



25 July 2022
Executive Vice Chairman/CEO
Nigerian Communications Commission

Attention: Director, Legal and Regulatory Services



Dear Professor Danbatta,

Re: Public Inquiry on Draft Regulations on Consumer Code of Practice

On behalf of the Alliance for Affordable Internet Nigeria Coalition (A4AI-Nigeria) we welcome the opportunity to make input into the *Draft Regulations on Consumer Code of Practice* issued by the Commission.

The Alliance for Affordable Internet (A4AI) brings together prominent stakeholders from government, the private sector, civil society and development community to provide a unified voice and coordinated focus in addressing the shared goal of open, affordable, meaningful and equal access to the Internet in developing countries. Our Nigeria coalition has been at the forefront of advocating for affordable and meaningful connectivity ensuring inclusive digital development that can benefit all Nigerians. We are pleased to have worked with the National Communications Commission (NCC) in some of these initiatives especially to advance affordable access.

We have set up two different working groups to focus on each of these issues in Nigeria; we commend the Commission for its open consultative process and we remain committed to continuous engagement towards ensuring affordable and meaningful connectivity for all Nigerians.

Sincerely

Olusola Teniola
A4AI-Nigeria National Coordinator

Chukwuyere Ebere Izuogu

A4AI-Nigeria,
Champion Spectrum, Open Access &
Infrastructure Sharing Working Group

CC. Onica Makwakwa; Head for Africa, Alliance for Affordable Internet





A4AI-NIGERIA COMMENTS TO THE DRAFT REGULATIONS

1. Reform the Quality of Service (QoS) measurements

The Individual Consumer Code in paragraph 13 provides that ‘Every Licensee shall provide services within any service supply time targets set out in the Commission’s Quality of Service Regulations’. The QoS Regulations establishes the QoS standards and/or parameters and associated measurement, reporting and record keeping tasks imposed on all Licensees. It provides an indication of what customers experience when using a particular network. The QoS parameters, also known as QoS metrics, QoS indicators, QoS measurements or QoS determinants are used to characterise the quality level of a certain aspect of a communications service being offered and ultimately consumer satisfaction.¹ Thus, the QoS Regulations serve as a consumer protection measure by enabling the average consumer to make an informed choice about the quality and price of a particular communications service. In addition, Licensees compete on the basis of quality as well as price and consumers are better served where such competition exists in a communications market.

Because we believe that QoS measurements are very intrinsic to affordability and meaningful connectivity, two thematic areas where we work and conduct advocacy, we recommend that the Commission undertake a comprehensive reform of QoS measurements by amending the QoS Regulations. This recommendation is made in the light of the evolving nature of telecommunications and internet protocol (IP) based networks since 2012 when the QoS Regulations were first issued. New technologies such as VOLTE/LTE, 5G are now capable of handling network traffic with minimal loss or latency. In this regard, we recommend that the amendment to the QoS Regulations should totally overhaul existing QoS measurement by taking cognisance of new QoS parameters and key performance indicators that are consistent with the evolving nature of IP based network and other new technologies, and designing the appropriate methodology that may be applied in obtaining reliable and accurate QoS measurements. A good reference material that can assist the Commission implement this recommendation is the **International Telecommunications Union’s *Quality of Service Regulation Manual 2017***². If done properly, a reformed QoS measurement would be sure to contribute to the enjoyment of communications services offered by Licensees to consumers and optimise the benefits consumers can derive from paragraph 13 of the Individual Consumer Code thereby strengthening consumer rights in relation to the provision of communications services in Nigeria.

¹ ITU-Handbook (2004), *Quality of Service and Network Performance*

² Available at https://www.itu.int/pub/D-PREF-BB.QOS_REG01-2017.





2. Define what constitutes consumer information

Part VI of the Individual Consumer Code prescribes the minimum set of requirements that Licensees are required to comply with in the protection of consumer information. However, we note that while the term ‘consumer’ was defined in the Draft Regulations, the meaning of ‘consumer information’ was not provided. We believe that the omission to define consumer information may pose regulatory enforcement and consumer redress challenges respectively for the Commission and consumers especially in instances where a License is challenged for failure to comply with this provision.

To trigger the application of Part VI of the Individual Consumer Code, it is important to understand that the scope of consumer information is central to the protection afforded consumers under this part. This is similar to the concept of personal data which is fundamental to the application of data protection legislations. To remedy this omission, we recommend that the definition of consumer information be drafted in such a manner as to bring personal data of natural persons who are consumers, within its scope. This is based on our reading of the general principles provided for in paragraph 43 (1) of the Individual Consumer Code that applies where Licensees collect and maintain consumer information, which all are consistent with the data protection principles provided for under data protection legislations. In this regard, the privacy interests in personal data attaching to each consumer is protected by ensuring that Licensees use consumer information in a manner that is privacy respecting and/or in accordance with constitutional safeguards. Thus, unless consumer information is properly defined, these privacy interests cannot be enforced by either the Commission or consumers.

As drafting suggestion, we propose that consumer information be defined as:

Consumer information means any information relating to an identified or identifiable natural person who subscribes or uses a communications service; an identifiable natural person in this regard is one who can be identified, directly or indirectly, in particular by reference to an identifier, such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person

3. The reference to the Data Protection Regulations may create regulatory uncertainty

Paragraph 42 of the Individual Consumer Code provides that ‘The purpose of this part is to set out the responsibility of a Licensee in the protection of individual consumer information in accordance with the Data Protection Regulations as may be amended from time to time’. Our understanding of this provision is that Licensees are to protect consumer information in the





manner prescribed by the Nigerian Data Protection Regulations 2019 (NDPR). If our understanding is correct, we believe that implementing this provision may create regulatory uncertainty for both Licensees and consumers alike because the Commission has not been granted any specific authority under the NDPR to enforce its provisions.

Rather we recommend that specific rules on how consumer information may be used and/or processed by Licensees be clearly set out by the Commission in the Individual Consumer Code. The legal basis that authorises the Commission to set such rules for the communications industry is section 4 (1) (b) of the Nigerian Communications Act 2003 (the Act) which charges the Commission with the function of protecting and promoting the interests of consumers which we believe also includes privacy interests of consumers of communications services. Section 4 (1) (i) also charges the Commission with making and enforcing such regulations as may be necessary to give full force and effect to the provisions of the Act. We also believe that exercising such power to make specific rules for the protection of consumer information would be within the contemplation of the provision of section 4 (1) (i) of the Act.

4. Expand the purpose of Part VI to include all data processing operations carried out by Licensees

Paragraph 42 of the Individual Consumer Code delineates the obligation of Licensees under Part VI as only in relation to the ‘protection of individual consumer information’. This delineation, we believe, is not expansive enough to afford protection to consumers in circumstances where their consumer information is processed by Licensees. An implication of the narrow scope of paragraph 42 is that while Licensees are obligated to take reasonable measures to protect consumer information possibly from a cyber-security incident, they have no obligation under the present Individual Consumer Code to ensure that consumer information is lawfully processed in accordance with well-established data protection criteria nor are they obligated to ensure that the processing is done in accordance with the globally recognised principles governing the processing of personal data such as those provided for in the General Data Protection Regulations (GDPR) applicable in the European Union (EU).

It is also important for us to stress that the code of practice on the confidentiality of consumer information provided as a license condition in most licenses issued by the Commission, and the totality of provisions under part VI of the Individual Consumer Code are not robust enough to guarantee the protection of the rights of the consumer regarding his consumer information. As a result of the narrow breath of the purpose stated in paragraph 45, part VI lacks the core elements necessary to protect the privacy interests of consumers, which we believe is what this part originally seeks to do. Our interest in advocating for consumer privacy safeguards is that a lack of trust and privacy protection in the digital economy may constitute a barrier to the user





adoption of communications services which in turn can result in digital exclusion, thus undermining one of the core aims pursued by A4AI.

To remedy this defect, we recommend the following in part VI:

i. **Provide the legal bases applicable to the processing of consumer information**

The Individual Consumer Code should outline the lawful bases, at least one of which can be relied upon by Licensees to process consumer information. A failure of a Licensee to rely on a lawful base to process consumer information would make the processing operation unlawful and thus subject to enforcement measures by the Commission, unless the Licensee can show that such processing is in the public interest. Some of the legal bases that can apply in the context of processing operations carried out by a Licensee are: where the consumer has given consent; where the processing is necessary for the performance of a contract between the Licensee and the consumer or in order to take steps at the request of the consumer to enter into such contracts; processing is necessary for the compliance with a legal obligation to which the Licensee is subject; processing is necessary in order to protect the vital interest of the consumer or of another natural person; and processing is necessary for the performance of a task carried out in public interest or in the exercise of official authority vested in the Licensee.

ii. **Provide the rights of consumers in respect to the processing of their consumer information**

The Individual Consumer Code should provide the various rights of consumers regarding the processing and protection of their consumer information. These rights are the cornerstone of human autonomy and are meant to enable consumers to exercise greater control over the processing of their consumer information by Licensees. This is to reverse the effects of information asymmetry between Licensees and consumers in how consumer information may be acquired, used, shared and/or processed in the context of communications services.

These rights should be enforceable against Licensees who fail or neglect to honour them and some of these rights that may be stated in the Individual Consumer Code are: right of the consumer to transparent communication and information about how a Licensee uses consumer information; right of a consumer to access his consumer information; right of a consumer to rectify his consumer information; right of a consumer to request in certain circumstance that his personal data be erased by the Licensee; right of the consumer to request the Licensee in certain circumstances to restrict the processing of his consumer information; right to data portability whereby the consumer can request





the Licensee to transfer to him or to another Licensee or third-party, a copy of his consumer information in a structured, commonly used and machine-readable format; right of the consumer to object to the processing of his personal data in certain circumstances; and right of the consumer to not be subject to automated decision-making by the Licensee.

iii. **Require Licensees to conduct Data Protection Impact Assessment (DPIA)**

The Individual Consumer Code should require Licensees to conduct a DPIA when using communications systems and/or equipment capable of processing consumer data on a massive scale or when such processing operation presents a high risk to the privacy rights and other freedoms of the consumer. The DPIA is a governance model recommended in data protection for use by companies to systematically assess and identify the privacy impact of any product or services they offer. It enables them to identify the impact of such an operation and to take the necessary actions to prevent or minimise the risks of such impacts.

Conducting DPIAs is very necessary in the light of the constant evolution of communications network where technologies such as 5G is capable of processing huge amount of consumer information which presents several privacy risks to consumers such as giving the precise geographic location of consumers, enhanced profiling and decision-making; exponential increase in cyber-attacks and possible loss of control of personal data by consumers.³

iv. **Data Breach Notification**

Despite all the security measures that may be applied to protect consumer information, it is still possible for a data breach to occur. A breach happens where the confidentiality, integrity and/or availability of consumer information has been compromised. Notifying stakeholders in such cases would serve as a transparency mechanism that can assist Licensees in mitigating any loss or damage resulting from the breach, and to identify any operational failures which can be improved upon by stakeholders to forestall a repeat of the incident. We recommend that in this instance, a Licensee suffering a breach is obligated to notify the Commission within 48 hours of ‘becoming aware’ of the breach. In making this recommendation, we are not unmindful of the provision of paragraph 4.3 of the Internet Code of Practice which imposes a data breach notification

³aepd, ‘Introduction to 5G technologies and their risks in terms of privacy’ (May 2020) <<https://www.aepd.es/sites/default/files/2020-06/nota-tecnica-privacidad-5G-en.pdf>> accessed 14 July 2022, pp. 9 - 11.





obligation on Internet Access Service Providers, but our view is that such provision is limited and cannot be relied on in all circumstances where a breach occurs as it only covers providers of internet access service and excludes providers of other types of regulated communications services such as value added services, central equipment identity registry, electronic directory information services and non-commercial/user operated radio network services who may also come into contact with consumer information. In addition, the Individual Consumer Code should clearly articulate the circumstances where such breach may be notified to consumers.

v. **Cross-border transfer of consumer information**

Due to the importance of consumer information to the digital economy and international trade, a Licensee may in some cases have the need to transfer it across borders to another country or territory. Our concern here is to ensure that in the cross-border transfer of consumer information, consumers should enjoy the same rights and protection in the recipient country as they would in Nigeria. To achieve this, we recommend that the Commission provide in the Individual Consumer Code, the conditions or safeguards that would apply if a Licensee intended to transfer consumer information out of Nigeria.

These conditions or safeguards that may be applicable in this case are: where the Commission or a data protection authority in Nigeria has determined that the recipient country (or communications sector in that country) has an adequate level of protection for the transferred consumer information; the use of binding corporate rules approved by the Commission to authorise Licensees to share consumer information with a related organisation operating in the communications sector abroad; in accordance with a code of conduct or certification mechanism approved by the Commission; and enforceable contractual clauses entered between the Licensee exporting consumer information and the party receiving the consumer information.

Conclusion

Once again, thank you to the Commission for this opportunity to provide feedback on this important regulatory proposal, we want to commend the Commission for its transparent and efficient regulatory efforts in Nigeria's communication sector. We also reiterate our willingness to make ourselves available at the request of the Commission to provide additional insight into our submission.

