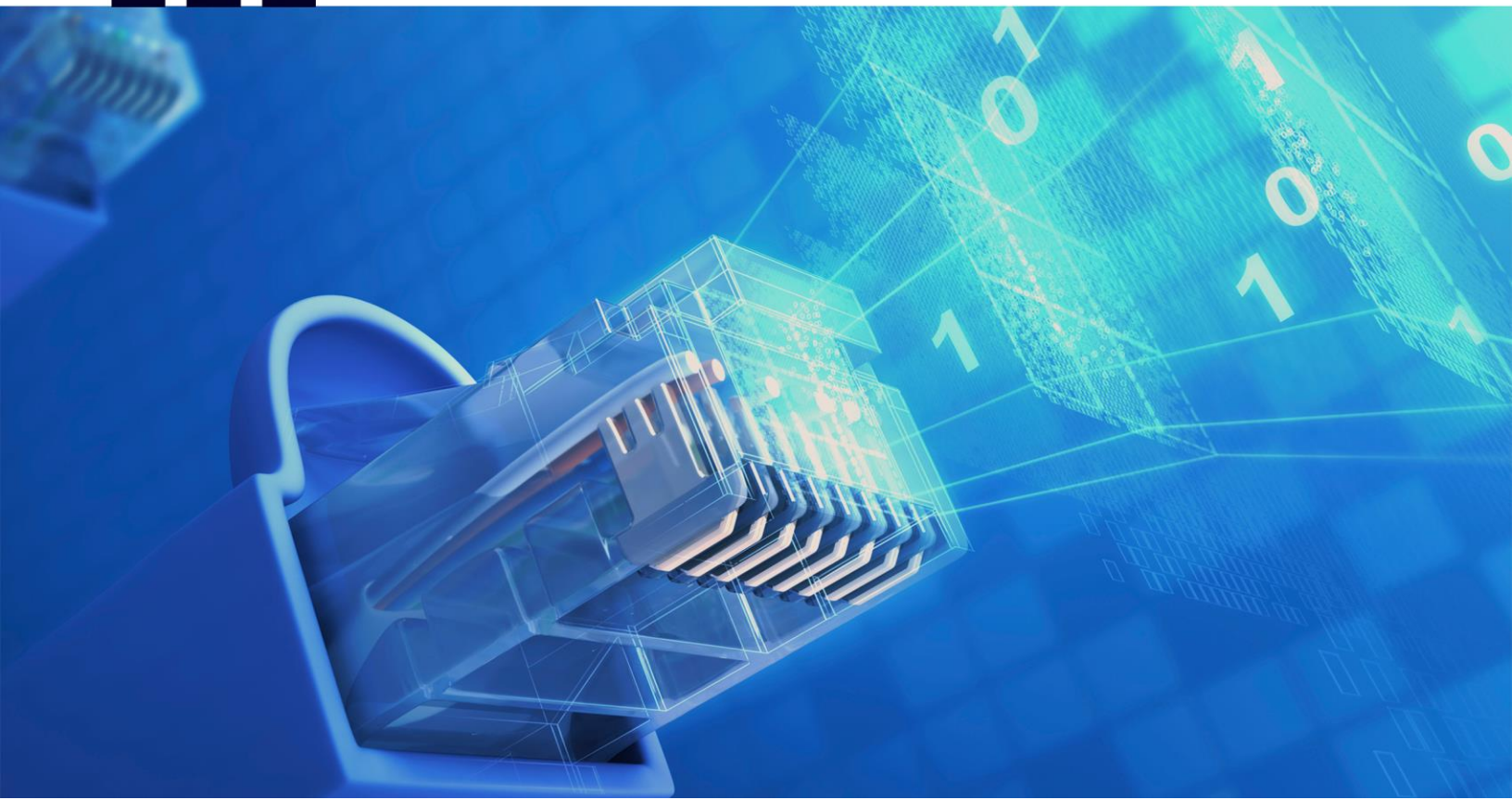


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Preface

Since the introduction of the phrase “net(work) neutrality” by Professor Tim Wu in 2003, the last 15 years has seen telecommunications regulators trying to grasp the myriad of concerns associated with this telecommunications policy issue and crafting various regulatory solutions in response. In the European Union (EU), the European Parliament have responded by enacting EU Regulation 2015/2120 (the EU Net-Neutrality Rules) which lays out net-neutrality safeguards and Law N° 20.453 establishes the principle of net-neutrality in Chile. These are just one of the few examples in other jurisdictions, with the exception of the United States (US), where unfortunately, the Federal Communications Commission (FCC) has rolled-back the Open Internet Order 2015 despite the public outcry, legal challenges and intervention of the US Senate.

At a fundamental level, net-neutrality argues in favour of the non-discrimination of internet content (or traffic) because the internet is considered to be a “dumb network” that is neutral irrespective of the content an internet user is able to access, thus any traffic passing through an internet access service provider’s (IASP’s) network should be treated on a first-come, first-served basis. The underlying justification for supporters of the net-neutrality debate is to have an open internet where everyone has a non-discriminatory access to lawful content online, or is able to access the internet from whatever terminal device.

Interestingly, Nigeria appears to be the only country in Africa to have expressed a clear intention to codify the protection of net-neutrality, and recently released a draft Internet Industry Code of Practice (the Draft Code) that among other things provides net-neutrality provisions that in some parts comprises elements borrowed from EU Net-Neutrality Rules and FCC’s Open Internet Order 2015. This report sets forth with hypothetical scenarios the extent to which the substantive principles of traditional competition regulation can effectively respond to net-neutrality violations in Nigeria’s internet ecosystem. It also examines the competition implication of non-enforcing net-neutrality obligations. The object of this examination is not farfetched because economic theory presumes that under the right condition a vertically integrated IASP with market power in the retail internet access service market, has the commercial incentive and opportunity to discriminate against traffic (or internet content) that competes with its own retail (or downstream) service, or enter into an exclusive (or preferential) agreement with a content and application provider (CAP) that impedes the ability of other CAPs to compete effectively by excluding them from a downstream market. Another question this report will attempt to answer is, what then are the effects of such anti-competitive conducts that are also in violation of the net-neutrality principle.

While it is conceded that the concept of net-neutrality and competition regulation are very much in their infant stage in Nigeria, thus reference will be made to legal and regulatory proceedings that have helped shape net-neutrality and competition regulation in other jurisdictions, particularly developments in EU and US to which Nigeria can learn from. In this regards, it is worth mentioning that the Open Internet Order 2010 and Open Internet Order 2015 which are referred to in this report have both been repealed by the FCC and any reference to any of them is only to describe or illustrate a particular situation.

This report is not, and should not be read as an exhaustive resource about the whole spectrum of arguments concerning the net-neutrality debate, but rather views the net-neutrality issue from the prism of competition regulation and sets the tone for further engagement with policy makers, the relevant regulatory authority, internet users, IASPs and CAPs in Nigeria regarding an open internet, innovation and a competitive market in Nigeria's internet ecosystem.

This report is organized into eight parts as follows;

I. Description of the Internet Ecosystem in Nigeria

This part will give a description of what the internet ecosystem looks like in Nigeria.

II. History of Net-Neutrality

This part will describe the concept of net-neutrality as well as its historical basis.

III. The Regulatory Framework for Net-Neutrality in Nigeria

This part will discuss the regulatory framework for net-neutrality, in particular it will review the various telecommunications license conditions, and the particular provisions of the Draft Internet Code of Practice that sets out net-neutrality obligations and measures.

IV. The Competition Framework applicable to Nigeria's Telecommunications Market

This part will give the main features of the existing competition framework in Nigeria, and in particular the Nigerian Communications Act, and the Competition Practices Regulations issued by the Nigerian Communications Commission applicable only in Nigeria's telecommunications sector, and the recently enacted Federal Competition and Consumer Protection Act 2018.

V. Competition Regulation as a Response to Net-Neutrality Violations

This part will provide a discussion of the range of conducts that are capable of undermining competition in the internet value chain/ecosystem as a result of net-neutrality violations and the non-enforcement of net-neutrality obligations, their effects on the relevant internet market, and how competition regulation may effectively respond to these conducts.

VI. Limitations of Competition Regulation

This part will discuss the limitation faced by existing competition frameworks in Nigeria in addressing net-neutrality violations.

VII. Recommendations

This part will make policy recommendations on how net-neutrality may be better protected in Nigeria.

VIII. Conclusion

This part will set out the concluding remarks of this report.

Executive Summary

This report sets forth with hypothetical scenarios the extent to which the substantive principles of traditional competition regulation can effectively respond to net-neutrality violations in Nigeria's internet ecosystem. It also examines the competition implication of non-enforcing net-neutrality obligations. The object of this examination is not farfetched because economic theory presumes that under the right condition a vertically integrated IASP with market power in the retail internet access service market, has the commercial incentive and opportunity to discriminate against traffic (or internet content) that competes with its own retail (or downstream) service, or enter into an exclusive (or preferential) agreement with a content and application provider (CAP) that impedes the ability of other CAPs to compete effectively by excluding them from a downstream market. Another question this report will attempt to answer is, what then are the effects of such anti-competitive conducts that are also in violation of the net-neutrality principle.

This report is not, and should not be read as an exhaustive resource about the whole spectrum of arguments concerning the net-neutrality debate, but rather views the net-neutrality issue from the prism of competition regulation and sets the tone for further engagement with policy makers, the relevant regulatory authority, internet users, IASPs and CAPs in Nigeria regarding an open internet, innovation and a competitive market in Nigeria's internet ecosystem.

In setting out hypothetical scenarios in which competition regulation may be an appropriate remedy for net-neutrality violations, this report considers the existing framework for regulating anti-competitive practices in Nigeria's internet ecosystem and the prevailing market conditions within this ecosystem such as market power and vertical integration. It also illustrates the diverse range of conducts under each of the prevailing market conditions that constitute a violation of net-neutrality principles and how competition regulation may effectively respond to these conducts.

In the final analysis, competition regulation may be an appropriate remedy to net-neutrality violations only in very limited circumstances, having regard to the market power exercised by an IASP (or a terminal equipment manufacturer) or the extent of vertical integration between an IASP and another entity operating within Nigeria's internet ecosystem. In addition, a private litigant alleging that a net-neutrality violation constitutes a competition claim may be discouraged from pursuing a remedy under traditional competition rules due to the high evidential threshold required to sustain this claim such as proof of market power and/or articulating a particular theory of anti-competitive harm, and the length of time spent in litigating this claim.

Nonetheless this report makes a number of policy recommendations which may be applied independently or in conjunction with another recommendation on an *ex post* or *ex ante* basis by either the Nigerian Communications Commission and/or the Federal Competition and Consumer Protection Commission established under the recently enacted Federal Competition and Consumer Protection Act 2018. These recommendations are intended to strengthen the enforcement of net-neutrality either as a core telecommunications issue or a competition related (or consumer protection) issue and are as follows;

- a) Enact and enforce the Draft Code;
- b) Establish clear standards for the transparency obligation of IASPs under the Draft Code;
- c) Reform quality of service measurement parameters and methodology for internet access service;
- d) The Federal Competition and Consumer Protection Commission should regularly conduct market reviews and dominance assessment of any aspect of the internet ecosystem;
- e) The Nigerian Communications Commission should implement a robust stand-alone mechanism for resolving net-neutrality disputes;
- f) The Nigerian Communications Commission should adopt the use of advisory enforcement opinions; and
- g) The Federal Competition and Consumer Protection Commission should exercise its consumer protection functions under the Federal Competition and Consumer Protection Commission Act to protect net-neutrality.

I. Description of the Internet Ecosystem in Nigeria

The global digital economy which is projected to be valued at \$23 Trillion in less than six years from today,¹ could never have existed in the absence of the internet, an interconnection of networks that is so seamless as to appear to the user as one network.² In Nigeria, internet access service first went live in Nigeria in 1997,³ and as at the end of December 2018, 111.6 million individuals were connected to the internet.⁴ The Nigerian internet market has evolved from the technological era of dial-up connection to wireless fidelity (Wi-Fi) and long-term evolution (LTE) presently in use for accessing the internet. Surprisingly, unlike most countries, the primary means of accessing the internet in Nigeria remains mobile devices.⁵ This is as a result of the huge infrastructural deficit in last-mile connectivity to the “hinterland” that will enable access to residential end-users, despite the availability of five submarine communications cables capable of delivering over nine terabytes of data to Nigeria.⁶

Despite this set-back and with penetration rate at 30.9%,⁷ Nigeria has the largest number of internet and mobile telecommunications users on the African continent.⁸ As more individuals are becoming connected to the internet, so also is their appetite for the consumption of content online increasing. These content range from social media applications to various streaming content, thus the internet as at today in Nigeria has become an agent for social change and a medium through which knowledge is impacted. From an economic growth perspective, the Nigerian telecommunications sector is regarded as one of the largest growing

¹ Huawei Technologies Co. Ltd. (2018). ‘GIV 20125 Unfolding the Industry Blueprint of an Intelligent World’ [WWW document] URL <https://www.huawei.com/minisite/giv/en/download/whitebook.pdf> (visited 2019, January 28), p. 2.

² Ray Horak, *Webster’s New World Telecom Dictionary* (Indianapolis: Wiley Publishing, 2008), p. 246.

³ Alexsamade. (2010, October 27). ‘Internet: 13 years of growth from ground zero in Nigeria from 1960- 1996’ [WWW document] URL <https://www.vanguardngr.com/2010/10/internet-13-years-of-growth-from-ground-zero-in-nigeria-from-1960-1996/> (visited 2019, March 25).

⁴ Premium Times. (2019, January 21). ‘Nigeria’s internet users hit 111.6m in December — NCC’ [WWW document] URL <https://www.premiumtimesng.com/news/more-news/306996-nigerias-internet-users-hit-111-6m-in-december-ncc.html> (visited 2019, January 23).

⁵ Kunle Sanni. (2018, July 26). ‘Google to launch 200 free wi-fi hotspots in Nigeria by 2019’ [WWW document] URL <https://www.premiumtimesng.com/news/more-news/277851-google-to-launch-200-free-wi-fi-hotspots-in-nigeria-by-2019.html> (visited 2019, January 28).

⁶ Adeyemi Adepetun. (2018, December 18). ‘Operators decry loss of \$1.5 million to submarine cable damages’ [WWW document] URL <https://guardian.ng/news/nigeria/national/operators-decry-loss-of-1-5-million-to-submarine-cable-damages/> (visited 2019, January 28).

⁷ Premium Times. (2018, December 13). ‘Nigeria’s broadband penetration at 31% — NCC’ [WWW document] URL <https://www.premiumtimesng.com/news/headlines/300950-nigerias-broadband-penetration-at-31-ncc.html> (visited 2019 January 25).

⁸ Internet World Stats. (2018). ‘Internet Penetration in Africa December 2017’ [WWW document] URL <https://www.internetworldstats.com/stats1.htm> (visited 2019, March 25).

telecommunications market in the world, and in 2017 attracted not less than \$70 Billion in Foreign Direct Investment (FDI), overtaking oil which is the main say of the Nigerian economy in gross domestic product (GDP) contribution.⁹

As at today, the internet ecosystem in Nigeria can be described as comprising of the following entities;¹⁰

- 1) Internet Access Service Providers (IASP): The Draft Code defines an IASP as “*Any entity licensed by the Nigerian Communications Commission, engaged in the provision of an Internet Access Service, irrespective of the network technology or terminal equipment used, or the license held*”,¹¹ while an internet access service is defined as a “*A publicly available electronic communications service, irrespective of the network technology or terminal equipment used, that provides access to data communications to or from Network Termination Points with IP addresses that are assigned through delegation from the Internet Assigned Numbers Authority...*”,¹² thus an electronic communications service that is not publicly available (or conversely is only privately available) does not qualify as an internet access service within the meaning of the Draft Code.

The Nigerian Communications Commission (the Telecoms Commission) which is the telecommunications regulator in Nigeria drafted the definition of an IASP in this manner so as to bring different categories of telecommunications licensees including holders of an internet service license within the regulatory scope of the Draft Code. The determining factor is if the entity whether a fixed network operator (FNO) or a mobile network operator (MNO) is also authorized to provide internet access services irrespective of whether the internet access service is provided directly to an end-user on a retail basis or to another telecommunications licensee on a wholesale basis.

In the internet ecosystem, (retail) IASPs occupy a unique position due to their nature as “two-sided markets”¹³ connecting end-users to the internet, and on the other hand providing a platform whereby content and application providers and end-users are able to interact.¹⁴

⁹ Dipo Oladehinde, Udoka Mokwunye, ‘Tale of two sectors: How telecoms overtook oil in GDP contribution’, *Businessday*, Tuesday 9 October 2018, p. 1.

¹⁰ Where necessary most of the definitions of these entities are derived from the Nigerian Communications Act 2003 (the Communications Act) or a subsidiary instrument, including the Draft Codemade by the Nigerian Communications Commission in exercise of its powers under the Communications Act.

¹¹ Section 1.4.

¹² *Ibid.*

¹³ Two-sided markets are economic platforms having two different categories of user that benefit from network externalities.

¹⁴ American Bar Association (ABA), *Telecom Antitrust Handbook* (Chicago, Illinois: ABA Publishing, 2013), pp. 546–547; Jan Krämer, Martin Peitz. (2018, March 28). ‘A Fresh Look at Zero-Rating’ [WWW document] URL http://www.cerre.eu/sites/cerre/files/CERRE_ZeroRating_FinalReport.pdf (visited 2018, November 19), p. 12; Body of European Regulators of Electronic Communications (BEREC). (2012, November 26). ‘BEREC Report on

- 2) Content and Application Providers (CAPs): These are individuals or *entities that provide any content, application, or service over the internet*.¹⁵ *These include search engines, over-the-top (OTT) media providers, social networking service providers, advertisers, content aggregators and e-commerce sites. CAPs are neither regulated nor licensed by the Telecoms Commission.*
- 3) Terminal Equipment Manufacturers (TEMs): These are manufacturers of any equipment designed to be connected directly or indirectly to a network termination point for the transmission, processing or reception of data.¹⁶ *These equipment includes mobile phones capable of accessing the internet, computer terminals, computers (desktops and laptops) and modems. TEMs are regulated and licensed by the Telecoms Commission in the class license category.*
- 4) Subscribers/end-users: The Nigerian Communications Act 2003 (the Communications Act) defines a subscriber as any person who uses a communications services.¹⁷ However this report narrows this definition “to a person who uses an internet access service including content, application or service provided over the internet”, which shall hereinafter be referred to as an end-user. *From this definition, CAPs also constitute end-users insofar as they use an internet access service to reach other end-users, however a reference to an end-user in this report should not be construed as a reference to a CAP unless stated otherwise.*

An end-user in the internet ecosystem could either be a natural person or corporate entity.

differentiation practices and related competition issues in the scope of net-neutrality’ [WWW document] URL https://www.berec.europa.eu/eng/document_register/subject_matter/berec/reports/1094-berec-report-on-differentiation-practices-and-related-competition-issues-in-the-scope-of-net-neutrality (visited 2015, June 18), pp. 38 – 39.

¹⁵ See also Section 8.2 (Definitions) of Appendix A of *In the Matter of Protecting and Promoting the Open Internet* GN Docket No. 14-28 (Hereinafter referred to as the *Open Internet Order 2015*).

¹⁶ See Schedule 1, Part 1 (m) of the License granted by the Nigerian Communication Commission for the Provision of Internet Service (ISP License).

¹⁷ Section 157.

II. History of Net-Neutrality

The term net-neutrality does not lend itself to any precise definition.¹⁸ Under different conditions, net-neutrality varies in definition depending on the particular conduct of the IASP under consideration, or one's point of view.¹⁹ At a fundamental level, net-neutrality as a concept seeks to impose anti-discrimination obligations on IASPs in respect of the content which they transmit,²⁰ or forbid IASPs from favouring the transmission of one content over another content,²¹ however as will be explained in paragraphs below, the literal concept of net-neutrality is much more expansive than requiring IASL not to discriminate. Net-neutrality as a technical concept is in a way related to the concept of an open internet whereby the internet's underlying infrastructure which is the TCP/IP protocol originally worked on a "best effort" basis, that is all data packets are routed on a first-come, first-served basis,²² and to do otherwise would undermine the very essence of an open internet and create barriers to entry for smaller CAPs.

In describing net-neutrality, Sir Tim Berners-Lee the inventor of the World Wide Web says;

"If I pay to connect to the Net with a certain quality of service, and you pay to connect with that or greater quality of service, then we can communicate at that level. That's all. It's up to the ISPs to make sure they interoperate so that that happens. Net-neutrality is NOT asking for the Internet for free. Net-neutrality is NOT saying that one shouldn't pay more money for high quality of service. We always have, and we always will. There have been suggestions that we don't need legislation because we haven't had it. These are nonsense, because in fact we have had net-neutrality in the past – it is only recently that real explicit threats have occurred".²³

Although net-neutrality is not given any statutory or regulatory definition in Nigeria, this report, for the sake of clarity and ease of reference adopts the Body of European Regulators for Electronic Communications' (BEREC's) definition of neutrality which reads;

¹⁸ Katerina Maniadaki, *EU Competition Law, Regulation and the Internet The Case of Net-neutrality* (Kluwer Law International, 2015), p. 19.

¹⁹ *Ibid.*

²⁰ Luca Belli & Primavera De Filippi, editors, *Net-Neutrality Compendium Human Rights, Free Competition and the Future of the Internet* (Springer International Publishing, 2016), p. 14; Thomas Randolph Beard, George S. Ford, Thomas Koutsky, Lawrence J. Spiwak, 'Network Neutrality and Industry Structure' *Hastings Communications and Entertainment Law Journal*, Vol. 29 (2007) pp. 149 - 170, p. 150.

²¹ Alexiadis, Peter. (2016). 'EU Net-Neutrality Policy and the Mobile Sector: The Need for Competition Law Standards' [WWW document] https://antitrustlair.files.wordpress.com/2016/05/net-neutrality-article_12-may-2016_final.pdf (visited 2017, January 13), p. 2.

²² Berin Szoka & Adam Marcus, editors, *The Next Digital Decade: Essays on the Future of the Internet* (TechFreedom, 2011), p. 258.

²³ Tim Berners-Lee. (2006, June 21). 'Net-Neutrality: This is serious' [WWW document] URL <http://dig.csail.mit.edu/breadcrumbs/node/144> (visited 2016, August, 9).

*“the principle that all electronic communication passing through a network is treated equally. That all communication is treated equally means that it is treated independent of (i) content, (ii) application, (iii) service, (iv) device, (v) sender address, and (vi) receiver address. Sender. and receiver address implies that the treatment is independent of end user and content/application/service provider.”*²⁴

Because of the seemingly relationship of net-neutrality to an open internet, advocates of net-neutrality have argued that due to the open architectural nature of the internet, IASPs who control the key bottle-neck infrastructure for delivering content to end-users, could actually leverage on this, to constrain end-users’ access to particular contents,²⁵ and/or the ability of CAPs to innovate on an open internet,²⁶ hence the origin for the call to mandate net-neutrality obligations in order to bar IASPs from interfering with how content is transmitted over the internet.²⁷

The first ever use of the term “*net(work) neutrality*” was by Professor Tim Wu in his seminal article “*Network Neutrality, Broadband Discrimination*”²⁸ where he correctly predicted that it would present policy challenges within the telecommunications industry in the years to come.²⁹ According to him where an IASP engages in a conduct that is a departure from net-neutrality, there must be a legitimate justification, for instance the blocking of applications likely to compromise network security or integrity.³⁰ But in extreme cases where an IASP without legitimate claim blocks an application simply because it has the technical capacity to do so, the resulting harm is two-fold, one, consumer choice is constrained, two, loss of opportunity to earn a revenue for the CAP whose content was blocked.³¹ As a result of this concern, Professor Wu proposed an anti-discrimination rule that establishes net-neutrality requirements for IASPs.³²

The first embodiment of the net-neutrality principles were first formulated by a telecommunications regulator in 2004,³³ when Michael K. Powell, Chairman of the FCC (as he then was) listed the four internet freedoms to which consumers are entitled to and these

²⁴ Body of European Regulators for Electronic Communications. (2009, September 30). ‘BEREC Response to the European Commission’s consultation on the open Internet and Net-Neutrality in Europe’ [WWW document] URL https://berec.europa.eu/doc/berec/bor_10_42.pdf (visited 2018, November 8), pp. 2 - 3.

²⁵ John Windhausen, Jr. (2006, February 6). ‘Good Fences Make Bad Broadband Preserving an Open Internet through Net-Neutrality’ [WWW document] URL <https://www.publicknowledge.org/pdf/pk-net-neutrality-whitep-20060206.pdf> (visited 2018, November 12), p. 1.

²⁶ Tim Wu, ‘The Broadband Debate: A User’s Guide’, *Journal of Telecommunications and High Technology Law*, Vol. 3, (2004), pp. 69-96, p. 72.

²⁷ Luca Belli & Primavera De Filippi, *supra*, p. 15.

²⁸ Tim Wu, ‘Network Neutrality, Broadband Discrimination’, *Journal of Telecommunications and High Technology Law*, Vol. 2, (2003), pp. 141 - 176.

²⁹ *Ibid.*, p. 141.

³⁰ *Ibid.*, pp. 150 - 151.

³¹ *Ibid.*, p. 151.

³² *Ibid.*, p. 165.

³³ Jonathan E. Nuechterlein, ‘Antitrust Oversight of an Antitrust Dispute: An Institutional Perspective on the Net-Neutrality Debate’, *Journal on Telecommunications and High Technology Law*, vol. 7, (2009), pp. 19 – 65, p. 26.

freedoms are;³⁴ freedom to access legal content of their choice;³⁵ freedom to use applications of their choice;³⁶ freedom to attach personal devices of their choice;³⁷ and lastly freedom of obtain meaningful information regarding their service plans.³⁸ Soon after the ink had dried on Chairman Powell’s speech, the FCC adopted the *Open Internet Policy Statement 2005* that incorporated most of the internet freedoms as stated by Chairman Powell. In issuing the *Open Internet Policy Statement 2005*, the FCC sought to ensure that providers of telecommunications for internet access or Internet Protocol-enabled (IP-enabled) services operate in a “neutral manner”.³⁹ In accordance with the *Open Internet Policy Statement 2005*, end-users are entitled; to access lawful internet content of their choice;⁴⁰ to run applications and use services of their choice, subject to the needs of law enforcement;⁴¹ to connect their choice of legal devices that do not harm the network;⁴² and to competition among network providers, application and service providers, and content providers.⁴³

The *Open Internet Policy Statement 2005* later became the subject of litigation when FCC sought to enforce its net-neutrality principles against Comcast for deliberately degrading customers’ access to peer-to-peer (P2P) services and had failed to demonstrate a non-discriminatory purpose for such conduct.⁴⁴ The US Court of Appeals for the District of Columbia in *Comcast Corp. v. FCC*⁴⁵ eventually ruled that the FCC had failed to tie the exercise of its Title I ancillary authority upon which it grounded the issuance and enforcement of the *Open Internet Policy Statement 2005*, to a “statutorily mandated responsibility” expressly delegated by congress,⁴⁶ and subsequently overturned it. The nullification of the *Open Internet*

³⁴Michael K. Powell. (2004, February 8). ‘Preserving Internet Freedom: Guiding Principles for the Industry’ [WWW document] URL <https://docs.fcc.gov/public/attachments/DOC-243556A1.pdf> (visited 2018, November 9), p. 5.

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ *Ibid.* Prior to the emergence of the net-neutrality debate, some commentators have argued that the end-user’s choice of terminal equipment should not be constrained by IASPs. This was the subject of the *Carterfone decision* (13 F.C.C.2d 420) in 1968 where FCC found that customers have an unqualified right to attach any equipment to the network as long as the network was not harmed. This decision now brought another perspective to the net-neutrality debate and the realization that should a similar scenario play out in the internet ecosystem, where an IASP is able to dictate which particular terminal equipment could be attached to its network, thus rendering useless an end-user’s right to an open internet. This concern primarily formed the basis of the net-neutrality argument that end-users have the right to use any terminal equipment of their choice.

³⁸ *Ibid.*

³⁹ Paragraph 4.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ See generally *Memorandum Opinion and Order, Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications* 23 F.C.C.R. 13, 028 (2008).

⁴⁵ 600 F.3d 642, 645 (D.C. Cir. 2010).

⁴⁶ Paragraph 655.

Policy Statement 2005 set in motion several regulatory proceedings in the US which led to the establishment of net-neutrality obligations for IASPs in 2010 and subsequently in 2015.⁴⁷

At its core, the spectrum of an IASP's conduct implicated in the net-neutrality debate are;⁴⁸

- I. *Blocking*: This is the blocking of specific content or specific types of content by an IASP.⁴⁹ The resultant effect is that end-users are denied access to the content blocked by the IASP. This conduct originally came to light in 2005 in the Madison River Communications LLC (Madison River) case⁵⁰ in US, where Madison River was alleged to be blocking ports used for Voice over Internet Protocol (VoIP) applications and thereby affecting customers' ability to use VoIP through one or more VoIP service providers.⁵¹ The FCC thereafter opened investigation and alleged that Madison River's conduct constituted an "unjust and unreasonable" practice in violation of Section 201 (b) of the Communications Act of 1934.⁵²

However, to avoid further investigation and save itself from the expenses of a long-drawn administrative proceeding, Madison River agreed to make a payment of \$15,000:00, and not to block ports used for VoIP applications or otherwise prevent customers from using VoIP applications.⁵³ Although it bears emphasis to note that in this case, FCC applied the "unjust and unreasonable" standard of Section 201 (b) of the US Communications Act of 1934, it would however go on to make clear in subsequent regulatory proceedings that such conduct as engaged by Madison River *limits* the openness of the internet.⁵⁴

- II. *Paid prioritization*: This refers to the traffic management practice (TMP) of an IASP, whereby certain traffics are prioritized (or given preferential network treatment) over others usually, in exchange for monetary consideration from the CAP that owns the

⁴⁷ This narrative is to trace the origin of the first ever reported regulatory proceedings in the world regarding net-neutrality as the history and development of net-neutrality in the US is outside the scope of this report.

⁴⁸ See generally, Internet Society. (2015, October 15). 'Policy Brief: Network Neutrality' [WWW document] URL <http://www.internetsociety.org/sites/default/files/ISOC-PolicyBrief-NetworkNeutrality-20151030.pdf> (visited 2016, August 9), pp. 2-3.

⁴⁹ Katerina Maniadaki, *supra*, p. 20.

⁵⁰ *In the Matter of Madison River Communications, LLC and affiliated companies* File No. EB-05-IH-0110, Acct. No. FRN: 0004334082.

⁵¹ *Ibid*, paragraph 1.

⁵² *Ibid*.

⁵³ *Ibid*, paragraphs 4 - 5.

⁵⁴ See *In the Matter of Preserving the Open Internet Broadband Industry Practices* GN Docket No. 09-191 WC Docket No. 07-52 (Hereinafter referred to as the *Open Internet Order 2010*), paragraph 35; *Open Internet Order 2015*, paragraph 79.

prioritized content.⁵⁵ In terms of network congestion, the prioritized traffic enjoys a better quality of service (QoS)⁵⁶ than the non-prioritized traffic.⁵⁷

The Draft Code instead uses the term “preferential data prioritization,” which it defines as “*the practice of granting preferential treatment to selected network data within the same service category based on the data’s origin, business agreements between IASPs and other entities, other commercial considerations, or any other consideration that do not qualify as reasonable network management*”.⁵⁸

III. *Throttling*: In this case, an IASP degrades the QoS of a particular traffic or bandwidth intensive application in order to mitigate the effects of network congestion,⁵⁹ or degrades content, applications, or services that might compete with the IASP’s affiliated content.⁶⁰ Unlike blocking, throttling “*inhibits the delivery of particular content, applications, or services, or particular classes of content, applications, or services*” provided over the internet.⁶¹

The Draft Code defines throttling as a “*network practice where data upload and download rates for specific services are intentionally restricted*”.⁶²

IV. *Zero-rated services*: This is the practice whereby IASPs exclude a certain content from the application of data charges, in other words the content is either made available to the end-user at a substantially reduced cost or for free.⁶³ An end-user who is subscribed to a zero-rated plan with an IASP is able to access the zero-rated content for free or at a discounted rate.⁶⁴ The Draft Code describes the practice of zero-rating as “*when an IASP applies a price of zero to the data traffic associated with a particular application or*

⁵⁵ Luca Belli & Primavera De Filippi, *supra*, pp. 18 -19.

⁵⁶ The International Telecommunications Union (ITU) defines QoS 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*”, see ITU-T E.800 Telecommunication Standardization sector of ITU (2008, September) ‘Definitions of terms related to quality of service’ [WWW document] URL <https://www.itu.int/rec/T-REC-E.800-200809-I> , (visited 2019, 1), paragraph 2.2.

⁵⁷ Axel Gautier, Robert Somogyi. (2018, July). ‘Prioritization vs Zero-Rating: Discrimination on the Internet’ [WWW document] URL https://www.cesifo-group.de/DocDL/cesifo1_wp7185.pdf (visited 2018, November 13), p. 2.

⁵⁸ Section 1.4.

⁵⁹ Luca Belli & Primavera De Filippi, *supra*, p. 18.

⁶⁰ *Open Internet Order 2015*, paragraph 123.

⁶¹ *Ibid.*, paragraph 120.

⁶² Section 1.4.

⁶³ Helani Galpaya. (2017, February 23). ‘Zero-rating in Emerging Economies’ [WWW document] URL <https://www.cigionline.org/publications/zero-rating-emerging-economies> (visited 2017, March 21), p. 1.

⁶⁴ Jeffrey A. Eisenach. (2015, March). ‘The Economics of Zero Rating’ [WWW document] URL <https://www.nera.com/content/dam/nera/publications/2015/EconomicsofZeroRating.pdf> (visited 2016, September 20), p. 2.

class of applications (and the data does not count towards any data cap in place on the internet access service)”.⁶⁵

Zero-rating can be distinguished on the basis of whether it applies to only a selected content or a category of content (class based).⁶⁶ Class based zero-rating is further divided into open, where the IASPs sets out a mechanism for the inclusion of third-party content into its zero-rated offers, or closed where the IASPs on its own decides which content to zero-rate.⁶⁷In Nigeria, the IASP Airtel Nigeria partnered with Facebook to launch free basics.⁶⁸ Under the free basics plan, subscribers of Airtel Nigeria are able to access more than 85 mobile websites for free.⁶⁹ From an economics perspective, zero-rating is a form of price discrimination (or differential pricing).⁷⁰

As at the beginning of 2019, at least ten national governments , excluding those in the EU have responded to the net-neutrality issue by either enacting statutory provisions or imposing net-neutrality regulatory obligations, or have commenced the process for doing so.⁷¹

⁶⁵ Section 1.4.

⁶⁶ Thomas Lohninger *et al.* (2019, January 29). ‘Report: The Net-Neutrality Situation in the EU’ [WWW document] URL <https://epicenter.works/document/1522> (visited 2019, January 29), p. 17.

⁶⁷ *Ibid.*

⁶⁸ internet.org by facebook. (2016, May 10). ‘Announcing the launch of Free Basics in Nigeria’ [WWW document] URL <https://info.internet.org/en/blog/2016/05/10/announcing-the-launch-of-free-basics-in-nigeria/> (visited 2018, November 13).

⁶⁹ *Ibid.*

⁷⁰ CRC. (2016, April 29). ‘Differential pricing Models in Mobile Data Markets – Zero Rating’ [WWW document] URL https://www.crcm.gov.co/pp/Zero_rating_eng.pdf (visited 2018, November 14), p. 6; See the decision of the Canadian Radio-television and Telecommunications Commission (CRTC) in Telecom Regulatory Policy CRTC 2017-104 *Framework for assessing the differential pricing practices of Internet service providers* (20 April 2017), paragraph 9.

⁷¹ ‘Net neutrality by country’ [WWW document] URL https://en.wikipedia.org/wiki/Net_neutrality_by_country (visited 2017, September 19).

III. The Regulatory Framework for Net-Neutrality in Nigeria

Telecommunications License Condition

The term “net-neutrality” is not defined in the Communications Act, the Draft Code or by the *Telecoms* Commission in any regulatory proceeding. Although prior to the issuance of the Draft Code, a non-discrimination obligation when providing an authorized telecommunications service is required under several licenses issued by the *Telecoms* Commission. In other words, this license condition imposes an obligation not to discriminate, on the holder of the telecommunications license and compels the holder to act in accordance with the provision stated therein. In this regard, Condition 5.1 of the ISP License provide as follows;

“The Licensee shall not (whether in respect of charges or other terms or conditions applied or otherwise) show undue preference to or exercise undue discrimination against any particular person or persons of any class or description in respect of;

- a) the provision of a service under this Licence; or*
- b) the connection of any equipment approved by the Commission”.*⁷²

Condition 5.2 goes on to state that;

“The Licensee shall be deemed to have shown such undue preference or to have exercised such discrimination if it unfairly favours to a material extent a business carried on by it or by its lawful telecommunications associates in relation to any of the matters mentioned in paragraph 5.1 so as to place at a significant competitive disadvantage persons competing with that business”.

This license condition exemplifies the core theme of net-neutrality in that an IASP is prohibited from showing undue preference (or discriminating) (a) when providing internet access service and/or (b) in respect of the connection of any (terminal) equipment approved by the *Telecoms* Commission. While as at the time of this report, the *Telecoms* Commission has yet to give an interpretation of these provisions neither have these provisions been asserted in any legal or regulatory proceedings, however it is worth noting that these provisions are almost identical to

⁷² This particular provision is replicated in Condition 4.1, Condition 5.1 and Condition 5.1 of the Wholesale Wireless Access Service License (WWAS License), Unified Access Service License (UAS License) and Digital Mobile License (DM License) respectively. The holders of these licenses are also authorized under the license to provide internet access service either on a retail and/or on a wholesale basis.

the net-neutrality provision in Section 27 (2) of the Canadian Telecommunications Act which provides that:

“No Canadian carrier shall, in relation to the provision of a telecommunications service or the charging of a rate for it, unjustly discriminate or give an undue or unreasonable preference toward any person, including itself, or subject any person to an undue or unreasonable disadvantage”.⁷³

When read, both Condition 5.1 of the ISP License and Section 27 (2) of the Canadian Telecommunications Act exhibit a shared commonality in the use of the phrase “undue preference”, in particular, a licensee/carrier is prohibited from showing undue preference in relation to the telecommunications service authorized. Unlike Nigeria, undue preference in Section 27 (2) of the Canadian Telecommunications Act has been asserted in regulatory proceedings before the Canadian Radio-Television and Telecommunications Commission (CRTC).

In this regard, in *Complaint against Bell Mobility Inc. and Quebecor Media Inc., Videotron Ltd. and Videotron G.P. alleging undue and unreasonable preference and disadvantage in regard to the billing practices for their mobile TV services Bell Mobile TV and illico.tv*,⁷⁴ the CRTC was called upon to explain the contours of Section 27 (2) in 2015. The facts were that Mr. Benjamin Klass, the Consumers’ Association of Canada, the Council of Senior Citizens’ Organizations of British Columbia and the Public Interest Advocacy Centre (collectively the Applicants) filed a formal complaint before the CRTC challenging the practice by Bell Mobility and Videotron of exempting illico.tv, the mobile TV services of Videotron from the standard monthly data caps and data charges generally applicable to their wireless services. The Applicants requested that CRTC prohibit Bell Mobility and Videotron from exempting the mobile TV services from data charges as this practice confers upon themselves an unfair advantage, gives the mobile TV services an *undue preference*, and unduly discriminates against their wireless customers that consume mobile online video services, and against Bell Mobility’s and Videotron’s competitors, in violation of *inter alia* subsection 27 (2) of the Canadian Telecommunications Act.

One of the questions set down for determination by the CRTC in this administrative proceeding was whether Bell Mobility and Videotron in operating as Canadian carriers in regard to the transport of their mobile TV services to subscribers’ mobile devices, are acting in violation of

⁷³ See generally, Standing Committee on Access to Information, Privacy and Ethics. (2018 May). ‘The Protection of Net-Neutrality in Canada’ [WWW document] URL <https://www.ourcommons.ca/Content/Committee/421/ETHI/Reports/RP9840575/ethirp14/ethirp14-e.pdf> (visited 2018, June 12), pp. 4 - 5. This similarity could be due to the fact that the Federal Government of Nigeria retained the services of Canadian law firm McCarthy Tétrault LLP to draft the initial regulatory framework for the telecommunications industry in Nigeria after opening the sector to private investors.

⁷⁴ Broadcasting and Telecom Decision CRTC 2015-26 (29 January 2015).

Section 27 (2), as alleged by the Applicants.⁷⁵ The analytical framework adopted by the CRTC in respect of an allegation of undue preference under Section 27 (2) consisted of two stages:⁷⁶

Stage 1: CRTC must first determine whether the conduct in question constitutes a preference or subjects a person to a disadvantage.

Stage 2: Where CRTC so determines, it must then decide whether the preference or disadvantage is undue or unreasonable.

In reaching a decision on stage 1, the CRTC stated that there is a significant difference in cost to consumers, when compared to accessing the mobile TV services because the mobile TV services is exempted from the standard data charges generally applicable to other content services,⁷⁷ as a result of which customers of Bell Mobility and Videotron have a significant economic incentive to access content through the mobile TV services rather than through other content services.⁷⁸ On this basis, the CRTC therefore found;

*“that in providing the data connectivity and transport required for consumers to access their respective mobile TV services on their mobile devices, Bell Mobility and Videotron have given a preference in favour of subscribers of their respective mobile TV services, as well as in favour of their own services, and have subjected consumers of other audiovisual content services, and other services, to a corresponding disadvantage”.*⁷⁹

In reaching a decision on stage 2, the CRTC made clear that preference in itself is not violatory of Section 27 (2), however the preference must be undue in order to be caught by Section 27 (2), and that the burden of establishing that any preference or disadvantage is not undue or unreasonable rests with the Canadian carrier that confers the preference and subjects the person to a disadvantage.⁸⁰

In support of its position, Videotron argued that the charges allow content providers to better know the market and to find new ways to make attractive offers to consumers. In Videotron’s view, should Canadians get used to consuming television content on their mobile devices, this could only have a positive impact on all service providers of such content,⁸¹ while Bell Mobility argued that there was no lessening of competition and referenced a positive growth rates for online video services on all platforms including mobile devices as evidence of that competition

⁷⁵ *Ibid.*, paragraph 8.

⁷⁶ *Ibid.*, paragraph 44.

⁷⁷ *Ibid.*, paragraph 46.

⁷⁸ *Ibid.*, paragraph 47.

⁷⁹ *Ibid.*, paragraph 48.

⁸⁰ *Ibid.*, paragraph 49.

⁸¹ *Ibid.*, paragraph 52.

in the mobile content viewing market has not been harmed.⁸² In response, the CRTC was of the opinion that Bell Mobility's and Videotron's arguments were not persuasive enough, not only did they fail to address the impact of the significant difference in data charges on consumers, they also did not address the potential for significant harm in the future to other audiovisual content services accessible on a subscriber's mobile devices that are subject to data caps. According to CRTC, the considerable difference in data charges is unlikely not to have any material impact in the future either on consumers or on the growth of other services.⁸³

In the light of these considerations, the CRTC concluded that Bell Mobility and Videotron failed in discharging the burden of establishing that any preference is not undue and, accordingly determined that the provision of mobile TV services at a substantially lower cost by Bell Mobility and Videotron to their customers conferred upon consumers of their services, as well as upon their services, an undue preference in violation of Section 27 (2) of the Canadian Telecommunications Act.⁸⁴ Respecting market competition, it bears emphasis to mention that the CRTC in making this determination considered the practice of Bell Mobility and Videotron in this case as interfering with the operation of market forces, and prohibiting such practice removes a significant impediment to competition and will allow for an efficient competitive entry into the market.⁸⁵

The Draft Code

The Draft Code was released by the *Telecoms* Commission in 2017 and has the following objectives, protect the right of internet users to an open internet;⁸⁶ provide clear guidelines to IASPs on the use of traffic management practices;⁸⁷ outline the obligations of IASPs in relation to the protection of consumers' personal data;⁸⁸ outline the obligations of IASPs in the handling of offensive and potentially harmful content, and the protection of minors and vulnerable audiences online;⁸⁹ ensure adequate safeguards are put in place by IASPs against unsolicited internet communications;⁹⁰ and establish best practices for internet governance in Nigeria, in line with emerging issues and global trends.⁹¹

Since its release in 2017, the Draft Code has undergone several revisions in conjunction with stakeholders⁹² and, once enacted the present version will apply to only IASPs and internet access services within Nigeria.

⁸² *Ibid.*, paragraph 54.

⁸³ *Ibid.*, paragraph 55.

⁸⁴ *Ibid.*, paragraph 61.

⁸⁵ *Ibid.*, paragraph 67.

⁸⁶ Section 1.2 (a).

⁸⁷ Section 1.2 (b).

⁸⁸ Section 1.2 (c).

⁸⁹ Section 1.2 (d).

⁹⁰ Section 1.2 (e).

⁹¹ Section 1.2 (f).

⁹² Including civil society, industry groups, professional associations, academia and private individuals.

Under the Draft Code net-neutrality is deemed protected in Sections 2 – 3. These sections are reproduced and explained below.

2 Right of Consumers to Open Internet Access

The Code upholds the consumer’s right to an Open Internet. Hence:

- a) *Internet users have the right to access and distribute information and content, use and provide applications and services, and use appropriate terminal equipment of their choice.*
- b) *No lawful content, applications or services shall be blocked or made unavailable to users of Internet services.*
- c) *No lawful content, applications or services shall be discriminated against by an Internet Access Service Provider.*
- d) *Where traffic management practices are required in order for the efficient operation of the network, an Internet Access Service Provider shall be completely transparent about what practices are in place and how the consumers’ services are affected.*

Section 2 employs words almost identical to that used in Article 3 (1) of the EU Net-Neutrality Rules.⁹³ This section prescribes measures designed to guarantee the rights of an end-user to an open internet, in particular an end-user’s right to have unrestricted and non-discriminatory access to lawful content, applications or services via his internet access services is expressly stated in this section. In accordance with this provision, the end-user is free to send and receive information and content online and use the appropriate terminal device of his choice without restriction from an IASP. This section also prescribes transparency obligations for IASPs when they engage in traffic management practices necessary for the efficient operation of the network.

⁹³ Article 3 (1) of EU Net-Neutrality Rules provides that:

“End-users shall have the right to access and distribute information and content, use and provide applications and services, and use terminal equipment of their choice, irrespective of the end-user’s or provider’s location or the location, origin or destination of the information, content, application or service, via their internet access service”.

3. Standards for Open Internet Access

3.1 Transparency

- a) *An Internet Access Service Provider shall disclose on its website and in all service agreements, full and accurate information regarding the performance, technical and commercial terms of its Internet Access Services in a manner sufficient for consumers and third-party content providers to make informed choices regarding their use of such services.*
- b) *Any traffic management practices employed by an Internet Access Service Provider for the purposes of network optimization shall be fully publicly disclosed, including:*
 - I. *The specific reason(s) why the traffic management practices are required;*
 - II. *The specific goal(s) of the practices implemented;*
 - III. *The manner in, and the extent to which those practices may affect the Internet Access Services.*

Section 3.1 is drafted in a manner similar to the transparency obligation enshrined in Article 4 (1) of the EU Net-Neutrality Rules.⁹⁴ This provision seeks to impose specific transparency

⁹⁴ Section 3. 1 of the EU Net-Neutrality Rules provides that;

“Providers of internet access services shall ensure that any contract which includes internet access services specifies at least the following:

- a) *information on how traffic management measures applied by that provider could impact on the quality of the internet access services, on the privacy of end-users and on the protection of their personal data;*
- b) *a clear and comprehensible explanation as to how any volume limitation, speed and other quality of service parameters may in practice have an impact on internet access services, and in particular on the use of content, applications and services;*
- c) *a clear and comprehensible explanation of how any services referred to in Article 3(5) to which the end-user subscribes might in practice have an impact on the internet access services provided to that end-user;*
- d) *a clear and comprehensible explanation of the minimum, normally available, maximum and advertised download and upload speed of the internet access services in the case of fixed networks, or of the estimated maximum and advertised download and upload speed of the internet access services in the case of mobile networks, and how significant deviations from the respective advertised download and upload speeds could impact the exercise of the end-users’ rights laid down in Article 3(1);*

obligation on IASPs with respect to the performance, technical and commercial terms of its internet access service in a manner that is “*sufficient for consumers and third-parties to make informed choices*” regarding their uses of such services. Not only does this provision specify disclosure to consumers/end-users, it also requires that information disclosure be made to third-party CAPs who may require such technical information in seeking to create content on the open internet. This disclosure is required to be made in a clear, comprehensible and comprehensive manner in all service agreement with the IASP and on the IASP’s website. In addition, this transparency obligation complements and appears to be much more broader than the disclosure obligation in the Guidelines for the Provision of Internet Service (Guidelines for ISPs) requiring IASPs to disclose the following information; a full and fair disclosure of bandwidth (including whether bandwidth is shared or dedicated to the user) and bit transfer rates to consumers before the process of subscription is concluded;⁹⁵ notice to their subscribers of any planned upgrade of ISP equipment, which could have any material effect on continuing use of the services, at least six (6) months before making the change;⁹⁶ and notice to their subscribers of any winding- up or other discontinuation of the services at least six (6) months before such discontinuation.⁹⁷ Accordingly, any Section in the service agreement which would limit the right of the end-user to seek redress in the event of the failure of the IASP to attain the minimum standard set forth in its disclosure information would also constitute a breach of its consumer code.⁹⁸

However, it is also noted that this provision does not give an example, or list of the specific type of *performance, technical and commercial* information that an IASP is required to disclose in order to satisfy compliance with the transparency obligation. In contrast, the FCC in *Restoring Internet Freedom Order 2018*⁹⁹ listed the content of these disclosures required of IASPs to be network management practices including, blocking, throttling, affiliated prioritization, paid prioritization, congestion management, application-specific behaviour, device attachment rules, security; performance characteristics including service description and impact of non-broadband internet access service data services; and commercial terms including price, privacy policies and redress options. Finally, this section sets out the minimum information that must be disclosed by an IASP where it engages in any network management practices.

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- e) *a clear and comprehensible explanation of the remedies available to the consumer in accordance with national law in the event of any continuous or regularly recurring discrepancy between the actual performance of the internet access service regarding speed or other quality of service parameters and the performance indicated in accordance with points (a) to (d)*”.

⁹⁵ Paragraph 3 (a).

⁹⁶ Paragraph 3 (b).

⁹⁷ Paragraph 3 (c).

⁹⁸ See Paragraphs 8 (2) and 41 (8) of Schedule 1 (The General Code) to the Consumer Code of Practice Regulations 2007.

⁹⁹ See *In the Matter of Restoring Internet Freedom* WC Docket No. 17-108, paragraphs 218 – 223.

The ability of an end-user to make an informed choice regarding his access to the internet and/or his choice of IASP is dependent on the information made available to him by the IASP, particularly disclosures regarding how an IASP engages in traffic management practices and how these practices may impact the quality of experience of the different content accessed with the internet access service.¹⁰⁰ Without a transparency obligation, an end-user's right to an open internet would be severely threatened.¹⁰¹ Additionally, the insertion of a transparency obligation in the Draft Code would discourage IASPs from engaging in practices that violate net-neutrality obligations, and enable end-users and third-party CAPs identify circumstances whereby their right to traffic management information disclosure has been violated, and to take steps to challenge such actions immediately.¹⁰²

3.2 No discrimination

An Internet Access Service Provider shall treat all lawful traffic within the same service category equally, without discrimination, restriction or interference, irrespective of the sender and receiver, the content accessed or distributed, the applications or services used or provided, or the terminal equipment used.

The non-discrimination obligation in Section 3.2 is almost identical in wording to Article 3.3 of the EU Net-Neutrality Rules.¹⁰³ This provision seeks to impose a positive obligation on IASPs when providing internet access service, to treat all traffic equally, without discrimination, restriction or interference, independently of its sender or receiver, content, application or service, or terminal equipment. One of the basic tenets of net-neutrality is the obligation of IASPs to treat all data traffic equally irrespective of its origin or destination. An IASP that engages in discrimination, not only would be in breach of this provision, but also violates the right of an end-user to an open internet access as enshrined in Section 2 (a) and (c) of the Draft Code.

According to BEREC, the enforcement of the no-discrimination rule should firstly involve an assessment of whether all traffic is treated equally, and secondly, an assessment of whether situations are comparable or different and whether a difference in treatment can be justified on an objective basis.¹⁰⁴ In BEREC's view, the fact that different end-users of an IASP experience

¹⁰⁰ Body of European Regulators for Electronic Communications (BEREC). (2011, December). 'BEREC Guidelines on Transparency in the scope of Net-Neutrality: Best practices and recommended approaches' [WWW document] URL https://berec.europa.eu/doc/berec/bor/bor11_67_transparencyguide.pdf (visited 2018, November 21), p. 8.

¹⁰¹ *Ibid.*, p. 9.

¹⁰² *Open Internet Order 2010*, paragraph 53.

¹⁰³ Article 3.3 of the EU Net-Neutrality Rules provides that; "*Providers of internet access services shall treat all traffic equally, when providing internet access services, without discrimination, restriction or interference, and irrespective of the sender and receiver, the content accessed or distributed, the applications or services used or provided, or the terminal equipment used.*"

¹⁰⁴ Body of European Regulators of Electronic Communications (BEREC). (2016, August). 'Guidelines on the Implementation by National Regulators of European Net-Neutrality Rules' [WWW document] URL https://berec.europa.eu/eng/document_register/subject_matter/berec/regulatory_best_practices/guidelines/6

different network performance and/or QoS, does not necessarily mean that the IASP's conduct is inconsistent with the non-discriminatory obligation, insofar that the data traffic is processed agnostic (treated equally or blindly) to sender and receiver, to the content accessed or distributed, and to the application or service used or provided,¹⁰⁵ thus an IASP may implement, in order to optimize the overall transmission quality and user experience, traffic management measures which differentiate between objectively different categories of traffic.¹⁰⁶

Despite the general prohibition of discrimination in the Draft Code, it is important to note that zero-rating which is a form of discrimination,¹⁰⁷ where all applications are blocked or slowed down once the data cap is reached except for the zero-rated content, is permissible insofar as it satisfies the requirement of Section 3.6 as will be explained below. In addition, it is not clear to what extent the offering by an IASP of "services other than general internet access service" or "non-broadband internet access service" (non-BIAS) referred to as specialized services,¹⁰⁸ and includes VoIP, internet protocol television (IPTV), video on demand (VoD), telepresence and massively multiplayer online gaming (MMOG) which are provided at different levels of quality, volume and performance will constitute discrimination, and thus an infringement of the no discrimination rule.¹⁰⁹

Indeed some commentators have argued that these specialized services do not by themselves grant access to the entire internet, since they are provided in only a portion of the internet and share capacity with the internet access service over providers' last-mile facilities, thus they should be exempt from net-neutrality obligations.¹¹⁰ As a caution, the FCC has noted that specialized services can be used to circumvent net-neutrality rules, especially if IASPs "*offer specialized services that are substantially similar to, but do not meet the definition of, [broadband] Internet access service, and if consumer protections do not apply to such services*".¹¹¹

[160-berec-guidelines-on-the-implementation-by-national-regulators-of-european-net-neutrality-rules](#) (visited 2017, September 23), p. 14.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*, p. 16.

¹⁰⁷ Thomas Lohninger *et al.* (2019, January 29). 'Report: The Net-Neutrality Situation in the EU', *supra*.

¹⁰⁸ See also, *Open Internet Order 2015*, paragraphs 201 - 213.

¹⁰⁹ In the EU, the provision of specialized services by an IASP will not infringe the provisions of the EU Net-Neutrality Rules regarding traffic management measures applicable to the internet access services provided the following conditions are met; the network capacity is sufficient to provide the specialised service in addition to any internet access service provided; specialised services are not usable or offered as a replacement for internet access service; and specialised services are not to the detriment of the availability or general quality of the internet for end-users (Article 3 (5) second subparagraph).

¹¹⁰ Body of European Regulators of Electronic Communications. (BEREC). (2012, November 26). 'Guidelines for Quality of Service in the Scope of Net-Neutrality' [WWW document] URL https://berec.europa.eu/eng/document_register/subject_matter/berec/regulatory_best_practices/guidelines/101-berec-guidelines-for-quality-of-service-in-the-scope-of-net-neutrality (visited 2016, September 18), p. 28; J. Scott Marcus *et al.* (2011). 'Network Neutrality Challenges and Responses in EU and US' [WWW document] URL <http://www.europarl.europa.eu/document/activities/cont/201105/20110523ATT20073/20110523ATT20073EN.pdf> (visited 2013, July 14), p. 39.

¹¹¹ *Open Internet Order 2010*, paragraph 112.

Lastly, the reference to “*treat all lawful traffic within the same service category equally*” indicates that Section 3.2 contemplates as permissible, only class-based zero-rated offers, that is offers where a category of content/application are zero-rated, or the prioritization of real time applications such as VoIP and IPTV on the basis of reasonable network management practice.¹¹²

3.3 No blocking

An Internet Access Service Provider shall not block any lawful content, applications, services, or non-harmful devices, with the exception of reasonable network management.

The no-blocking rule of the Draft Code is similar to the no-blocking rule of Section 8.5 of the *Open Internet Order 2015*.¹¹³ Section 3.3 will bar IASPs from blocking lawful content on the internet, unless under condition of reasonable network management.¹¹⁴ The Draft Code defines reasonable network management to be “*Network practices designed to enhance or protect quality of experience for end-users while complying with net-neutrality principles and guidelines*”,¹¹⁵ thus because the no-blocking rule was designed to protect an end-user’s right to access lawful content online and use whatever non-harmful device of his choice in connecting to the internet, it bars IASPs from blocking specific content applications, services, or non-harmful devices unless it is done under the guise of reasonable network management. On the other hand, the no-blocking rule applies to only lawful content, applications, services, or non-harmful devices and, this gives clear legal authority to IASPs to block unlawful content such as pornographic articles¹¹⁶ or content that infringes a trademark¹¹⁷ and/or copyright on the internet.¹¹⁸

3.4 No throttling

An Internet Access Service Provider shall not impair or degrade lawful internet traffic on the basis of internet content, source, destination, application, or service, or use of a non-harmful device, with the exception of reasonable network management.

Except for the omission of a few words, Section 3.4 of the Draft Code is almost identical to Section 8.7 of the *Open Internet Order 2015*.¹¹⁹ Section 3.4 will bar IASPs from degrading or

¹¹² See paragraphs below for an explanation of preferential data prioritization.

¹¹³ Section 8.5 of the *Open Internet Order 2015* provides that: “*A person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not block lawful content, applications, services, or non-harmful devices, subject to reasonable network management*”.

¹¹⁴ See paragraphs below.

¹¹⁵ See paragraphs below on further explanation on the criteria for assessing a reasonable traffic management practice.

¹¹⁶ See also Condition 4 (1) (b) of the ISP License which prohibits the holder from disseminating any pornographic article.

¹¹⁷ See Section 25 (1) Cybercrime (Prohibition, Prevention, Etc.) Act 2015.

¹¹⁸ Guidelines for ISPs, paragraph 12; See also, *Open Internet Order 2015*, paragraph 304.

¹¹⁹ Section 8.7 of the *Open Internet Order 2015* provides that; “*A person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not impair or degrade lawful Internet traffic*

impairing lawful internet traffic unless under condition of reasonable network management. Throttling is defined by the Draft Code as “*Network practices where data upload and download rates for specific services are internationally restricted*”.¹²⁰ Without reasonable network management, throttling is likely to result in the degradation of an end-user’s internet experience.¹²¹ The primary objective served by the no-throttling rule is to avoid situations where an IASP is able to circumvent the no-blocking rule through the degradation of end-users’ experience by effectively preventing the delivery of particular content and/or services over the internet. According to the FCC, examples of conduct that constitutes throttling would be any conduct engaged by an IASP in the absence of reasonable network management, that impairs, degrades, slows down, or renders effectively unusable particular content, services, applications or devices.¹²²

3.5 No preferential data prioritization

An Internet Access Service Provider shall not engage in preferential data prioritization under any circumstances.

Both Section 3.5 of the Draft Code and Section 8.9 (a) of the *Open Internet Order 2015* prohibit prioritization in almost identical terms.¹²³ Accordingly, Section 3.5 of the Draft Code will bar IASPs from engaging in preferential data prioritization. As stated above in Part II of this report, the Draft Code in Section 1.4 defines preferential data prioritization as “*the practice of granting preferential treatment to selected network data within the same service category based on the data’s origin, business agreements between IASPs and other entities, other commercial considerations, or any other consideration that do not qualify as reasonable network management*”. This definition is drafted broadly in that it covers situations in which an IASP accepts monetary consideration from a third-party CAP to manage its network in a manner that favours the CAP’s content or services. This definition also forbids an IASP from managing its network in such a manner that favors the content, applications, services or devices of an affiliated entity. The only exception to the no-preferential data prioritization rule is only if implemented under the guise of reasonable network management practices.

Without reasonable traffic management, preferential data prioritization represents a threat to the openness of the internet as it potentially categorizes traffic management practices into a “fast lane” category, especially for CAPs that can afford to pay and a “slow lane” category or conversely a degraded QoS lane (colloquially referred to as the internet “dirt road”) for the rest

on the basis of Internet content, application, or service, or use of a non-harmful device, subject to reasonable network management.”

¹²⁰ Section 1.4.

¹²¹ See, *Open Internet Order 2015*, paragraphs 119 – 121.

¹²² *Ibid.*, paragraph 120.

¹²³ Section 8.9 (a) of the *Open Internet Order 2015* provides that: “A person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not engage in paid prioritization”.

of the end-users.¹²⁴ It also gives IASPs the incentive to intentionally degrade QoS in a manner that impedes market competition in order to induce end-users to pay for the fast lane,¹²⁵ otherwise they face the risk of being constructively foreclosed from effectively accessing the internet on a non-discriminatory basis, or in the case of CAPs from delivering content over the internet. This line of argument has been made by vimeo, an an ad-free open video platform¹²⁶ that paid prioritization would particularly “*disadvantage user-generated video and independent filmmakers*” that lack the resources of major film studios to pay priority rates for dissemination of content.¹²⁷ In fact, the US Court of Appeals for the District of Columbia Circuit, *per* Tatel stated in *Verizon v. FCC*¹²⁸ that “[IASPs] also have powerful incentives to accept fees from [CAPs], either in return for excluding their competitors or for granting them prioritized access to end users”.¹²⁹

3.6 Zero-Rating

Zero-rating may be permissible to the extent that it furthers the objectives of the Act, particularly Section 1 (c), and policy objectives of Universal Access contained in the National Information and Communications Technology Policy 2012 and the Nigeria ICT Roadmap 2017 - 2020, in accordance with the provisions of the Competition Practice Regulations 2007, and with the approval of the Commission.

Under this provision, an IASP is not prohibited from offering zero-rated services, provided such services furthers the objectives of the Communications Act in Section 1 (c), and policy objectives of universal access contained in the National Information and Communications Technology Policy 2012 and the Nigeria ICT Roadmap 2017 - 2020, in accordance with the provisions of the Competition Practice Regulations 2007, and is done with the approval of the *Telecoms* Commission. Absent the approval of the *Telecoms* Commission which is required prior to an IASP commencing zero-rating, the rest of the requirements are not cumulative requirements as any of them can form the basis for the *Telecoms* Commission’s approval. For example, the *Telecoms* Commission’s approval pursuant to Section 1 (c) of the Communications Act, the zero-rated service shall be required to “*promote the provision of modern, universal, efficient, reliable, affordable and easily accessible communications services and the widest range thereof throughout Nigeria*”, thus the zero-rated service proposed to be offered by an IASP seeking the *Telecoms* Commission’s approval under this section must drive the uptake of

¹²⁴ Body of European Regulators of Electronic Communications (BEREC). (2012, December 6). ‘An assessment of IP interconnection in the context of Net-Neutrality’ [WWW document] URL https://berec.europa.eu/eng/document_register/subject_matter/berec/reports/1130-an-assessment-of-ip-interconnection-in-the-context-of-net-neutrality (visited 2014, March 16), p. 32.

¹²⁵ *Ibid.*, p. 60.

¹²⁶ <https://en.wikipedia.org/wiki/Vimeo>

¹²⁷ *Open Internet Order 2015*, paragraph 126.

¹²⁸ 740 F.3d 623 (D.C. Cir. 2014).

¹²⁹ P. 37.

internet service and/or deepen internet penetration in unserved or underserved areas in Nigeria.¹³⁰

It is however unclear whether a zero-rated plan that is based on a commercial consideration between a CAP and an IASP normally referred to as “*a sponsored data plan*”, or part of a vertically integrated offer by an IASP would satisfy the requirement of Section 3.6, and/or the particular criteria the *Telecoms Commission* will apply in its determination of whether it satisfies Section 3.6, and thus eligible for regulatory approval. This is because, in the former scenario, only financially strong big CAPs can afford to pay the IASP for this service, thereby leading to a competitive disadvantage for smaller CAPs who cannot afford to pay, in the latter scenario the concern is that the vertically integrated IASP is engaging in discrimination in favour of its own content to the disadvantage of the non-zero-rated content offered by competing CAPs.¹³¹

3.7 Acceptable Traffic Management Practices

a) *Circumstances that may warrant the use of reasonable network management by an Internet Access Service Provider are as follows:*

- I. *In order to preserve the integrity and security of the network, of services provided via that network, and of the terminal equipment of internet users;*
- II. *In order to prevent impending network congestion or mitigate the effects of temporary network congestion, provided that equivalent categories of traffic are treated equally;*
- III. *In order to comply with a law, court order or regulatory obligation.*

b) *Reasonable network management practices in this context shall demonstrate the following characteristics:*

- I. *There shall be a legitimate and demonstrable technical need for the practice;*
- II. *The practice shall have a specific and stated technical goal;*

¹³⁰ See Alliance for Affordable Internet (2016, 3 June 2016). ‘The Impacts of Emerging Mobile Data Services in Developing Countries’ [WWW document] URL <https://a4ai.org/the-impacts-of-emerging-mobile-data-services-in-developing-countries/> (visited 2019, February 4), p.7.

¹³¹ Jan Krämer, Martin Peitz. *supra*, p. 10; See generally *Open Internet Order 2010*, paragraph 76.

- III. *The effect of the practice shall be proportional to the need it intends to address, and considered a reasonable effect by the majority of consumers;*
- IV. *There shall be full disclosure with regard to the practice, in a manner sufficient for consumers to develop an informed opinion on whether, when, and how the practice will affect their service;*
- V. *The practice shall be based on globally accepted standards.*

Section 3.7 sets out circumstances, that warrant the use of, and the specific characteristics of reasonable network management practices. In the light of this, it bears emphasis to note that reasonable network management is an exception to the no-blocking, no-throttling and no-preferential data prioritization rules set out respectively in Sections 3.3, 3.4 and 3.5 of the Draft Code to the extent that it is deemed “reasonable”. Traffic management refers to “*specific function that is offered at a specific layer. The function should determine whether traffic is transmitted and/or the rate at which traffic is transmitted*”,¹³² and includes “(1) nodal traffic control functions such as traffic conditioning, queue management, scheduling, and (2) other functions that regulate traffic flow through the network or that arbitrate access to network resources between different packets or between different traffic streams”.¹³³ On the other hand, the Draft Code as explained above defines reasonable network management as a “*traffic management practice designed to enhance or protect quality of experience for consumers while complying with global standards for open internet*”. As highlighted above traffic management practices can be used by an IASP to “*implement both limiting measures (such as blocking and throttling) and enabling measures (such as routing and traffic forwarding)*.”¹³⁴

Irrespective of the semantics involved in the meaning of “traffic management practice” and “reasonable network management”, whether a traffic management practice is “reasonable” within the meaning of the Draft Code would depend to a great extent on whether the basis of its implementation satisfies the requirements set forth in Section 3.7. In other words, if a traffic management practice meets any of these criteria, it would constitute reasonable network management. According to BEREC when assessing the reasonableness of a traffic management practice, it takes into consideration the degree of end-user control, application agnosticism and

¹³² Jordan, Scott. (2010, October 1). ‘A Framework for Classification of Traffic Management Practices as Reasonable or Unreasonable’ [WWW document] URL <https://escholarship.org/content/qt3ng6r1fw/qt3ng6r1fw.pdf> (visited 2018, November 26), p. 12.4.

¹³³ D. Awduche, *et al.* (2002, May). ‘Overview and Principles of Internet Traffic Engineering’ [WWW document] URL <https://www.ietf.org/rfc/rfc3272.txt> (visited 2017, March 6), p. 4.

¹³⁴ Body of European Regulators of Electronic Communications. (BEREC). (2012, November 26). ‘Guidelines for Quality of Service in the Scope of Net-Neutrality’, *supra*, p. 5.

full blocking vs. moderate throttling,¹³⁵ while on the other hand the FCC in the *Open Internet Order 2010* stated that it would consider end-user control and use-(or application- agnostic) treatment in its evaluations of network management practices.¹³⁶ According to BEREC, traffic management practices that an end-user can control may often be seen as more reasonable than measures that are unilaterally taken by an IASP.¹³⁷

However under the Draft Code, the Telecoms Commission will evaluate reasonable network management practices on the following basis. Pursuant to Section 3.7 (a) of the Draft Code, the circumstances in which reasonable network management is deserving are as follows;

In order to preserve the integrity and security of the network, of services provided via that network, and of the terminal equipment of internet users;

On this basis, reasonable network management may be implemented to maintain network security and integrity, and of the terminal equipment of end-users. In this circumstance, reasonable network management is applied as an efficiency enhancing measure to optimize network performance and enhance end-user experience.¹³⁸ Some examples of the application of reasonable traffic management are to prevent a denial of service (DoS) attack or to block unsolicited internet communications directed at the end-user.¹³⁹

In order to prevent impending network congestion or mitigate the effects of temporary network congestion, provided that equivalent categories of traffic are treated equally;

This requires that reasonable network management be implemented both proactively to prevent impending network congestion and reactively as a remedial measure to mitigate the effects of temporary network congestion. Network congestion occurs in IP networks when the traffic payload exceeds the bandwidth available on the network, resulting in a failure of the packets to reach their intended destination (packet loss).¹⁴⁰ A network congestion could result from end-users' use of bandwidth intensive applications¹⁴¹ or the inability of the IASP to meet the bandwidth capacity demand of end-users.¹⁴²

¹³⁵ Body of European Regulators of Electronic Communications (BEREC). (2011, December 8). 'A Framework for Quality of Service in the Scope of Net-Neutrality' BoR (11) 53 [WWW document] URL https://berec.europa.eu/doc/berec/bor/bor11_53_qualityservice.pdf (visited 2019, January 3), p. 19.

¹³⁶ Paragraph 87.

¹³⁷Body of European Regulators of Electronic Communications (BEREC). (2011, December 8). 'A Framework for Quality of Service in the Scope of Net-Neutrality' BoR (11) 53, *supra*.

¹³⁸ BEREC Report on differentiation practices and related competition issues in the scope of net-neutrality, *supra*, p. 28.

¹³⁹ See also Section 6.2 of the Draft Code on the use of spam filters by IASPs.

¹⁴⁰ Lefteris Mamatras, Tobias Harks, Vassilis Tsaoussidis, 'Approaches to Congestion Control in Packet Networks' *Journal of Internet Engineering*, vol. 1, no. 1 (2007), pp. 22 - 33, p. 22.

¹⁴¹ Christopher S. Yoo, 'Network Neutrality, Consumers, and Innovation' *University of Chicago Legal Forum*, Volume 2008, Issue 1, Article 5 (2008), pp. 179 - 262, p. 205.

¹⁴² Katerina Maniadaki, *supra*, p. 17.

Lastly, it is equally important to note that the reference to the equal treatment of equivalent traffic in reducing the effects of network congestion means that an IASP is prohibited by this provision from targeting the specific use of an application that may have been implicated in the network congestion but rather, the IASP should not discriminate among specific uses of the network or classes of uses (use/application agnostic).¹⁴³

In order to comply with a law, court order or regulatory obligation.

This will require that reasonable network management be applied to fulfil legal obligations prescribed by a provision of law, a court or by a regulation. As an example, the Draft Code in Sections 5.3 and 7.3, respectively require an IASP to block access to child sexual abuse content and unlawful content. In this circumstance the traffic management practice by the IASP will be deemed reasonable.

In addition, pursuant to Section 3.7 (b), reasonable network practices must have the following characteristics

There shall be a legitimate and demonstrable technical need for the practice;

As explained above the recognized basis for implementing reasonable network management practices are stated in Section 3.7 (a) (I) – (III) of the Draft Code, thus any deviation from these provisions will likely fail the legitimacy and demonstration test of this provision.

The practice shall have a specific and stated technical goal;

The technical goal sought to be addressed by reasonable network practices must be specific, for instance reasonable network management could be implemented with the primary aim of enhancing end-users' experience while online or to reallocate network resources to deserving applications such as specialized services or non-BIAS. In addition, the specificity of the practice shall be disclosed to end-users.

The effect of the practice shall be proportional to the need it intends to address, and considered a reasonable effect by the majority of consumers;

The proportionality of a reasonable network management practice involves the consideration of several factors including if in the case of network congestion, whether it is implemented during only network congestion,¹⁴⁴ whether it genuinely seeks to address network congestion,¹⁴⁵

¹⁴³ *Ibid.*; See also *Open Internet Order 2010*, paragraph 73.

¹⁴⁴ Katerina Maniadaki, *supra*, p. 258.

¹⁴⁵ *Ibid.*

whether it is applied discriminatorily,¹⁴⁶ whether there exist a more convenient and efficient alternative to reasonable network management,¹⁴⁷ or whether there exist a readily available structural option for overcoming a reasonable network management practice.¹⁴⁸

There shall be full disclosure with regard to the practice, in a manner sufficient for consumers to develop an informed opinion on whether, when, and how the practice will affect their service;

This requires that all reasonable network management practice must be disclosed in advance to end-users to enable them form an informed opinion on its effects.

The practice shall be based on globally accepted standards.

The language used in this provision is very broad and subject to multiple interpretations, however, it will grant the Telecoms Commission a very wide discretion in making a choice as to the particular globally accepted standard it will apply when implementing reasonable network management practice.

¹⁴⁶ *Ibid.*

¹⁴⁷ *Ibid.*, p. 259.

¹⁴⁸ *Ibid.*, p. 260.

IV. The Competition Framework in Nigeria's Telecommunications Market

The existing competition framework applicable to the telecommunications sector in Nigeria are;

The Federal Competition and Consumer Protection Act 2018

The Federal Competition and Consumer Protection Act 2018 (the Competition Act) was signed into law on 30 January 2018 by the President of the Federal Republic of Nigeria.¹⁴⁹ The Competition Act in its explanatory memorandum seeks to provide for the establishment of the Federal Competition and Consumer Protection Commission (the Competition Commission) and for the promotion in the Nigerian markets at all levels by eliminating monopolies, prohibiting abuse of a dominant market position and penalizing other restrictive trade and business practices.

The Competition Act has the following objectives;¹⁵⁰ promote and maintain competitive markets in the Nigerian economy; promote economic efficiency; protect and promote the interests and welfare of consumers by providing consumers with wider variety of quality products at competitive prices; prohibit restrictive or unfair business practices which prevent, restrict or distort competition or constitute an abuse of a dominant position of market power in Nigeria; and contribute to the sustainable development of the Nigerian economy.

The Competition Act applies to all undertakings and all commercial activities within, or having effect within Nigeria.¹⁵¹ In addition, all agencies of the Federal Government of Nigeria (FGN) engaged in commercial activities, and a body corporate in which the FGN or government of a state or an agency of the FGN or any state or local government has a controlling interest where such body engages in economic activities will come within the scope of the Act.¹⁵² In addition, the Competition Act has an extra-territorial reach to conducts committed outside of Nigeria by a citizen of Nigeria or a person ordinarily resident in Nigeria; a body corporate in Nigeria carrying on business within Nigeria; any person in relation to the supply or acquisition of goods or services by that person into or within Nigeria; or any person in relation to the acquisition of

¹⁴⁹ Omololu Ogunmade. (2019, February 7). 'Buhari Signs Federal Competition, Consumer Protection Bill' [WWW document] URL <https://www.thisdaylive.com/index.php/2019/02/07/buhari-signs-federal-competition-consumer-protection-bill/> (visited 2019, February 7).

¹⁵⁰ Section 1.

¹⁵¹ Section 2 (1).

¹⁵² Section 2 (2).

shares or other assets outside of Nigeria that results in the change of control of a business, part of a business or any asset of a business in Nigeria.¹⁵³

In seeking to achieve its objectives the Competition Act establishes the Competition Commission¹⁵⁴ and the Competition and Consumer Protection Tribunal (the Competition Tribunal) respectively charged with enforcing the provisions of the Competition Act and adjudication over conducts prohibited under the Competition Act.

In terms of regulating market competition, the Competition Act has three main prohibitions. The Act in Section 59 prohibits restrictive agreements, that is agreements among undertakings or a decision of an association of undertakings that has the purpose of actual or likely effect of preventing, restricting or distorting competition in any market. Section 59 (2) of the Competition Act contains a list agreements that constitutes a restrictive agreement. This list although illustrative is not exhaustive. Lastly, section 60 of the Competition Act provides several types of agreements that are exempted from the application of Section 59 upon authorization of the Competition Commission.

The second prohibition is contained in Section 72 (1) of the Competition Act which prohibits the abuse by one or more undertakings of the dominant position. Section 72 (2) of the Competition Act further describes circumstances in which an abuse of a dominant position has occurred.

Thirdly, the Competition Act requires that all mergers or proposed mergers occurring in Nigeria be notified to the Competition Commission for review and if necessary approval.¹⁵⁵ The primary aim of reviewing mergers by the Competition Commission is to ensure that only mergers that do not substantially lessen competition are approved with or without conditions attached to the approval.

Lastly, the provisions of Competition Act overrides the provision of any other existing law in Nigeria with the exception of the Constitution.¹⁵⁶ In addition, the Competition Act establishes a concurrent jurisdiction with another government agency (including the Telecoms Commission) charged with regulating competition, with the Competition Commission having precedence over and above the relevant government agency.¹⁵⁷

The Communications Act

The Communications Act was signed into law on 8 July 2003. In its explanatory memorandum, the Communications Act provides, amongst other things for the; repeal of the Nigerian

¹⁵³ Section 2 (3).

¹⁵⁴ Section 3 (1).

¹⁵⁵ Section 93 (1).

¹⁵⁶ Section 104.

¹⁵⁷ Section 105 (2).

Communications Commission Act 1992 as amended; reform of the Telecoms Commission as an independent regulatory body for the communications sub-sector; establishment of the National Frequency Management Council; and establishment of the Universal Service Fund. Accordingly, the Act establishes the Telecoms Commission. Under the Communications Act, the Telecoms Commission is charged with the responsibility of regulating the communications sector¹⁵⁸ and has a number of specified functions. The Communications Act also makes detailed provisions for licenses,¹⁵⁹ establishment and function of the National Frequency Management Council,¹⁶⁰ powers and procedures of the Commission,¹⁶¹ rule making powers of the Telecoms Commission,¹⁶² the Telecoms Commission's power to resolve communications disputes,¹⁶³ the Telecoms Commission's exclusive competence on competition laws,¹⁶⁴ interconnection,¹⁶⁵ access,¹⁶⁶ quality of service,¹⁶⁷ tariff rate regulation,¹⁶⁸ universal service provision¹⁶⁹ and technical regulation.¹⁷⁰

Under the Communications Act, Section 90 gives the *Telecoms* Commission the exclusive authority to enforce competition laws and regulations in the Nigerian telecommunications sector. Section 91 (1) goes further in prohibiting a licensee from engaging in any conduct which has the purpose or effect of substantially lessening competition in any aspect of Nigeria's telecommunications sector, thus the standard used by the *Telecoms* Commission for evaluating an anti-competitive conduct is the "substantially lessening competition" test. Accordingly, Section 91 (2) of the Communications Act authorizes the *Telecoms* Commission publish from time to time, guidelines or regulations which clarify the meaning of "substantial lessening of competition" in the Nigerian telecommunications sector and such guidelines or regulations may include references to;

- a) the relevant economic market;
- b) global trends in the relevant market;
- c) the impact of the conduct on the number of competitors in a market and their market shares;

¹⁵⁸ Section 3 (1).

¹⁵⁹ Chapter IV.

¹⁶⁰ Sections 26 and 28.

¹⁶¹ Chapter V.

¹⁶² Sections 70 – 72.

¹⁶³ Section 73.

¹⁶⁴ Section 90.

¹⁶⁵ Sections 96 – 100.

¹⁶⁶ Sections 101 – 103.

¹⁶⁷ Section 104.

¹⁶⁸ Sections 108 – 111.

¹⁶⁹ Sections 112 – 120.

¹⁷⁰ Chapter VIII

- d) the impact of the conduct on barriers to entry into the market;
- e) the impact of the conduct on the range of services in the market;
- f) the impact of the conduct on the cost and profit structures in the market; and
- g) any other matters which the *Telecoms* Commission is satisfied are relevant.

The Communications Act in Section 91 (3) also prohibits a licensee from entering 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 licensee. Additionally Section 91 (4) of the Communications Act provides that a licensee shall not, at any time or in any circumstance, make it a condition for the provision or supply of a product or service in a telecommunications market that the person acquiring such product or service in the communications market is also required to acquire or not to acquire any other product or service either from himself or from another person.

The Communications Act also empowers the *Telecoms* Commission to determine that a licensee is in a dominant position in any aspect of the Nigerian telecommunications market.¹⁷¹ In this regard, the *Telecoms* Commission may publish guidelines and regulations which clarify how it shall apply the test of “dominant position” to licensees,¹⁷² and the guidelines and regulations may specify the matters which the *Telecoms* Commission may take into account, including;¹⁷³

- a) the relevant economic market;
- b) global technology and commercial trends affecting market power;
- c) the market share of the licensee;
- d) the licensee’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 which the *Telecoms* Commission is satisfied are relevant.

Lastly, the *Telecoms* Commission is authorized by the Communications Act to direct a licensee in a dominant position in the communications market to cease a conduct in that market which

¹⁷¹ Section 92 (1).

¹⁷² Section 92 (2).

¹⁷³ Section 92 (3).

has or may have the effect of substantially lessening competition in any telecommunications market and to implement appropriate remedies.¹⁷⁴

The Competition Practice Regulation 2007

The Competition Practice Regulations 2007 (the Telecoms Competition Regulations) was enacted by the *Telecoms* Commission pursuant to its powers under the Communications Act, and its scope is to provide a regulatory framework for the promotion of fair competition in the communications sector, and protection against the misuse of market power or other anti-competitive practices.¹⁷⁵

Accordingly, the Telecoms Competition Regulations provides further guidance on the standards and procedures which the *Telecoms* Commission will apply in determining whether particular conduct constitute a substantial lessening of competition for the purposes of the Communications Act;¹⁷⁶ clarify what agreements or practices the *Telecoms* Commission will find to be anti-competitive, and so prohibited under the Communications Act;¹⁷⁷ provide further guidance on the standards and processes which the *Telecoms* Commission will apply in determining whether a licensee has a dominant position in one or more communications markets;¹⁷⁸ clarify what conduct the *Telecoms* Commission will find to be an abuse of dominance, and subject to a “cease conduct” direction under the Communications Act;¹⁷⁹ and provide further guidance on the merger review procedures to be applied by the *Telecoms* Commission.¹⁸⁰ The Telecoms Competition Regulations also sets out the factors to consider in assessing whether a conduct (or any conduct) constitute a substantial lessening of competition¹⁸¹and a non-exhaustive list of conducts deemed by the *Telecoms* Commission to result in a substantial lessening of competition.¹⁸²

In addition, the Telecoms Competition Regulations prohibits anti-competitive agreements and practices, and the abuse of a dominant position.¹⁸³ For this purpose, the Telecoms Competition Regulations authorizes the *Telecoms* Commission to review other forms of agreement and related practices that have the purpose or effect of substantially lessening competition in a relevant communications market and mergers and acquisition involving a licensee¹⁸⁴ and sets out the criteria considered by the *Telecoms* Commission in determining whether any person

¹⁷⁴ Section 92 (4).

¹⁷⁵ Regulation 1.

¹⁷⁶ Regulation 2 (a).

¹⁷⁷ Regulation 2 (b).

¹⁷⁸ Regulation 2 (c).

¹⁷⁹ Regulation 2 (d).

¹⁸⁰ Regulation 2 (e).

¹⁸¹ Regulations 6 and 7.

¹⁸² Regulation 8. However, these conducts should be read as non-exhaustive in the light of the provision of Section 91 (1) of the Act prohibiting licensees from engaging in “any conduct” which has the purpose or effect of substantially lessening competition in any aspect of the Nigerian communications market.

¹⁸³ Regulations 11 and 23.

¹⁸⁴ Regulations 12 and 27.

occupies a dominant position in a relevant communications market.¹⁸⁵ The Telecoms Competition Regulations also sets out the criteria considered by the *Telecoms* Commission in defining a relevant communications market.¹⁸⁶

Finally, the Telecoms Competition Regulations provides penalty for its breach¹⁸⁷ and the power of the *Telecoms* Commission to give directions to remedy the actions or activities of a licensee constituting an abuse of its dominant position or an anti-competitive practice.¹⁸⁸

¹⁸⁵ Regulation 18.

¹⁸⁶ Regulation 19.

¹⁸⁷ Regulation 33.

¹⁸⁸ Regulation 34.

V. Competition Regulation as a Regulatory Response to Net-Neutrality Violations

As explained in Part III, to protect net-neutrality in Nigeria the telecommunications licenses and the Draft Code both impose certain positive and negative obligations on IASPs. These obligations are; obligation not to show undue preference to or exercise undue discrimination;¹⁸⁹ obligation of transparency;¹⁹⁰ obligation not to discriminate;¹⁹¹ obligation not to block;¹⁹² obligation not to throttle;¹⁹³ obligation not to engage in preferential data prioritization;¹⁹⁴ and to conditionally zero-rate.¹⁹⁵ However, because net-neutrality works to ensure that all network traffic are treated equally, thus any deviation from this constitutes an incidence of network discrimination which forms the cornerstone of most net-neutrality violation,¹⁹⁶ and will be caught by the foregoing obligations with the exception of the transparency obligation. Accordingly, an IASP that throttles, blocks or zero-rates a particular content online essentially engages in discrimination.

In competition regulation, discrimination is a prohibited conduct as it is capable of substantially lessening of competition or will have a detrimental effect on competition in the affected market. Particularly, the Competition Act authorizes the Competition Commission in Section 18 (3) to prohibit the discrimination or preferences in prices or other related matters, while the Telecoms Competition Regulation in Regulation 8 (b) provides that discriminating in the provision of interconnection or other communications services or facilities to competing Licensees, except under circumstances that are objectively justified based on supply conditions, such as discrimination based on differences in the costs of supply is a conduct deemed to result in a substantial lessening of competition.¹⁹⁷ Where competition is substantially lessened in a market, it results in several harms which is borne by consumers and/or competitors within that market.

¹⁸⁹ Condition 4. 1 of the WWAS License, Condition 5.1 ISP License, UAS License and DM License.

¹⁹⁰ Section 3.1 of the Draft Code.

¹⁹¹ Section 3.2 of the Draft Code.

¹⁹² Section 3.3 of the Draft Code.

¹⁹³ Section 3.4 of the Draft Code.

¹⁹⁴ Section 3.5 of the Draft Code.

¹⁹⁵ Section 3.6 of the Draft Code.

¹⁹⁶ Timothy J. Brennan, 'Network Neutrality or Minimum Quality? Barking Up the Wrong Tree—and Finding the Right One', *CPI Antitrust Chronicle*, March (2), (2012), pp. 1 – 9, p. 2.

¹⁹⁷ However, it worth to note that it is still not clear whether the scope of the Communications Act and the Telecoms Competition Regulations apply within the internet ecosysystem in Nigeria and will apply to CAPs whose services as at the time of this Report are not subject to a license.

This argument if transposed to the net-neutrality debate means that where an IASP engages in a discriminatory conduct, it is likely to negatively impact market competition to the extent that specific market conditions exist. The same holds true if net-neutrality obligations are not enforced by the regulator, thus this report argues that a failure to enforce net-neutrality obligations will affect competition in the internet ecosystem in the same manner that a violation of net-neutrality obligations will and vice versa, and that the market effects flowing from a violation (or under-enforcement) of net-neutrality obligations may also be addressed by the application of the substantive principles of traditional competition regulations.¹⁹⁸ This argument is without prejudice as to whether or not the enforcing authority is the Competition Commission or Telecoms Commission. For the discriminatory conduct of an IASP to have an effect on competition, the following market conditions must either be present;

Market Power

Market power is the ability of a seller to charge prices without being restrained by competitive pressure.¹⁹⁹ An IASP will have market power where it is able to behave independently from its competitors and users.²⁰⁰ According to the Competition Act, “*an undertaking is considered to be in a dominant position if it is able to act without taking account of the reaction of its customers, consumers or competitors*”,²⁰¹ while the Telecoms Competition Regulations provides that Licensees (including IASPs) having the ability to unilaterally restrict output, raise prices, reduce quality or otherwise and to act independent of competitors or consumers will be identified by the *Telecoms* Commission as having market power in the defined telecommunications market.²⁰² The ability of an IASP to act independent of competitors or consumers is evidence that the IASP is not constrained by competition in the relevant communications market, and thereby exercises substantial market power in that market.²⁰³ Market share is one of the best indicator for gauging market power and it is calculated on the basis of the percentage of the market controlled by the firm in question, thus a firm with a large share of a properly defined market presumptively has market power.²⁰⁴

Where an IASP exercises market power in a telecommunications market, there is the potential concern that the market power that it weilds affords it an opportunity to engage in abusive conducts and/or discriminatory practices that can undermine net-neutrality, thus resulting in

¹⁹⁸ Alexiadis, Peter. (2016). ‘EU Net-Neutrality Policy and the Mobile Sector: The Need for Competition Law Standards’, *supra*, p.1; pp. 27-31.

¹⁹⁹ Organisation for Economic Co-operation and Development (OECD). (2003, January 17). ‘Indicators for the Assessment of Telecommunications Competition’ [WWW document] URL <https://www.oecd.org/sti/broadband/2496809.pdf> (visited 2015, April 22), p. 7.

²⁰⁰ BEREK Report on differentiation practices and related competition issues in the scope of net-neutrality, *supra*, p. 43.

²⁰¹ Section 70 (1).

²⁰² Regulation 18 (1).

²⁰³ See Einer Elhauge, Damien Geradin, *Global Antitrust Law and Economics* (New York, Foundation Press, 2007), p. 269.

²⁰⁴ Herbert Hovenkamp, *Federal Antitrust Policy: The Law of Competition and its Practices* (Thompson/West, 2005), p. 83.

harm to both end-users including CAPs and generally market competition.²⁰⁵ This is particularly true as both competition law and competition economics agree that each individual IASP enjoys market power for terminating traffic to subscribers on its network, thus intervening on the basis of market power may become necessary to prevent an IASP from abusing this market power.²⁰⁶ The range of such discriminatory conducts varies from blocking of VoIP applications to degrading the QoS of end-users.

Vertical integration

Vertical integration in this report is used broadly to include all forms of commercial, joint venture and ownership agreements (or arrangements) between an IASP and another CAP (or TEM). In competition regulation, an agreement or arrangement that gives rise to vertical integration (a vertical agreement) is subject to review in order to assess its effect on competition. Unlike the market power situation which involves the unilateral conduct of an IASP that enjoys market power, vertical integration in this context will involve multiple participants within the internet ecosystem, at least one of which must be an IASP.

A vertically integrated IASP has a very strong incentive to engage in a discriminatory conduct by blocking or throttling third-party contents, particularly those that compete with contents affiliated with the IASP.²⁰⁷ Additionally, from a competition regulation perspective, the conduct of an IASP in blocking or throttling third-party contents could also amount to a constructive “refusal to deal” with third-party CAPs.²⁰⁸ A constructive refusal to deal while not a case of straight forward refusal by a firm that enjoys market power, but involves conduct by that firm to offer terms of service that are so uneconomic or unreasonable that they amount to a refusal.²⁰⁹ The resulting effect of this discriminatory conduct in this circumstance would be (vertical) foreclosure which excludes third-party CAPs operating in the downstream CAPs market, and reduces their incentive to compete effectively in this market.²¹⁰

This concern for the occurrence of vertical foreclosure is not unfounded in Nigeria in view of the fact that the 4 major MNOs collectively control more than 99% of the market for retail mobile internet access,²¹¹ and are vertically integrated with firms that also compete with CAPs

²⁰⁵ BEREC Report on differentiation practices and related competition issues in the scope of net-neutrality, *supra*, p. 41.

²⁰⁶ Jonathan E. Nuechterlein, ‘Antitrust Oversight of an Antitrust Dispute: An Institutional Perspective on the Net-Neutrality Debate’, *supra*, p. 34.

²⁰⁷ *Ibid.*; See also, Herbert Hovenkamp, ‘Antitrust and Information Technologies’, *Florida Law Review*, Issue 2, Article 9 (2017), pp. 419 – 465, p. 446; *Open Internet Order 2015*, paragraph 140.

²⁰⁸ Alexiadis, Peter. (2016). ‘EU Net-Neutrality Policy and the Mobile Sector: The Need for Competition Law Standards’, *supra*, p. 11.

²⁰⁹ Organisation for Economic Co-operation and Development (OECD). (2007, October 4). ‘Roundtable on Refusal to Deal’ [WWW document] URL <https://www.ftc.gov/sites/default/files/attachments/us-submissions-oecd-and-other-international-competition-fora/usrefdeal.pdf> (visited 2016, August 21), p. 4.

²¹⁰ American Bar Association (ABA), *supra*, p. 37.

²¹¹ Bolaji Samuel. (2018, June 3). ‘Industry Map: Nigeria Internet Service Providers by Sector Structure, Size, Competition, Penetration Rates & More’ [WWW document] URL

in the downstream market. Moreover, this view is consistent with the principle of “baxter’s law” which postulate that a vertically integrated company that is subject to price cap on its platform services (as are IASPs in Nigeria) may well have the incentive to discriminate against rival applications providers in order to recover monopoly profits that those price ceilings preclude it from recovering in the platform market.²¹²

In 2015 when the FCC issued the *Open Internet Order 2015*, it made clear that an IASP that engages in discriminatory practices that undermines market competition in the market for content and/or devices, constrains the ability of CAPs to reach end-users and retards innovation.²¹³ In the absence of these conducts, enhanced competition would provide greater choice for end-users in content and promote utility of internet access services for both end-users and CAPs.²¹⁴ According to the FCC, when evaluating the effects of these conducts, the extent of the firm’s vertical integration and its relationship with affiliated firms will be taken into consideration.²¹⁵ In the light of this, competition law may be used to challenge a vertical agreement if it results in the foreclosure of a sizeable part of the relevant market or it significantly raises a rival’s cost of doing business in the relevant market.²¹⁶

The range of conducts in violation of the net-neutrality principles that are capable of undermining competition in the internet ecosystem, and how competition regulation in Nigeria may effectively respond to these conducts are set out below with hypothetical scenarios under the different market conditions.

Market power

I. *Blocking of VoIP applications by an IASP*

To the extent that an IASP enjoys market power in the market for retail mobile internet access service (or mobile telephone service), it has the incentive and ability to abuse its market power by blocking VoIP applications.²¹⁷ The primary motive for engaging in this conduct is to forestall the erosion of its market share in the market for mobile telephone services since VoIP applications are regarded by end-users as substitutable with mobile telephone services, and whom may accordingly be willing to switch.²¹⁸ The resulting competition effect is that VoIP providers are foreclosed from operating in the market for

<https://brandspurng.com/2018/06/03/industry-map-nigeria-internet-service-providers-by-sector-structure-size-competition-penetration-rates-more/> (visited 2018, November 21).

²¹² Joseph Farrell, Phil Weiser, ‘Modularity, Vertical Integration, and Open Access Policies: Towards a Convergence of Antitrust and Regulation in the Internet Age’ *Harvard Journal of Law and Technology*, vol. 17, no.1 (2003), pp. 86 – 132, pp. 105 – 107.

²¹³ *Open Internet Order 2015*, paragraph 140.

²¹⁴ *Ibid.*

²¹⁵ *Ibid.*

²¹⁶ American Bar Association (ABA), *supra*, pp. 140 – 143.

²¹⁷ BERC Report on differentiation practices and related competition issues in the scope of net-neutrality, *supra*, p. 51.

²¹⁸ *Ibid.*, p. 52.

mobile telephone service²¹⁹ and the choice of end-users is constrained to only the mobile telephone service offered by the IASP.²²⁰

This particular conduct would be in breach of the no-blocking rule imposed by Sections 2 (b) and 3.3 of the Draft Code, and it is unlikely to be justified on the basis of reasonable network management. This conduct is exemplified in the Madison River case,²²¹ where Madison River may have considered VoIP as a reasonable substitute to its own voice telephone service and apparently blocked it because, obviously they had both the incentive and ability to do so.²²² As earlier explained, this conduct raises competition concern because it anti-competitively forecloses VoIP providers from operating in the market for mobile telephone services.²²³ In describing what it means for a competitor to be foreclosed from a market, the European Commission (EC) in *Wanadoo España v. Telefónica*²²⁴ said that “The establishment of foreclosure effects does not mean that rivals are forced to exit the market: it is sufficient that the rivals are disadvantaged and consequently led to compete less aggressively” (underlining for emphasis).²²⁵ In addition, a foreclosure will in most cases result in a price increase and reduction in consumer choice,²²⁶ especially if the VoIP application has a sizable number of users and there are no alternate VoIP providers.

However for the purpose of invoking competition regulation in this particular scenerio, it should be noted that the Competition Act does not expressly state that the blocking of VoIP applications by a dominant IASP constitutes an instance in which market power has been exercised in an abusive manner, but rather pursuant to Section 72 (1), prohibits one or more firms from abusing its market power. In addition, pursuant to Section 72 (2) (c) of the Competition Act, an abuse of market power occurs where one or more firms engage in an exclusionary act, if the anti-competitive effect of that act outweighs its technological efficiency and other pro-competitive gains. In competition regulation an exclusionary act is the ability of a firm to dictate the pace of competition in a market by preventing competitors from entering or significantly undermining the ability of existing

²¹⁹ Katerina Maniadaki, *supra*, p. 253.

²²⁰ BERC Report on differentiation practices and related competition issues in the scope of net-neutrality, *supra*.

²²¹ See Section 2 of this Report.

²²² However, in the absence of market power and if switching costs are low, Madison River’s conduct would be unprofitable and discliplined by end-users’ switching to competing IASPs.

²²³ *Restoring Internet Freedom Order 2018*, paragraph 145.

²²⁴ Case COMP/38.784.

²²⁵ Paragraph 586.

²²⁶ J. Scott Marcus. (2014, November). ‘Network Neutrality Revisited: Challenges and Responses in the EU and in the US’ [WWW document] URL [http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU\(2014\)518751](http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2014)518751) (visited 2016, October 21), p. 38.

efficient competitors from competing effectively, either by driving them out of the market or preventing them from expanding (foreclosure).²²⁷

Thus, this report contends that in this scenario, an IASP's conduct of blocking VoIP applications although not expressly provided in the Competition Act constitutes an incidence of an abuse of market power by the IASP and would be caught by Section 72 (2) (c) of the Competition Act insofar that it can be established that market power exists in the relevant market and the resulting harm negatively affected competition in the relevant market including its foreclosure effects.

In addition, the Communications Act may be triggered in this instance insofar as IASPs are subject to its provisions. In this regard, the Telecoms Commission may exercise any of its powers under the Commission Act, for instance it may choose to exercise its Section 34 (1) power authorizing the variation or imposition of additional conditions on the license held by an IASP (or IASPs),²²⁸ or on a competition regulation basis exercise its Section 92 (2) power directing a dominant IASP *"to cease a conduct in that market which has or may have the effect of substantially lessening competition in any communications market and to implement appropriate remedies"*.²²⁹

II. Degradation of QoS of individual applications

It is generally accepted that the ability of a firm to unilaterally reduce quality is an indicator of the market power the firm holds.²³⁰ An IASP could abuse the market power it enjoys in the market for retail mobile internet access service by employing traffic management practices in relation to certain individual applications on the internet and such practices are not deemed reasonable in the circumstance. This conduct may be employed with the intention of anti-competitively compelling end-users to pay for prioritized data services which enjoy a better QoS,²³¹ or to degrade the QoS of competing content.²³²

In any case, and depending on how the IASP may implement the degradation of QoS, this conduct is likely to be in direct contravention of any or all of Sections 3.2, 3.3, 3.4, 3.5 and 3.7 of the Draft Code which respectively, impose a no-discrimination obligation; impose a no-blocking obligation; impose a no-throttling obligation; prohibits

²²⁷ Liza Lovdahl Gormsen, 'Article 82 EC: Where are we coming from and where are we going to?', *The Competition Law Review*, Volume 2 Issue 2, (March 2006), footnote 11.

²²⁸ Readers are to note that this power is not competition regulation related.

²²⁹ Although the latter option is less preferable considering the fact that it is still not clear whether the internet and its content come within the regulatory purview of the Communications Act.

²³⁰ Katherine Kemp, *Misuse of Market Power: Rationale and Reform* (Cambridge University Press, 2018), p. 61.

²³¹ Body of European Regulators of Electronic Communications (BEREC). (2012, December 6). 'An assessment of IP interconnection in the context of Net-Neutrality', *supra*.

²³² Body of European Regulators of Electronic Communications. (BEREC). (2012, November 26). 'Guidelines for Quality of Service in the Scope of Net-Neutrality', *supra*, p. 53; *Restoring Internet Freedom Order 2018*, *supra*.

preferential data prioritization, and sets out the conditions warranting the use of acceptable traffic management practices. The resulting competition effect of this conduct is a loss of quality in the affected market, and the inability of end-users to switch to another competing IASP due to prohibitive switching costs and the network effects involved, which further limits market competition that would have otherwise existed absent this conduct²³³ In addition, there remains the real likelihood of a loss of business opportunity for CAPs whose applications suffer a degradation in QoS which in turn is capable of retarding innovation in the internet ecosystem generally.²³⁴

The same standard in the Competition Act for assessing the abuse of market power in the *blocking of VoIP applications* scenario would also apply in this scenario.

III. *Restriction on the use of certain internet ready applications on terminal devices*

An often-overlooked entity in the internet ecosystem that is pertinent to the net-neutrality debate are TEMs who may also be the developers of the operating system (OS) on which their device runs. For instance, let us consider the hypothetical scenario where only 2 internet browsers exist in the market; browsers A and browser B, either of which can be used to access the internet from a terminal device or smart-phone, but unfortunately the manufacturer of a particular smart-phone having market power in the market for smart-phones, has through its OS placed a restriction (based on commercial considerations) on the use of browser A on smart-phones that it manufactures. In essence, the manufacturer of these smart-phones has successfully restricted purchasers of its smart-phones who prefer to use browser A instead of browser B, from accessing the internet. This particular conduct infringes Section 2 (a) and (b) of the Draft Code. To the extent that this conduct favours browser B over A, it also infringes the no-discrimination rule set out in Section 3.2 of the Draft Code.

In other cases, the manufacturer of the smart-phone could through its OS prevent end-users who access the internet from its device, from accessing certain content on the internet. This particular conduct is in violation of the no-blocking rule of Sections 2 (b) and 3.3 of the Draft Code. In a role reversal, the developer of browser B with market power in the market for internet browser could actually impede end-users' access to the internet by making its browser incompatible with the OS of certain terminal devices as illustrated by *Case AT.40099 – Google Android* where Google was fined €4.34 billion for *inter alia*, anti-competitively preventing device manufacturers from using any alternative version of android that was not approved by Google, which practice reduced

²³³ BEREC Report on differentiation practices and related competition issues in the scope of net-neutrality, *supra*, p. 47.

²³⁴ Body of European Regulators of Electronic Communications. (BEREC). (2012, November 26). 'Guidelines for Quality of Service in the Scope of Net-Neutrality', *supra*, p. 45.

the opportunity for devices running on android forks to be developed and sold.²³⁵ This particular conduct is in violation of Section 2 (a) of the Draft Code.

As market power exist on the part of the manufacturer of the smart-phone or the developer of browser B, competition regulation can intervene if it is established that any of these conduct resulted in the foreclosure of either the manufacturer of browser A or the manufacturers of other terminal device as the case may be. In addition, end-user choice must have been constrained. Under both the Competition Act and Telecoms Competition Regulations, a discrimination and an abuse of a dominant position are prohibited conducts.

Vertical Integration

I. *Zero-rating affiliated content*

As earlier explained in Part II of this report, zero-rating refers to the conduct by an IASP to offer access to content online for free or at a substantially reduced cost. In other words, the charges for accessing the zero-rated content is excluded from the application of data charges. Zero-rating infringes Section 2 (a) of the Draft Code because it materially limits the right of end-users to access information and content, and use applications and services of their choice especially in situations where only a particular content is zero-rated rather than an entire category of content.²³⁶

In addition, because zero-rating constitutes both price discrimination and technical discrimination,²³⁷ it contravenes the no-discrimination rule set out in Sections 2 (c) and 3.2 of the Draft Code to the extent that it fails to satisfy the conditions set out in Section 3.6. This holds true where a particular content is zero-rated as against an entire category of application, this creates an economic incentive to use only the zero-rated content because obviously end-users will find them commercially much more attractive than non zero-rated contents, thus competition is harmed as end-user choice is materially reduced in practice to only the zero-rated content, and competing CAPs are foreclosed from the market since their content is unlikely to attract any user.²³⁸

²³⁵ European Commission. (2018 July 18). 'Antitrust: Commission Fines Google €4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google's search engine' [WWW document] URL http://europa.eu/rapid/press-release_IP-18-4581_en.htm (visited 2019, February 12).

²³⁶ Body of European Regulators for Electronic Communications (BEREC). (2016, August). 'BEREC Guidelines on the Implementation by National Regulators of European Net-Neutrality Rules', *supra*, p. 11.

²³⁷ Andrew Moshima, 'Zero Rating: Price Discrimination in an Era of Net-Neutrality' *Infrastructure*, vol. 54, no. 4 (2015).

²³⁸ Thomas Lohninger *et al.* (2019, January 29). 'Report: The Net-Neutrality Situation in the EU', *supra*, p. 29; Body of European Regulators for Electronic Communications (BEREC). (2016, August). 'BEREC Guidelines on the Implementation by National Regulators of European Net-Neutrality Rules', *supra*; See also Broadcasting and Telecom Decision CRTC 2015-26 (29 January 2015), Section 1.2 (f).

This concern that zero-rating can indeed distort competition and undermine consumer welfare has been tested by a team of researchers who collected statistical information concerning economic analysis and availability of zero-rated offers in select EU markets from 2014 – 2016 and came to the conclusion that the introduction of zero-rated offers is associated with markets that exhibited price increase which is detrimental to consumer welfare.²³⁹ In any case, in order not to run the risk of over-enforcement (referred to as “Type I” error in competition regulation parlance), it is necessary to conduct a robust assessment of the market implication of zero-rating on consumer welfare and competing CAPs. This view is reinforced by the both the provision of the Competition Act and the Telecoms Competition Regulations which requires a clear showing of anti-competitive injury through conducting the substantial lessening of competition test in cases where an anti-competitive conduct is suspected. This test involves an assessment of *inter alia*; whether CAPs are materially discouraged from entering the market or forced to exit the market; and/or whether there exists a discrimination between individual content within the same category or discrimination between classes of application.²⁴⁰

II. *Differentiating traffic delivery conditions to CAPs*

This basically refers to differentiation in the conditions under which CAPs get access to subscribers using the internet access service of a particular IASP.²⁴¹ A vertically integrated IASP may differentiate traffic delivery conditions whereby affiliated content is prioritized and/or offered with better QoS, or a degrading delivery conditions in order to force non-affiliated CAPs to pay for prioritized traffic delivery.²⁴² These conducts although do not generally give rise to competition concerns if, in the former, the conduct does not affect the quality of other services provided over the internet.²⁴³ In the case of the latter, the condition of competition in the market and lack of information could actually provide an enabling environment for an IASP to engage in such conducts and discriminate against contents that do not benefit from prioritized service delivery.²⁴⁴ This can raise barriers to entry for smaller innovative CAPs who face unfavourable economic costs in order to access the internet under good conditions for the delivery of their contents.²⁴⁵

To trigger the application of competition remedies in this instance, the competition (or enforcing authority) will review the nature and characteristics of the vertical relationship

²³⁹ Thomas Lohninger *et al.* (2019, January 29). ‘Report: The Net-Neutrality Situation in the EU’, *supra*, p. 31.

²⁴⁰ *Ibid.*, p. 13.

²⁴¹ BEREC Report on differentiation practices and related competition issues in the scope of net-neutrality, *supra*, p.30

²⁴² *Ibid.*, p. 61.

²⁴³ *Ibid.*, p.63

²⁴⁴ *Ibid.*

²⁴⁵ *Ibid.*

between the IASP and the CAP, and other relevant market information which may include the structure of competition in the market for content and application services,²⁴⁶ and the percentage of competing CAPs foreclosed from the market.²⁴⁷

III. *Tying the sale of internet access service with a terminal equipment*

Tying is an arrangement prohibited in competition regulation. In a typical tying arrangement a seller conditions the sale of a product (the “tying” product) on the sale of another product (the “tied” product).²⁴⁸ Because the telecommunications market comprises many vertically integrated operators, it is not unusual within the internet ecosystem for an IASP to bundle the sale of its internet access service with a terminal equipment such as internet routers, smartphone, etc. Tying arrangements can negatively affect a rival’s sales by capturing customers who would otherwise have purchased only the tying product instead of both the tying and tied product, thereby reducing the portion of market for the tied product the vertically integrated firm must compete for.²⁴⁹

In the net-neutrality context, a tying arrangement is violatory of Section 2 (a) of the Draft Code, which establishes the rights of end-users to access the internet using “*appropriate terminal equipment of their choice.*” In terms of competition regulation, Section of 59 (2) e of the Competition Act prohibits tying arrangements. According to this provision “*making the conclusion of an agreement subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such agreement*” is a prohibited conduct subject to very narrow exceptions approved by the Competition Commission.²⁵⁰

Tying is also expressly prohibited under Section 91 (4) of the Communications Act. As a general rule this provision states that:

“A licensee shall not, at any time or in any circumstance, make it a condition for the provision or supply of a product or service in a communications market that the person acquiring such product or service in the communications market is

²⁴⁶ See also, Slaughter and May. (2018 January) ‘The EU Competition Rules on Vertical Agreements’ [WWW document] URL <https://www.slaughterandmay.com/media/64575/the-eu-competition-rules-on-vertical-agreements.pdf>, p. 8.

²⁴⁷ Crane, Daniel A., Miralles, Graciela, ‘Toward a Unified Theory of Exclusionary Vertical Restraints’ *Law & Economics Working Papers*, paper 24 (2010), pp. 1 – 45, pp. 27 - 28.

²⁴⁸ International Competition Network (ICN). (2015, April). ‘Unilateral Conduct Workbook Chapter 6 : Tying and Bundling’ [WWW document] URL <http://www.internationalcompetitionnetwork.org/uploads/library/doc1033.pdf> (visited 2015, October 19), p. 5.

²⁴⁹ National Economic Research Associates. (2003, January). ‘Anticompetitive Bundling Strategies: A Report for the Australian Competition and Consumer Commission’ [WWW document] URL <https://www.accc.gov.au/system/files/Consultant%20report%E2%80%9494anticompetitive%20bundling%20strategies%20%28Jan%202003%29.pdf> (visited 2015, October 12), p. 2.

²⁵⁰ Section 60.

also required or not to acquire any other product or service either from itself or from another person.”

A licensee as defined under Section 157 of the Communications Act means “a person who either holds an individual licence or undertakes activities which are subject to a class licence granted under this Act.” All IASPs operating in Nigeria hold an individual license. The Telecoms Competition Regulations goes further in clarifying that tying arrangements as identified in Section 91 (4) of the Communications Act are “... prohibited without the requirement of assessing their practical effects.” Thus, tying arrangements are presumed to be outrightly illegal and will be condemned without an elaborate investigation as to whether the seller engaging in the tying arrangement has market power in the tying product²⁵¹ and/or the anti-competitive effect(s) of such tying arrangement. This presumption of illegality is based on the serious effect of the restriction and on experience from other competition jurisdictions showing that direct restrictions of competition is more likely than not, to produce negative effects on the market and undermine the broad objectives of the competition regulation regime.²⁵²

IV. *Vertical mergers occurring in the internet ecosystem*

A merger occurs when separate firms merge to become a single firm, or come under a common ownership.²⁵³ The Competition Act defines a merger in Section 92 (1) (a); “... when one or more undertakings directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another undertaking.” A vertical merger is a merger occurring between firms that operate at different levels of the market. For instance, in the internet ecosystem an IASP could merge with a CAP to become a post-merger firm that operates as both an IASP and a CAP. A vertical merger harms competition if the post-merger firm refuses to supply an essential input to existing competitors in a downstream market, raises the cost of this input or delays in the supply of the essential input.²⁵⁴ In the context of net-neutrality this conduct is illustrated by the outright blocking of certain contents online by the post-merger firm. If indeed, this would be the case, the conduct of the post-merger firm is violatory of the no-blocking rule of Sections 2 (b) and 3.3 of the Draft Code.

In competition regulation, merger is one of the 3 market activities subject to enforcement,²⁵⁵ thus any merger occurring in a market or a section of the market is

²⁵¹ However, caselaw jurisprudence in the EU and US indicate that only firms with market power can successfully pursue a tying arrangement without fear of losing customers who purchase the tying product. See COMP/C-3/37.792 *Microsoft*, C(2004) 900; *Eastman Kodak Co. v. Image Technical Services*, 504 U.S. 451 (1992).

²⁵² Chukwuyere Ebere Izuogu, *Regulating Anti-competitive Practices in Nigeria’s Communications Sector* (Oisterwijk: Wolf Legal Publishers, 2017), p. 247.

²⁵³ Richard Whish, David Bailey, *Competition Law* (New York: Oxford University Press, 2012), pp. 809 – 810.

²⁵⁴ See generally, Chukwuyere Ebere Izuogu, ‘A summary evaluation of the antitrust implications of Helios towers’ acquisition of Multi-links’, *Businessday*, 09 February 2012, p. 31.

²⁵⁵ With the other being Agreements, and Abuse of a dominant market position.

required to be notified to the competition authority for regulatory scrutiny and approval, before it is consummated. Because competition regulation of mergers or merger control is forward looking in that it is triggered prior to the commission of any anti-competitive act that may result from the merger,²⁵⁶ thus if in the instant case, the competition authority is concerned that there exist a real risk of the vertical merger giving rise to vertical foreclosure, then the competition authority is at liberty to utilize any of the regulatory tools available to it to ensure that this risk is eliminated or at best minimized to the barest. One of such regulatory tools is to impose conditions on any or all of the merging parties that prescribes net-neutrality commitments, of which a failure to comply with could lead to either the revocation of the merger approval, or in most cases the imposition of a fine.

For instance, in granting approval for the proposed joint venture arrangement between Universal, Inc. (NBC) and Comcast Corporation (Comcast), the FCC in seeking to protect competition in the online video distribution market presented by the transaction, imposed several net-neutrality like conditions on the parties to *inter alia*; require Comcast-NBCU to offer its video programming to any requesting online video distributor (OVD) on the same terms and conditions that would be available to a multichannel video programming distributor (MVPD); obligate Comcast-NBCU to make comparable programming available on economically comparable prices, terms, and conditions to an OVD that has entered into an arrangement to distribute programming from one or more of Comcast-NBCU's peers; and prevent Comcast from disadvantaging rival online video distribution through its broadband internet access services and/or set-top boxes.²⁵⁷

In Nigeria, both the Competition Commission and Telecoms Commission are authorized respectively by, Section 93 (1) of the Competition Act, and Section 90 of the Communications Act and Part VI of the Telecoms Competition Regulations, to review mergers, and if required impose conditions to mitigate the effects of a merger that is presumed to harm competition.²⁵⁸ The substantial lessening of competition test is the substantive test for assessing mergers is applied by both the Competition Commission and the Telecoms Commission.²⁵⁹ The Telecoms Commission is also authorized to apply the dominance test to assess mergers should it see the need for doing so.²⁶⁰

²⁵⁶ Richard Whish, David Bailey, *supra*, p. 817. This is because it is less difficult to prevent the anti-competitive effects of a merger at its early stages, rather than to undone an anti-competitive merger after consummation (Einer Elhauge, Damien Geradin, *supra*, p. 872).

²⁵⁷ *In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licensees*, MB Docket No. 10-56, FCC 11-4, paragraph 4.

²⁵⁸ See Sections 95 (5) and 96 (4); Regulation 30 (a) Telecoms Competition Regulations.

²⁵⁹ Section 94 (1) of the Competition Act and Regulation 32 of the Telecoms Competition Regulations. Although the factors to be taken into consideration by the Competition Commission and Telecoms Commission in making this assessment differs.

²⁶⁰ Regulation 32 of the Telecoms Competition Regulations.

VI. Limitations of Competition Regulation

The immediately preceding part of this report has shown that there indeed exist a causal relationship between a competitive market development and compliance with (or enforcement of) net-neutrality obligations in Nigeria’s internet ecosystem. Even though the reach of the Competition Act is extensive and without doubt captures anti-competitive conducts occurring within Nigeria’s internet ecosystem, the same cannot be said to be the case with the Communications Act and Competition Regulations which applies only within the telecommunications sector, thereby tilting regulatory intervention on the basis of competition regulation against only IASPs and TEMs who are subject to its provisions. The resultant effect is that rather a systemic regulation of the whole internet ecosystem, only a part of the ecosystem is regulated.

In other words, unlike the Communications Act²⁶¹ which regulates only the conduct of IASPs and TEMs within the internet ecosystem, the scope of the Competition Act is all encompassing and covers all sectors of the Nigerian economy including the entire internet ecosystem, thus reducing the risk that CAPs will escape enforcement if they engage in an anti-competitive conduct that otherwise infringes net-neutrality as would have been the case under the Communications Act. Indeed, as at the time of this report CAPs are not subject to the regulatory oversight of the *Telecoms* Commission, in fact, the *Telecoms* Commission in producing the Draft Code indicated an intention to adopt a “light-touch” regulatory approach towards content online. Be that as it may be, should such an intention change subsequently, it may be subject to a legal challenge in court due to the unclarity of the Communications Act whether the jurisdiction of the *Telecoms* Commission does indeed extend to content online and CAPs.

Despite the argument this report makes that competition regulation can respond to net-neutrality violations, caution must still be exercised as any such contention should be made on the basis of a case-by-case assessment, without which one runs the risk of a type I error. One must also note that the primary objective for the application of competition regulation in response to net-neutrality violations is not to protect the various competitors within the internet ecosystem, but rather is to prevent a substantial lessening of competition through the creation of an enabling condition in which market competition thrives, which naturally leads to enhanced consumer welfare for end-users.²⁶²

Regarding the consumer welfare prescription for end-users, it thus becomes necessary to make a clear showing of consumer harm that justifies the intervention of competition regulation. For instance, in a case where VoIP applications are blocked by a dominant IASP, such a clear

²⁶¹ Including the Competition Regulations and Draft Code.

²⁶² Katerina Maniadaki, *supra*, p. 232.

showing may be by way of demonstrating that the IASP's conduct prevented competing VoIP providers from offering new and innovative service in the affected market which overall retards innovation.²⁶³ Thus, being able to access the internet or any portion thereof, on a non-discriminatory basis also benefits market competition on non-price parameters, and end-users.²⁶⁴

On the other hand, demonstrating that consumer welfare has been diminished when net-neutrality rules are violated, and calling for the application competition remedies on this basis, as stated earlier carries the risk of a type I error or over enforcement, thus, the overriding question for the enforcing authority is where exactly does the threshold lie for consumer harm within the context of competition regulation's response to net-neutrality violations.²⁶⁵

Another major concern regarding the limits of competition regulation in addressing net-neutrality violations, is whether or not end-users whose welfare has been eroded by a violation of net-neutrality obligation, have the incentive to pursue a claim under competition rules. This question is important in the light of the fact that litigating a competition related claim in the traditional judicial system is very expensive and time consuming for the private litigant,²⁶⁶ especially in those cases where the relevant market must be identified, market power must be established and clear and convincing evidence of actual anti-competitive effects are required to sustain an antitrust claim.²⁶⁷ These factors taken cumulatively together makes is very prohibitive for start-ups and end-users who allege that a violation of net-neutrality obligation constitutes an antitrust infringement.

Lastly, absent any regulatory guidance from the Telecoms Commission, the question of what constitutes "reasonable" in reasonable network management practices appears to be very fluid at this time and provides some flexibility in how IASPs may choose to manage their networks. In particular, the Draft Code qualifies the acceptability of a reasonable network management practice by setting out its characteristics which are that *"there shall be a legitimate and demonstrable technical need for the practice; the practice shall have a specific and stated technical goal; the effect of the practice shall be proportional to the need it intends to address, and considered a reasonable effect by the majority of consumers; there shall be full disclosure with regard to the practice, in a manner sufficient for consumers to develop an informed opinion on whether, when, and how the practice will affect their service; and the practice shall be based on globally accepted standards"* (underlining for emphasis), thus any practice lacking

²⁶³ *Ibid.*, p. 234.

²⁶⁴ *Ibid.*, pp. 234 - 235.

²⁶⁵ Katerina Maniadaki, *supra*, p. 235.

²⁶⁶ Hal. J. Singer. (2017, August). 'Paid Prioritization and Zero Rating: Why Antitrust Cannot Reach the Part of Net Neutrality Everyone Is Concerned About' [WWW document] URL https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/aug17_singer_8_2f.authcheckdam.pdf (visited 2018, September 1), p. 2.

²⁶⁷ Herbert J. Hovenkamp, 'The Rule of Reason', *Florida Law Review*, (2018), pp. 81 – 167, p. 98.

any or all of these characteristics is deemed unacceptable and will not constitute a reasonable network management practice.

Because of the seemingly wide ambit of what constitutes reasonable network management within the meaning of the Draft Code as provided in the foregoing paragraph, it would not be unusual or impossible for IASPs to exploit this justification as a defence to the no-blocking and/or no-throttling rules in order to perpetuate an otherwise anti-competitive conduct.²⁶⁸

²⁶⁸ See American Bar Association (ABA), *supra*, p. 544.

VII. Recommendations

As shown in the main body of this report, vigorous and sustained competition enforcement in deserving circumstances can safeguard net-neutrality principles within Nigeria's internet ecosystem, and is complementary to the regulatory and enforcement oversight of the Telecoms Commission over IASPs and TEMs. Nonetheless, to provide an additional layer of protection that reduces the risk of breaching net-neutrality rules by engaging in discriminatory conducts, this report makes a number of recommendations which may be applied independently or in conjunction with another recommendation on an *ex post* or *ex ante* basis by either the Telecoms Commission and/or the Competition Commission. These recommendations are intended to strengthen the enforcement of net-neutrality either as a core telecommunications issue or a competition related (or consumer protection) issue, and are as follows;

a) Enact and enforce the Draft Code

Once enacted, the scope of net-neutrality obligations in the Draft Code would be broader than the non-discrimination obligation imposed under the various telecoms licenses. In carrying out its monitoring activities pursuant to Section 9 of the Draft Code, the Telecoms Commission should in relation to net-neutrality focus on; whether there are any restrictions on the right of consumers to a open internet access (Section 2); compliance with the transparency obligation (Section 3.1); compliance with the no-discrimination rule (Section 3.2); compliance with the no-blocking rule (Section 3.3); compliance with the no-throttling rule (Section 3.4); compliance with the obligation not to engage in preferential data prioritization (Section 3.5); compliance with the zero-rating requirements (Section 3.6); and compliance with the standards for acceptable traffic management practices (Section 3.7).

In monitoring traffic management practices implemented by IASPs, the Telecoms Commission may want to consider regularly conducting technical traffic management measurements to detect infringements of net-neutrality obligations such as blocking or throttling. The Telecoms Commission may also consider developing or recommending a reliable and user-friendly traffic management measurement tool to enable end-users conduct measurement tests by themselves and notify the Telecoms Commission where an IASP fails to comply with the acceptable standard for traffic management.

Lastly, the Telecoms Commission should endeavour to reach out to regulators of telecommunications services in other countries (possibly within the African region) to learn from their experience as it relates to their monitoring and enforcement activities of net-neutrality obligations within their jurisdictions.

b) Establish clear standards for transparency

It remains a possibility for IASPs to rely on reasonable network management to evade net-neutrality obligations.²⁶⁹ For instance a dominant IASP may justify the blocking of all VoIP applications on the basis of (a non-existent) impending network congestion.²⁷⁰ Because of this, it is important for the Telecoms Commission to establish clear and detailed standards to guide the application of the transparency requirements of IASPs that takes into consideration the diverse network management needs of FNOs, MNOs, Wi-Fi providers and other pertinent network characteristics,²⁷¹ and the information requirements of different community of end-users and CAPs. For instance the Office of Communications (Ofcom) in United Kingdom recommends that information disclosed by IASPs regarding their traffic management practices be appropriate, assessible, understandable, verifiable, comparable and current.²⁷²

The Telecoms Commission may also consider specifying the specific content and format of the disclosure obligation of IASPs, particularly as it relates to the performance, technical and commercial terms of the internet access service as required by Section 3.1 of the Draft Code. This serves as an effective means of ensuring that IASPs do not unjustly rely on the reasonable network management exception to circumvent their no-blocking/no-throttling obligations under the Draft Code.²⁷³

In addition, the Telecoms Commission should identify the globally acceptable standard required to demonstrate the characteristics of reasonable traffic management practices pursuant to Section 3.7 (b) v to provide regulatory predictability and legal certainty concerning the interpretation of acceptable traffic management practices.

c) Reform QoS measurement parameters and methodology

In Nigeria, QoS obligations in the telecommunications sector are imposed pursuant to the provisions of the Quality of Service Regulations 2012 (the QoS Regulations). This report recommends that the Telecoms Commission undertake a reform of QoS obligations of IASP and QoS metrics for general internet access service, to include new QoS parameters and key performance indicators that are consistent with the evolving nature of IP-based network technologies, and the particular methodology to be applied in obtaining reliable and accurate QoS measurements. However, specialized services or non-BIAS which differs from core internet access service and typically relies on strict

²⁶⁹ *Open Internet Order 2015*, paragraph 154.

²⁷⁰ However in BEREC's view, this argument cannot stand on account of the fact that VoIP applications use only a small portion of a network's bandwidth capacity, see BEREC Report on differentiation practices and related competition issues in the scope of net-neutrality, *supra*, p. 49.

²⁷¹ *Open Internet Order 2015*, paragraph 218.

²⁷² Ofcom. (2011, November 24. 'Ofcom's approach to net neutrality' [WWW document] URL https://www.ofcom.org.uk/data/assets/pdf_file/0011/50510/statement.pdf (visited 204, January 23), pp. 13 – 14.

²⁷³ See *Ibid.*, paragraph 154.

access restriction and extensive use of traffic management practices may not warrant any intervention in this regard unless the capacity of specialized services negatively impacts the utility of internet access service.²⁷⁴

Additionally, it should be borne in mind that a degradation of QoS is typified into 2 categories; a degradation of the internet access service as a whole; and a degradation of an individual application using the internet.²⁷⁵ In the former category, the Telecoms Commission may choose to intervene on the basis of competition regulation by encouraging and promoting switching by an end-user in a manner similar to the mobile number portability business scheme (applicable to only mobile telephone services) currently in use in Nigeria,²⁷⁶ otherwise the Telecoms Commission may consider enforcing the QoS Regulations against (or imposing minimum QoS obligations on) the IASP and/or impose punitive measures if the IASP fails to attain the minimum QoS requirements.²⁷⁷ In the latter scenario, if competition regulation is insufficient to address an IASP's limiting measure such as throttling or blocking, the appropriate response would be for the Telecoms Commission to enforce Section 3.3 (no-blocking) and/or Section 3.4 (no-throttling) obligations under the Draft Code (if already in force at the relevant time) against defaulting IASPs,²⁷⁸ or exercise its Section 53 (1) of the Communications Act prohibiting the IASP from blocking/throttling the relevant application.²⁷⁹ In extreme cases, the Telecoms Commission may consider a general prohibition on IASPs' blocking or throttling of certain individual application.²⁸⁰

A good reference material to guide the implementation of this recommendation are the following; International Telecommunications Union's *Quality of Service Regulation Manual 2017*²⁸¹ and BEREC's *Net-Neutrality Regulatory Assessment Methodology 2017*,²⁸² and generally BEREC's Report on *Monitoring quality of internet access services*

²⁷⁴ Body of European Regulators of Electronic Communications. (BEREC). (2012, November 26). 'Guidelines for Quality of Service in the Scope of Net-Neutrality', *supra*, p. 3.

²⁷⁵ *Ibid.*, p. 4.

²⁷⁶ The ability of an end-user to change from one IASP to another fosters competition between IASPs and minimizes the risk of a lock-in-effect to a particular IASP.

²⁷⁷ See Body of European Regulators of Electronic Communications. (BEREC). (2012, November 26). 'Guidelines for Quality of Service in the Scope of Net-Neutrality', *supra*, pp. 5 – 6.

²⁷⁸ See *Ibid.*, p. 7.

²⁷⁹ *Ibid.*

²⁸⁰ BEREC Report on differentiation practices and related competition issues in the scope of net-neutrality, *supra*, p. 10.

²⁸¹ Available at https://www.itu.int/pub/D-PREF-BB.QOS_REG01-2017.

²⁸² Available at https://www.berec.europa.eu/eng/document_register/subject_matter/berec/regulatory_best_practices/methodologies/7295-berec-net-neutrality-regulatory-assessment-methodology.

in the context of net neutrality 2014,²⁸³ and Klaus Nieminen’s *Net Neutrality Measurements: Regulatory Use Case and Problem Statement 2017*.²⁸⁴

d) Conduct market reviews and dominance assessments on a regular basis

In cases where it is established that a relevant market within the internet ecosystem is not competitive, the Competition Commission may pre-emptively act and exercise its Sections 76 and 84 powers under the Act by opening an investigation into a monopoly situation that exists in Nigeria, and subsequently recommending “*actions to be taken to remedy or prevent any effects resulting from the monopoly situation*”. This type of regulatory intervention is to prevent the occurrence of an anti-competitive conduct for instance, a dominant IASP may employ limiting traffic management practices that generally degrades the QoS of its internet access service or may block access to a particular content online.

The exercise of such statutory powers may require the Competition Commission to impose *ex ante* type obligations on the dominant IASP, that are designed to ensure the development of a more competitive internet ecosystem that promotes alternative IASPs and lowers barriers to end-users’ switching. These *ex ante* type obligations include; non-discriminatory obligation, access obligation and transparency obligation and in extreme cases functional or structural separation of an upstream IASP from its vertically integrated downstream CAP business/affiliate.

e) Implement a robust stand-alone mechanism for resolving net-neutrality disputes

The Telecoms Commission is authorized pursuant to Sections 4 (1) (p) and 73 to resolve disputes in the telecommunications sector. The Telecoms Commission may exercise this power in such manner including but not limited to Alternative Dispute Resolution (ADR) processes and upon such terms and conditions as it may deem fit.²⁸⁵ In accordance with these provisions, it is recommended that the Telecoms Commission adopt a stand-alone dispute resolution process with a dedicated panel/ombudsman for resolving net-neutrality disputes. In adopting this mechanism, it bears emphasis to note that while the evidential burden of proof will lie on the party alleging a violation of net-neutrality rules consistent with the evidential rule and a plethora of caselaw in Nigeria that “he who alleges must prove”,²⁸⁶ however, this report recommends that the evidential threshold

²⁸³ Available at https://berec.europa.eu/eng/document_register/subject_matter/berec/reports/4602-monitoring-quality-of-internet-access-services-in-the-context-of-net-neutrality-berec-report .

²⁸⁴ Available at <https://tools.ietf.org/html/draft-nieminen-ippm-nn-measurements-01>.

²⁸⁵ Section 76 (1) of the Communications Act.

²⁸⁶ *Johnson v. Maja* (1951) 13 WACA 290; *Odukwe v. Ogunbiyi* (1998) 8NWLR (Pt. 561) 309; *O.A.A. Co-operative Society v. N.A.C.B* (1992) 2 NWLR (Pt. 590) 234 at p. 243.

be lowered to dispense with the need to establish market power or consumer harm as required in a traditional antitrust claim.²⁸⁷

f) Adoption of advisory enforcement opinions

The Telecoms Commission should adopt the use of advisory opinions to provide additional insight and guidance into the application of net-neutrality rules. For instance, an IASP could prior to engaging in a particular traffic management practice seek the advisory opinion of the Telecoms Commission in evaluating its own proposed conduct and determining whether such conduct would constitute an infringement of existing net-neutrality obligations.²⁸⁸ Advisory opinions helps to provide legal certainty and predictability within the internet ecosystem, and strengthens the existing dispute resolution process used for resolving net-neutrality disputes.²⁸⁹

g) The Competition Commission should exercise its consumer protection functions under the Competition Act to protect net-neutrality

The Competition Commission has a number of consumer protection functions under the Competition Act,²⁹⁰ which extends to all sectors of Nigeria's economy including the telecommunications sector, and can be exercised to prohibit some of the conducts implicated in net-neutrality violations. For instance the Competition Commission's function to eliminate misleading, unfair or deceptive trade/business practices under Section 17 (g) of the Competition Act is enforceable against IASPs to compel them to disclose, blocking, throttling or information material to traffic management practices to end-users, which may be included in their advertising, or commercial terms and conditions.

For instance, in the US, the Federal Trade Commission (FTC) has exercised its consumer protection authority in a similar manner by charging TracFone Wireless, Inc., an IASP with deceptive advertising for promising unlimited data to consumers where in fact it throttled their service by between 60% - 90% after they reached certain data limits, as result of which the company agreed to pay \$40 million in consumer redress to settle those charges.²⁹¹

²⁸⁷ Hal. J. Singer. (2017, August). 'Paid Prioritization and Zero Rating: Why Antitrust Cannot Reach the Part of Net Neutrality Everyone Is Concerned About', *supra*, p. 3.

²⁸⁸ See *Open Internet Order 2015*, paragraph 229.

²⁸⁹ *Ibid.*

²⁹⁰ See Section 17 (g), (l), (s) of the Competition Act.

²⁹¹ *FTC v. TracFone Wireless, Inc.*, No. 15-cv-392 EMC (N.D. Cal. Feb 20, 2015) (consent order), <https://www.ftc.gov/system/files/documents/cases/150223tracfoneorder.pdf>.

VIII. Conclusion

This report has argued that the substantive rules of competition regulation may be applicable to respond to net-neutrality violations insofar as the defaulting IASP possesses market power in the relevant market or is vertically integrated to a large extent with a CAP or TEM. As earlier explained, for a complainant to prevail in alleging that a net-neutrality violation also constitutes an anti-competitive conduct, the competition theory of harm must *inter alia* establish through robust and non-speculative evidence that competition and ultimately end-users suffer (or will suffer) some harm in the market as a result of the alleged net-neutrality violation. In any case, one must bear in mind that the applicability of competition regulation as a regulatory response to net-neutrality violations is not unbounded but should be examined on a case-by-case assessment of each individual case and whether to pursue a remedy under traditional competition rules will be appropriate in the circumstance. Indeed, the net-neutrality provisions of the Draft Code once enacted should complement and regulatorily co-exist with the provisions of the applicable competition rules in Nigeria's telecommunications sector currently in existence in Nigeria. Accordingly, this report in Part VII, makes a number of recommendations which may be applied independently or in conjunction with another recommendation on an *ex post* or *ex ante* basis by either the Competition Commission and/or the Telecoms Commission.

Without doubt, a competitive internet ecosystem cannot thrive in the absence of enforceable net-neutrality obligations. Factors like transparency and switching costs must also be considered and if necessary tailored to ensure that the market remains competitive. Drafting and enacting net-neutrality provisions can be relied upon as the primary basis for an enduring open internet, which may also be augmented by the provisions of competition regulation that in particular forbids any form of discriminatory anti-competitive conduct or an abuse of a dominant position. The resulting effect of these two separate regimes is the preservation of a normative open internet order that ensures end-users' access to the internet is non-discriminatory and the QoS experienced reflect advances in technology and platforms, within the internet ecosystem.