



# CEON

**CONSUMERS EMPOWERMENT ORGANISATION OF NIGERIA** (RC. 27288)

(FORMERLY CONSUMER AFFAIRS MOVEMENT OF NIGERIA- CAMON)

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16 October 2012

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The Executive Vice Chairman  
NIGERIAN COMMUNICATIONS COMMISSION  
Plot 423, Aguiyi Ironsi Street  
Maitama District  
Abuja

Dear Sir,

### REQUEST FOR INVESTIGATION

Greetings from Consumers Empowerment Organisation of Nigeria ("CEON")!!!

Pursuant to § 1 Schedule to the Competition Practices Regulations 2007 ("CPR"), we humbly request that the Commission exercise its power of investigation for the purpose of determining:

- I. Whether Airtel, Glomobile MTN and (collectively referred to as "GSM service providers") are engaging in "*concerted practices*" between themselves by collectively discriminating in providing access to their network infrastructure to competing Mobile Content Service Providers ("MCSP"); and/or
- II. Whether these GSM service providers are abusing their collective dominant position in the market for access to 2G and 2.5G mobile network infrastructure by discriminating in the provision of access to their mobile network infrastructure to competing MCSPs.

As a consumer advocacy group, our interest in this matter is based on our concern that such discriminatory conduct by these GSM service providers is capable of distorting competition in the mobile content applications space through constraining the choice of consumers, reducing output and retarding innovation, hence we see the need for Commission's intervention.

Kindly find attached the factual background into this matter and legal authorities we have relied on in making this request.

In thanking you in advance for your favourable consideration of this matter, we avail ourselves of this opportunity to renew to the Commission the assurance of our highest consideration

Yours Faithfully

ADEDEJI Babatunde Abiodun  
Co-ordinator General

CHUKWUYERE Ebere Izuogu  
Legal Counsel

cc: The Chief Executive Officer, Airtel Nigeria,  
The Chief Executive Officer, Glo Mobile Nigeria; and  
The Chief Executive Office, MTN Nigeria

**CEON (CAMON)**

Affiliates

Nigeria  
Consumer  
Movement Union  
(ANCOMU)

International  
Network of Civil  
Society  
Organizations on  
Competition  
(ICSOC)

Network for  
Accountability of  
Bacco  
Transnational  
(NATT)

**CEON (CAMON)**  
is recognized by:  
International Centre  
for Trade and  
Sustainable  
Development  
(ICTSD)

Consumer Unity  
and Trust Society  
International  
(CUTS)

INTRODUCTION AND PREAMBLE IN THE MATTER OF

1.1 The Nigerian Communications Act 2003 ("NCA") commenced on 8<sup>th</sup> July, 2003 repealing the Nigerian Communications Commission Act of 1992. NCA establishes "a regulatory framework for the Nigerian communications industry" that is intended to amongst other things, "promote the provision of modern, universal, efficient, reliable, affordable and easily accessible communication services and facilities in a wide range thereof throughout Nigeria" "the introduction of innovative services and practices in the industry in accordance with international best practices and trends" "ensure fair competition in all sectors of the Nigerian communications industry and also encourage participation of Nigerians in the ownership, control and management of communication companies and organisations" and "protect the rights and interest of service providers and consumers within Nigeria".

**THE COMPETITION PRACTICES REGULATION 2007**

1.1 NCA contemplated the REQUEST FOR INVESTIGATION for market entry, encourage technological innovation and rapid deployment of telecommunications services while ensuring that a firm's prowess in satisfying consumer demand will determine its success or failure in the market. Economic impediments to entry will enable competitors to enter markets freely and encourage rapid technological development.

**REQUEST FOR INVESTIGATION**

1.2 To this end § 96 and § 101 respectively impose specific market opening mechanisms, such as mandatory interconnection and access obligations on network facilities providers ("NFP"), in order to restrict the DATED THE 16<sup>TH</sup> DAY OF OCTOBER 2012

1.3 These comments attributed to Abiola Ajedogben at the AfricaCom conference in Lagos, Senegal early this year, provide a good background to this matter. "I think the telecom operators should give us open API's (application programming interfaces) so that we can have access to their billing system and easily bill people who use the applications we are developing by ourselves".

SUBMITTED BY:

**CONSUMERS EMPOWERMENT ORGANISATION OF NIGERIA**

Section 1 of NCA  
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Section 15 of NCA defines a "NFP" as a person who is an owner of any network facilities, also notes that in the complaint any reference to NFP is a reference to mobile network operators ("MNO") and not vice versa.  
\* Nigerian Telecoms have already been licensed to roam a facility of interconnecting different networks in which "operator" cannot provide services to the roamers. See *R & T plc/Sealink Harbour* [2002] 5 C.M.L.R. 254, para 41.  
\* Kindly find attached as Appendix 1 a pair of the article as posted at <http://www.fachin.com/2012/10/17/what-are-apis-why-are-they-important>

## 1 INTRODUCTION AND FACTUAL BACKGROUND

- 1.1 The Nigerian Communications Act 2003 ("NCA") commenced on 8<sup>th</sup> July, 2003 repealing the Nigerian Communications Commission Act of 1992. NCA establishes "*a regulatory framework for the Nigerian communications industry*"<sup>1</sup> that is intended to amongst other things; "*promote the provision of modern, universal, efficient, reliable, affordable and easily accessible communications services and the widest range thereof throughout Nigeria*"<sup>2</sup>, "*encourage local and foreign investments in the Nigerian communications industry and the introduction of innovative services and practices in the industry in accordance with international best practices and trends*"<sup>3</sup>, "*ensure fair competition in all sectors of the Nigerian communications industry and also encourage participation of Nigerians in the ownership, control and management of communications companies and organisations*"<sup>4</sup> and "*protect the rights and interest of service providers and consumers within Nigeria*"<sup>5</sup>.
- 1.1 NCA contemplated the removal of barriers to entry so as to enable free market entry, encourage technological innovation and rapid deployment of telecommunications services while ensuring that a firm's prowess in satisfying consumer demand will determine its success or failure in the marketplace. NCA also envisages that removing barriers to entry and reducing economic impediments to entry will enable competitors to enter markets freely and encourage rapid technological development.
- 1.2 To this end § 96 and § 101 respectively impose specific market-opening mechanisms, such as mandatory interconnection and access obligation on network facilities providers<sup>6</sup> ("NFP"), in order to restrict their monopoly control over essential facilities<sup>7</sup>.
- 1.3 These comments attributed to Ajibola Aiyedogbon at the AfricaCom conference in Dakar, Senegal early this year<sup>8</sup> provide a good background to this matter: "*I think the telecom operators should give us open API's (application programming interfaces) so that we can have access to their billing system and easily bill people who use the applications we are developing by ourselves*"

<sup>1</sup> Section 1 (b) NCA.

<sup>2</sup> Section 1 (c) NCA.

<sup>3</sup> Section 1 (d) NCA.

<sup>4</sup> Section 1 (e) NCA.

<sup>5</sup> Section 1 (g) NCA.

<sup>6</sup> Section 157 NCA defines a NFP as a person who is an owner of any network facilities, also note that in this complaint any reference to NFP is a reference to mobile network operators ("MNOs") and *vice versa*.

<sup>7</sup> Essential facilities have traditionally been interpreted to mean a facility of infrastructure without access to which competitors cannot provide services to the customers. See *B & I plc/Sealink Harbours* [1992] 5 C.M.L.R. 255, para. 41.

<sup>8</sup> Kindly find attached as Appendix A a print out of the article as posted at <http://techloy.com/2012/06/17/telcos-give-us-open-apis-now/>

1.4 The blog post went further to say:

*“Aiyedogbon further argued that while the telecom operators’ revenue share practice are unfair to African app developers and content providers, they had a fair revenue share arrangement with the bigger international app developers such as Google and Facebook, owing to the fact that the ‘big boys’ have access to bill users and keep ad revenues independently”.*

1.5 Aiyedogbon further argued that *“If telcos give us open APIs to bill users by ourselves it will encourage more app developers into the market and we will develop even more apps to make data consumption even more attractive and that will generate even high revenue for the telcos and for the app developers...”*

1.6 These comments attributed to Aiyedogbon formed the basis of our preliminary investigation into whether NFPs were complying with the access obligation mandated by §101 of the NCA. In the course of our investigation we distributed the following questions below to individuals active in the mobile content application sector. The questions are;

- 1) Which NSP would you rather seek access for your mobile content from; GSM service provider or CDMA provider?
- 2) Could you please summarize the types of costs borne under an interconnection/access agreement by a mobile content service provider (MCSP) for accessing the network of a network service provider (NSP)?
- 3) What is the standard revenue sharing model between an MCSP and NSP? Is it uniform among all NSPs (eg. MTN, Airtel, etisalat, Glomobile, Visafone, Starcomms, Multilinks and Reltel)?
- 4) Is there any difference between the access granted foreign MCSPs (like google and facebook) and that provided to Nigerian MCSPs? If yes, what is the nature of the difference? In terms of quality of access, do foreign MCSPs get preferential treatment in terms of quality and access to specific network element not enjoyed by third party mobile content? If yes, could you please explain.
- 5) Is there any difference between the access granted to NSPs’ own branded/on deck mobile content and that provided to third-party MCSPs? If yes, what is the nature of the difference? Does an NSP’s own branded content enjoy better access in terms of quality and access to specific network element not enjoyed by third party mobile content? If yes, could you please explain.
- 6) Do MCSPs have access to the billing infrastructure of NSPs to enable them bill end-user independently?

- 7) Do foreign MCSPs and operator branded content have access to the billing infrastructure?
- 8) What exactly is open mobile network API? In your opinion would it make the market for mobile content services in Nigeria more competitive?
- 9) In your opinion what can be done to make the market more competitive, are local MCSPs getting fair deal from NSPs in Nigeria. Can the situation be improved?

- 1.7 In some other instance, slight variations to the questions above were distributed. We received responses<sup>9</sup> from three individuals. We have also edited slightly the responses provided by these individuals, however the editing does not affect their response in any material way. For the purpose of this complaint we refer to these individuals as Alice, Bob and Charlie, due to their concern to remain anonymous in order not to be targeted for reprisals by their employer and/or particular NFP. Alice is a Telecoms Operations Support Engineer at a licensed Valued-Added Service ("VAS") provider in Nigeria, Bob is Team Lead of Mobile Content Development and Aggregation at another licensed operator of VAS while Charlie occupies an executive management position at another licensed VAS operator.
- 1.8 Their responses indicated that three Global System for Mobile Communications Service Providers in Nigeria are collectively discriminating in providing access to their mobile network infrastructure to competing Content Applications Service Providers<sup>10</sup> ("CASPs"). Airtel, Glomobile and MTN are the GSMSPs we suspect of engaging in the discriminatory conduct and are collectively referred to as "these GSM service providers" or "these GSMSPs" for the purpose of this complaint.
- 1.9 We note that this particular conduct of these GSMSPs is capable of a substantial lessening of competition under the Competition Practice Regulation 2007 ("CPR") applicable to Nigeria's communications sector. More importantly, § 91 NCA prohibits a licensee from engaging in any conduct capable of a substantial lessening of competition in any aspect of the communications market.
- 1.10 We now proceed to examine in detail whether; (i) these GSMSPs are engaging in "*concerted practices*" between themselves by collectively discriminating in providing access to their network infrastructure to competing MCSPs. Concerted practices is provided for in § 14 CPR and capable of a substantial lessening of competition by virtue of § 8 (b) of CPR; and (ii) these GSMSPs are abusing their collective dominant position in the market for access to 2G and 2.5G mobile network infrastructure by discriminating in the provision of access to their mobile network infrastructure to competing MCSPs. This conduct is capable of a substantial lessening of competition by virtue of § 8 (b) of CPR.

<sup>9</sup> The full details of these responses are respectively attached as Appendix B from Alice, C from Bob and D from Charlie.

<sup>10</sup> In this complaint, the words mobile content service provider ("MCSP") and content application service provider ("CASPs") is used interchangeably.

- 1.11 In making this request, we rely heavily on foreign legal precedents since this is a first impression matter where the issues raised have never been considered by any court in Nigeria.

## 2 LEGAL AND REGULATORY FRAMEWORK

### 2.1 Relevant Market

- 2.2 The initial step in evaluating whether a particular conduct is capable of a substantial of competition in any aspect of the Nigerian communications market is to define the relevant market or markets.<sup>11</sup> Section 19 of CPR sets out the criteria for the identification of the relevant markets as: (a) the products and services and geographic scope of the market; (b) demand-side substitutability within the market; and (c) supply-side substitutability. Demand-side substitutability describes the ability of consumers to switch to substitute products or services that they consider sufficiently similar in function, price and characteristics in the event of a small non-transitory price increase<sup>12</sup> while supply-side substitutability describes the ability of suppliers of products or services to adjust their production resources to produce products or to provide services that are demand substitutes, and to market them in the short term without incurring significant additional costs or risks in response to small and permanent changes in relative prices.<sup>13</sup> For instance in European Union ("EU") competition law practice, demand-side substitutability is the primary criterion used by the European Commission ("EC") in defining the relevant market.<sup>14</sup>
- 2.3 Also prevailing legal precedents in EU define relevant market to be "*all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use*"<sup>15</sup>. In the EU case of *Continental Can v Commission*<sup>16</sup>, the European Court of Justice ("ECJ") held that:  
*"the definition of the relevant market is of essential significance, for the possibilities of competition can only be judged in relation to those characteristics of the products in question by virtue of which those products are particularly apt to satisfy an inelastic need and are only to a limited extent interchangeable with other products"*<sup>17</sup>.
- 2.4 This judgement of the ECJ show that defining the relevant market is primarily a question of interchangeability; to what extent the product or services in question can be regarded as

<sup>11</sup> Section 6 (a) of CPR.

<sup>12</sup> Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services 2002/C 165/03 ("SMP Guidelines"), para. 39

<sup>13</sup> *Ibid.*

<sup>14</sup> Laurent Garzaniti, *Telecommunications, Broadcasting and the Internet: EU Competition Law and Regulation*, (London: Sweet & Maxwell, 2003) p. 268

<sup>15</sup> Commission notice on the definition of relevant market for the purposes of Community competition law (97/C 372/03), para. 7.

<sup>16</sup> Case 6/72 [1973] ECR 215.

<sup>17</sup> Para. 32

interchangeable. Where goods are interchangeable they belong to the same product market.<sup>18</sup> Lastly, market definition is dependent on the facts of each case and the anti-competitive conduct being investigated.<sup>19</sup>

2.6 **The upstream market for access to 2G and 2.5G mobile network infrastructure**

2.7 2G and 2.5G mobile network infrastructures are owned by mobile network operators (MNOs). In Nigeria, there are currently nine mobile network operators licensed by the Commission to provide their services across Nigeria, five of these MNOs are in the GSM category, the remaining four are in the code division multiple access ("CDMA") category. The question of whether the market for access should be divided on the basis of existing categories of network infrastructure depends on the extent to which such alternative networks are substitutable taking into consideration the evolving technology in the telecommunications market and the classes of users to which access is granted<sup>20</sup>. In this respect, the question whether the access market to mobile infrastructure relates to access to an individual mobile network or to all mobile networks, in general, should be decided on the basis of an analysis of the structure and functioning of the market<sup>21</sup>.

2.7 To provide mobile content services in Nigeria MCSPs need a technical interface between their own service platform and that of the mobile network to which potential subscribers of MCSPs are connected. MCSPs need to be able to connect or access a mobile operator's network and ultimately its mobile subscribers. To achieve connectivity, MCSPs are required to be interconnected at the local switch of the MNO nearest their operational areas provided that the local switch is capable of processing the particular service demanded<sup>22</sup>. Where the nearest local switch is not capable of processing the demand of the MCSP, access is provisioned at any other convenient technically feasible point<sup>23</sup>.

2.8 High-speed IP-based networks such as 2G and 2.5G networks are better suited for bandwidth demanding services and capable of supporting the provision of innovative multimedia content applications services to subscribers.<sup>24</sup> These mobile multimedia services arise from the convergence of computing, communications and established media, and delivered via mobile communications networks<sup>25</sup>. Such services will be a total integration of voice, data and video images, in two-way (interactive) communication mode<sup>26</sup>.

2.9 Lastly, access to 2G and 2.5G mobile network infrastructure is a relevant market within the meaning of CPR and if MNOs decided to increase significantly the price of accessing 2G and

<sup>18</sup> Richard Whish, *Competition Law*, (Oxford: Oxford University Press, 2009), p.28

<sup>19</sup> Laurent Garzaniti, *supra*, p. 274

<sup>20</sup> SMP Guidelines, para 67 - 68

<sup>21</sup> *Ibid*, para. 69.

<sup>22</sup> Section 10.9 of the Technical Standards for Interconnectivity for Networks ("TSIN").

<sup>23</sup> *Ibid*.

<sup>24</sup> Report of EuroStrategy Consultants on Regulatory Aspects of Access to Mobile Network Infrastructures and Network Intelligence (July 2001), p. 13.

<sup>25</sup> *Ibid*.

<sup>26</sup> *Ibid*.

2.5G network infrastructure, due to the absence of a cost effective substitute<sup>27</sup>, it is unlikely that a sufficient number of access requesting MCSPs in Nigeria would switch to other means of providing their services to mobile telecommunications subscribers.

2.10 **The downstream market for the distribution of mobile content application by short code**

2.11 Short codes which is either Common Short Codes ("CSC") or Premium Short Codes ("PSC") are numbers shorter than full mobile numbers, which can be used to address wireless SMS and MMS messages from mobile phones or fixed lines.<sup>28</sup> CSC functions through subscribers, MNOs, connection/content aggregators, application providers and MCSPs<sup>29</sup>. Subscribers use common short codes for communicating with an application with MNOs providing the network infrastructure for the delivery of messages between subscribers and connection aggregators<sup>30</sup>.

2.12 Some types of content distributed by short code in Nigeria are; SMS based alerts such as news, jokes, religious and motivational quotes, banking alerts, movie schedules, train/airline schedules, trivia/quiz questions etc and SMS based social networking services. All short code services are also mobile value added services<sup>31</sup> and hold value added service license issued by the Commission. MCSPs providing their service through short codes are normally connected to a mobile network through its short message service center ("SMSC").

2.13 There is no cost effective substitute to short code services in Nigeria, thus the market for the distribution of mobile content by short code is a relevant market of within the meaning of CPR.

2.14 **The downstream market for the distribution of mobile content without short code**

2.15 Service providers in this category do not use short codes, also services in this category are multimedia in nature and include, picture messages, ring tones, graphics, games, mobile internet sites, videos, etc<sup>32</sup>.

2.16 Lastly, with respect to these downstream markets, we refer to them collectively as Mobile Content Service ("MCS") for the purpose of this complaint.

2.17 **Geographic market**

2.18 In telecommunications services, the geographic scope of the market is normally determined by reference to two main criteria; (i) the area covered by the network; and the existence of legal and other regulatory instruments that could prevent the cross-border provision of the services<sup>33</sup>. To provide mobile telecommunications services and/or content applications services, you must hold

<sup>27</sup> Other mobile applications distribution platform such as Amazon Appstore, Apple Appstore, BlackBerry Appworld, Google Play/Android Marketplace, Nokia (Ovi) Store and Windows Phone Market place are mobile operating system specific, requires access to mobile internet to download as contents are normally bandwidth consuming and services may not be readily available in Nigeria, hence these platform are not proper substitutes for access to mobile network infrastructure.

<sup>28</sup> Guidelines on common and premium short code operation in Nigeria, explanatory note 1.

<sup>29</sup> Guidelines on common and premium short code operation in Nigeria, explanatory note 4 c.

<sup>30</sup> *Ibid.*, explanatory note 4 d.

<sup>31</sup> NCC License Framework for Value Added Services, pg. 4

<sup>32</sup> Also see *Ibid.*

<sup>33</sup> SMP Guidelines, para. 59



a license from the NCC authorising such services. These services can only be provided in Nigeria, thus the relevant geographic market is within the geographic territory of the Federal Republic of Nigeria.

2.19 **Anti-competitive conduct**

*Whether these GSMSPs are engaging in "concerted practices" between themselves by collectively discriminating in providing access to their network infrastructure to competing MCSPs? Concerted practices is provided for in § 14 CPR and capable of a substantial lessening of competition by virtue of § 8 (b) of CPR.*

2.20 We consider first the concept of discrimination in the context of interconnection and/or the provision of access. 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 prohibited conduct capable of substantial lessening of competition under § 8 (b) CPR.

2.21 To provide their services MCSPs need access to the network infrastructure of NFPs who also compete with them downstream in the market for the distribution of mobile content. Because of this vertical integration, NFPs have both the incentive and the ability to discriminate in the provision of access to competing MCSPs, thus denying them a meaningful opportunity to compete in this market.

2.22 Section 101 (2) NCA enacts the general obligation of NFPs not to discriminate against MCSPs in these clear terms: *The access provided by one provider ("the first provider") to another provider under subsection (1) of this section shall be of at least the same or more favourable technical standard and quality as the technical standard and quality provided on the first provider's network facilities or network services.* Also, by virtue of § 103 NCA, the obligation not to discriminate is reinforced by § 97 NCA which requires that all access agreements between licensees must comply with the principles of neutrality, transparency, fair competition, universal coverage, *access to information, equality of access and equal terms and conditions* [emphasis ours].

2.23 The Federal Communications Commission<sup>34</sup> ("FCC") has held<sup>35</sup> that the term "non discriminatory" in relation to the statutory obligation to interconnect<sup>36</sup> applies to the terms and conditions an incumbent Local Exchange Carrier ("LEC") imposes on third parties as well as on itself, the FCC further held:

*"that the equal in quality standard of section 251(c)(2)(C) requires an incumbent LEC to provide interconnection between its network and that of a requesting*

<sup>34</sup> The communications sector regulator in the United States.

<sup>35</sup> In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 CC Docket No. 96-98 ("Implementation proceedings"), para. 218

<sup>36</sup> Section 251 Telecommunications Act of 1996, Pub. L.A. No. 104-104, 110 Stat. 56 (1996)

*carrier at a level of quality that is at least indistinguishable from that which the incumbent provides itself, a subsidiary, an affiliate, or any other party*<sup>37</sup>.

2.24 With respect to non-discriminatory access to unbundled network elements, FCC held that it means at least two things:

*“first, the quality of an unbundled network element that an incumbent LEC provides, as well as the access provided to that element, must be equal between all carriers requesting access to that element; second, where technically feasible, the access and unbundled network element provided by an incumbent LEC must be at least equal-in-quality to that which the incumbent LEC provides to itself*<sup>38</sup>

2.25 In reaching this conclusion, the FCC rightly noted that an incumbent LEC could potentially act in a non-discriminatory manner in providing access or elements to all requesting carriers, **while providing preferential access or elements to itself**<sup>39</sup>.

2.26 Also, the EU Access Directive<sup>40</sup> provides that:

*“Obligations of non-discrimination shall ensure, in particular, that the operator applies equivalent conditions in equivalent circumstances to other undertakings providing equivalent services, and provides services and information to others under the same conditions and of the same quality as it provides for its own services, or those of its subsidiaries or partners”.*

2.27 Accordingly, the unifying theme in these legal precedents point to the fact that discrimination consists of not only treating like cases alike but also of treating different cases in the same way, thus we conclude that access in this particular case means that **access granted by an NFP must as a minimum be equal**<sup>41</sup> **between all services requiring and/or requesting access to the network infrastructure.**

2.28 To sustain our claim under this head, we must also be able to prove the existence of concerted practices as the strategy employed by these GSMSPs to facilitate their collective discrimination in provisioning access to competing MCSPs. Section 91 (1) NCA expressly states that: *“A licensee shall not engage in any conduct which has the purpose or effect of substantially lessening competition in any aspect of the Nigerian communications market”*. In addition, section 14 CPR further provides that NCC *“...may review any other agreements or practices between Licensees or between Licensees and third parties, including joint-venture or similar*

<sup>37</sup> Implementation proceedings, para. 224

<sup>38</sup> *Ibid.*, para. 312

<sup>39</sup> *Ibid.*

<sup>40</sup> Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (“Access Directive”).

<sup>41</sup> Equality in terms of terms and conditions of access, network elements accessed, quality of access, the technical configuration of access, neutrality, transparency, fair competition, universal coverage and/or access to information.

*collaboration agreements, to determine whether they have the purpose or effect of substantially lessening competition”.*

- 2.29 Section 157 NCA defines a licensee to mean “*a person who either holds an individual licence or undertakes activities which are subject to a class licence granted under this Act*”, thus both NFPs and MCSPs are proper licensees within the meaning of § 157 NCA, also **GSMSPs are NFPs within the meaning of NCA**. Section 14 CPR also clearly contemplates for the purpose of finding an infringement, the characterisation of a prohibition as “*concerted practices*” as a form of practice not expressly provided under Part III CPR.
- 2.30 A concerted practice does not require an actual agreement (whether express or implied) to have been reached. A concerted practice covers any form of collusive conduct which knowingly substitutes practical co-operation between undertakings for the risks of competition<sup>42</sup>. In *ICI Ltd v Commission*<sup>43</sup>, the European Court of Justice (“ECJ”) held<sup>44</sup> thus:  
“... *draws a distinction between the concept of ‘concerted practices’ and that of ‘agreements between undertakings’ or of ‘decisions by associations of undertakings’; the object is to bring within the prohibition of that Article a form of co-ordination between undertakings which, without having reached the stage where an agreement properly so called has been concluded, knowingly substitutes practical co-operation between them for the risks of competition*”
- 2.31 And further explained by the EC in *Polypropylene*:<sup>45</sup> “*The importance of the concept of a concerted practice does not thus result so much from the distinction between it and an ‘agreement’ as from the distinction between forms of collusion falling under Article [81](1) and mere parallel behaviour with no element of concertation*”.
- 2.32 Where a group of undertakings pursues a single plan involving at the same time agreements or concerted practices it would be artificial to split up the conduct by treating it as consisting of a number of separate infringements<sup>46</sup>. In *Hercules*<sup>47</sup> the Court of First Instance stated:  
“...*the Court points out that, in view of their identical purpose, the various concerted practices followed and agreements concluded formed part of systems of regular meetings, target-price-fixing and quota-fixing*

<sup>42</sup> Joined Cases 40 to 48, 50, 54 to 56, 11, 113 and 114/73 *Suiker Unie and others v European Commission* [1975] ECR 1663 para 26

<sup>43</sup> [1972] ECR 1969

<sup>44</sup> At para. 64

<sup>45</sup> *Polypropylene* OJ N° L230 18.8.1986, p.1 at para 87

<sup>46</sup> *HFB Holding für Fernwärmetechnik Beteiligungsgesellschaft mbH & Co. KG and Others v Commission of the European Communities* ECR 2002 Page II-01487, para 4

<sup>47</sup> One of the appeals arising out of the Polypropylene decision, Case T -7/89 *Hercules Chemicals v European Commission*, paras 262 - 263

*Those schemes were part of a series of efforts made by the undertakings in question in pursuit of a single economic aim, namely to distort the normal movement of prices on the market in polypropylene. It would thus be artificial to split up such continuous conduct, characterised by a single purpose, by treating it as consisting of a number of separate infringements”.*

2.33 Accordingly, it is not necessary for the purpose of finding the existence of concerted practices between these GSMSPs to characterise their conduct on an individual basis but rather to perceive them as a single infringement since the acts are in pursuit of a common plan *to wit*: discriminate in providing access to competing MCSPs.

2.34 To sustain our claim that these GSMSPs are participating in some sort of **concerted practices to discriminate in providing access to competing MCSPs** we refer to Charlie’s response to question 5 which we set out in full below for ease of reference :

*“on-paper, the answer is no, but in reality it’s a yes. the key difference lies in the flexibility<sup>48</sup> that is NOT accorded the MCSP, for example if i plan to launch a service and based on my familiarity with operator systems recommend that the box I place in the operator’s network confirm from IN/billing certain parameters before hitting my logic engine to know what message to send/receive, the MCSP is quickly given a set of ‘thou shall not’s. However, at times, shortly after, the operator is seen launching that same/similar service with the config/tech routing its people communicated earlier ‘can’t be done”*

2.35 And Alice which has this to say to question 5: *“it is only Natural for an internal NSP to receive priority over 3rd party NSP’s, infact (NSP) will not permit 3rd parties (MCSP) to run any service which they currently run”*

2.36 From these responses it appears that these GSMSPs<sup>49</sup> are in a concerted practice to collectively discriminate in providing access to competing MCSPs, Charlie’s *“flexibility that is NOT accorded the MCSP”* in our opinion constitutes discrimination in respect of the technical configuration of network access granted to competing MCSPs. This technical configuration relates to either; (i) the degree of technical sophistication of the access (*i.e.* restrictions on the type or level in the network hierarchy of exchange involved in the access or the technical capabilities of this exchange; and/or (ii) the number and/or location of the connection points (*i.e.* the requirement to collect and distribute traffic for particular areas at the switch which directly serves the area rather than at a higher level of the network hierarchy may have a

<sup>48</sup> Flexibility according to Charlie from further verbal enquiries allows an MCSP to compete effectively by responding to changes like price and demand in the market.

<sup>49</sup> Kindly note that though we included CDMA providers in our questions, most of the answers provided were only in respect of GSMSPs particularly Airtel, Glomobile and MTN, indicating that either CDMA providers are not active in the MCS space and/or MCSPs prefer to request access from only GSMSPs.

significant impact on the cost of the company seeking access<sup>50</sup>. In any event, such discrimination will ultimately lead to poor quality of mobile content services.

- 2.37 Though we note that the concept of a concerted practice must be understood in light of the principle that each economic operator must determine independently the policy it intends to adopt on the market including the choice of the persons and undertakings to which it makes offers or sells or provides services.<sup>51</sup> In particular, as the ECJ held:

*“Although it is correct to say that this requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors, it does however strictly preclude any direct or indirect contact between such operators, the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market”.*

- 2.38 But where such independent conduct cannot be validly explained the ECJ has held that: *“Parallel conduct cannot be regarded as furnishing proof of concertation unless concertation constitutes the only plausible explanation for such conduct...”*<sup>52</sup>. It is on this basis that we conclude that concerted practices is the only plausible explanation for these GSMSPs’ practice in collectively discriminating in the provision of access to competing MCSPs, more so is the fact that it is highly improbable for them to independently engage in the same prohibited conduct: discrimination in providing interconnection or communications services to other competing Licensees without any sort of practical co-operation between them.

*Whether these GSMSPs are abusing their collective dominant position in the market for access to 2G and 2.5G mobile network infrastructure by discriminating in the provision of access to their mobile network infrastructure to competing MCSPs? This conduct is capable of a substantial lessening of competition by virtue of § 8 (b) of CPR.*

- 2.39 Section 92 (4) NCA authorises the Commission to *“direct a licensee in a dominant position in the communications market 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”*. Abuse of a dominant position in Nigeria’s communications sector is primarily governed by section 92(4) of the NCA and Part V of the CPR. To prove an abuse of a dominant position by a communications licensee, it will be necessary to first determine whether the licensee in question occupies a dominant position in the relevant market. In addition to this, the Commission is also authorised to *“determine that two or more Licensees, acting jointly or collectively, are in a dominant position, including, where the*

<sup>50</sup> Access Notice, para. 127

<sup>51</sup> Joined Cases 40-48/73 *Suiker Unie v Commission* [1975] ECR 1663, at para. 173

<sup>52</sup> Joined cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85, *Ablstroem Osaakeybtioe and Others v. Commission (Woodpulp)* [1993] ECR I-1307, para. 3

*Licensees have no common ownership, are not parties to any formal agreement or operate in different markets*<sup>53</sup>

- 2.40 The European Court has defined a dominant position as:<sup>54</sup> “*a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of consumers*”
- 2.41 A dominant undertaking will possess a substantial degree of market power that is in excess of any market power held by any of its competitors. It is not, however, necessarily the case that a firm with market power, or even the firm with the greatest degree of market power in any particular market, will be dominant.
- 2.42 With respect to collective dominance, the ECJ in the case *Compagnie Maritime Belge Transports v Commission*<sup>55</sup> stated that collective dominance implies that a dominant position may be held by two or more economic entities legally independent of each other provided that from an economic point of view “*they present themselves or act together on a particular market as a collective entity*”. The Commission even recognised in its dominance proceeding<sup>56</sup> that a condition of “joint” or “collective” dominance could emerge among two or more operators, with the effect of limiting competitive market forces<sup>57</sup>, also the Commission’s preliminary analysis for collective dominance in the market for mobile telecommunications services indicated<sup>58</sup> that;
- Entry barriers are fundamentally high in the mobile telephone market;
  - By necessity, there is frequent interaction among all firms in the cellular mobile industry;
  - While there is in general a high degree of innovation in the mobile industry, 3G services have yet to take off in Nigeria, and innovation within the 2G market has been limited;
  - There are few mobile operators, although again the presence of the CDMA licensees increases this number;
  - There is considerable symmetry among operators, even taking account of their differences between GSM and CDMA;
  - There are necessary structural links among operators, required for interconnection;
  - Demand growth has been very high in the Nigeria mobile telephone market;
  - Combined, the three main firms currently control over 98% of the market, as the two smaller operators are limited to less than 1% each. However, as noted above, at the time this assessment did not include the new CDMA entrants; and
  - Other factors that apply to individual dominance, such as operator size and control of infrastructure, also generally apply to the three largest operators collectively.

<sup>53</sup> Section 21 CPR.

<sup>54</sup> Case C27/76 *United Brands v. Commission*, [1978] ECR 207, [1978] 1 CMLR 429.

<sup>55</sup> Case C-396/96 P [2000] ECR I-1365, at para 36.

<sup>56</sup> NCC, *Determination of Dominance in Selected Communications Market in Nigeria* (March 26 2010).

<sup>57</sup> *Ibid.*, pg. 6

<sup>58</sup> *Ibid.*, Pg. 18

2.43 For our analysis of collective dominance in the market for access to 2G and 2.5G mobile network infrastructure we refer to the criteria set out under § 18 CPR and the main factors that supports the emergence of collective dominance in a communications market as summarised<sup>59</sup> by the Commission in its dominance proceeding and address some of them below;

2.44 **Market share**

2.51 Network externalities derived from using GSM services seems to indicate that MCSPs have more incentive to provide their services through the network infrastructure operated by GSMSPs than that operated by CDMA provider possibly due to larger market base of GSM service in the mobile telecommunications sector.<sup>60</sup> In order to take maximum advantage of the total number of connected GSM lines as a potential source of customer, MCPS have expressed a preference for distributing their services to GSM subscribers rather than CDMA subscribers which represents only 3.47 percent in terms of a total of three million, five hundred and forty one thousand, three hundred and fifty five connected CDMA mobile lines.<sup>61</sup> Because of this, MCSPs are more willing to request access to the network infrastructure of a GSM service provider than that operated by a CDMA service provider. In addition, GSM service provider by investing in modern network infrastructure have demonstrated that they are capable of offering better mobile quality of service(QoS) in terms of service coverage in various cities and towns across Nigeria, thus also increasing the service coverage of MCS. Combined, these GSMSPs currently control about 87.37 per cent of the market for mobile telecommunications services<sup>62</sup>, indirectly controlling 87.37 per cent of the market for access to 2G and 2.5G mobile network infrastructure.

2.45 **Entry barriers**

Entry barriers for the operation of 2.G or 2.5G mobile network are very high because a license and spectrum frequency must be obtained from the Commission.

2.46 **Frequent interaction among firms**

Also as indicated by the Commission in its dominance proceeding, there is frequent interaction among all firms in the cellular mobile industry

2.47 **Low levels of innovation**

Also as indicated by the Commission in its dominance proceeding, there is in general a high degree of innovation in the mobile industry, 3G services have yet to take off in Nigeria, and innovation within the 2G market continues to improve.

2.48 **Few market participants**

Mobile network operators are only nine in the country, of these only seven are in active operation.

<sup>59</sup> *Ibid.*,

<sup>60</sup> See also ABA Section of Antitrust Law, *Telecoms Antitrust Handbook* pg. 9

<sup>61</sup> See NCC subscriber data for June 2012

<sup>62</sup> *Ibid.*

- 2.49 **Symmetry among providers**  
Also as indicated by the Commission in its dominance proceeding, there is considerable symmetry among operators, even taking account of them differences between GSM and CDMA
- 2.50 **Fast demand growth**  
Networks continue to be congested, signifying an increase in subscriber numbers and activities.
- 2.51 **Control of essential facilities**  
Due to their larger collective subscriber base, these GSMSPs indirectly have collective control over the essential facility needed for MCSPs to connect their services to their own subscribers. Also mandated access granted by § 101 NCA prevents the emergence of an alternate 2G and 2.5 network thereby reinforcing GSMSPs monopoly control of this infrastructure<sup>63</sup>.
- 2.52 For the forgoing reasons, we conclude that these GSMSPs collectively enjoy a position of dominance in the market for access to 2G and 2.5G mobile network infrastructure.
- 2.53 **Abuse**
- 2.54 We note that the *holding* of a dominant position is not prohibited but rather it is the *abuse* of a dominant position that is prohibited. The abuse committed by these GSMSPs need not occur in the market in which they collectively enjoy dominance over access to 2G and 2.5G mobile network infrastructure. The court noted in *Tetra Pak International SA v Commission of the European Communities*<sup>64</sup> that a dominant firm may abuse its dominant position by leveraging its market power on one market so as to distort competition on a neighbouring market. Also, the EC has indicated in its Access Notice that where a telecom operator has a dominant position on the infrastructure market and a significant presence on the downstream service market, it may be found to be able to leverage its dominant position from the infrastructure market into the downstream market<sup>65</sup>.
- 2.55 The abusive conduct in this case is "discriminating in the provision of interconnection or other communications services or facilities to competing Licensees"<sup>66</sup>, thus these GSMSPs successfully leverage their collective dominance in the upstream market for access to 2G and 2.5G mobile network infrastructure so as to distort competition in the downstream market for the distribution of mobile content application by short code and without short code through the discrimination in access provided to competing MCSPs. As we have been able to conclude<sup>67</sup> from responses to "question 5" this access provisioned to MCSPs is discriminatory, particularly Charlie had this to say "...is seen launching that same/similar service with the config/tech routing its people communicated earlier 'can't be done". This fact clearly makes a showing that the access granted to competing MCSPs by GSMSPs fails the

<sup>63</sup> See Christopher S. Yoo and Daniel F. Spulber, *Networks in Telecommunications: Economics and Law*, (New York: Cambridge University Press, 2009) p. 297

<sup>64</sup> Case C-333/94, 1996 E.C.R.I-5951.

<sup>65</sup> Access Notice, para. 65-66.

<sup>66</sup> This conduct is capable of substantial lessening of competition by virtue of § 8 (b) CPR.

<sup>67</sup> See para. 2.34-2.36



non-discriminatory standard of § 101 (2) NCA as well as the regulatory policy adopted by the FCC and EU.

2.56 **Anti-competitive effect**

2.57 The substantive test for determining whether a particular conduct will infringe CPR is whether there will be a *substantial lessening of competition*. We now proceed to analyse the practical effects of the collective discrimination of access provided to competing MCSPs in accordance with § 6 CPR.

2.58 **Impact of the conduct on existing competitors in the identified markets**

As stated by Charlie, the difference in the access granted MCSPs lies in the flexibility that is not accorded to competing MCSPs. Though NCA requires that access is provisioned at any technically feasible point, barring the possibility of compromising a network's reliability and security, the real effect of § 101 NCA is to lower entry barrier by mandating access to requesting MCSPs. Moreover, because competing MCSPs must also compensate NFPs for the "bearer costs" incurred for providing access, they have an incentive to make economically efficient decisions about where access can be provisioned<sup>68</sup>. Denying competing MCSPs such opportunity is capable of raising their cost especially where access is provisioned at a more expensive point of access. We have also indicated<sup>69</sup> that discrimination in the technical configuration of network access will ultimately lead to poor quality of mobile content services.

2.59 **Impact of the conduct on further market entry**

As we have indicated above, raising rival cost is likely to constrain further market entry and/or limit the ability of competing MCSPs to expand by attracting more subscriber base, especially where the point of access as in this case may be of a lesser quality of service enjoyed by these GSMSPs ultimately translating into poor QoS for mobile content service subscribers.

2.60 **Impact of the conduct on consumers, including the availability and pricing of products and services**

The discriminatory conduct engaged by these GSMSPs is capable of reducing the incentive of MCSP to compete effectively and efficiently by offering innovative services at minimal cost of production. Where MCSPs no longer have this incentive, there will be a reduction in output, poor quality of mobile content service, consumer choice will be severely constrained and innovation retarded in the industry.

2.61 **Degree of interference with competition that results in identifiable injury to competitors or consumers**

There is an appreciable degree of interference with competition in the downstream market for the distribution of mobile content application by short code and without shortcode because these GSMSPs control about 87.37 per cent of the market for mobile telecommunications services and indirectly the market for access to 2G and 2.5 mobile network infrastructures.

<sup>68</sup> See Robert S. Pindyck and Daniel L. Rubinfeld, *Microeconomics* (2nd ed. 1992)

<sup>69</sup> Para 2.36

### 3. CONCLUSION

- 3.1 We believe we have made a compelling case to justify our request for an investigation. As we stated previously such discriminatory conduct engaged by these GSM service providers is capable of severely constraining the choice of mobile content service consumers and retarding innovation in the mobile content space, more so as the Commission will note that news sources recently indicated the potential of the mobile content space to generate revenue in excess to \$11.5 Billion by 2014<sup>70</sup> and also, innovation in mobile content services is likely to promote increased consumption of mobile content which drives MCSPs to invest in more innovation thus creating a demand driven "virtuous circle" of innovation and investment consistent with § 1 (d) of NCA.
- 3.2 To this end we humbly request that the Commission exercise its power of investigation under § 1 to the Schedule to CPR to determine;
- I. Whether these GSMSPs are engaging in "*concerted practices*" between themselves by collectively discriminating in providing access to their network infrastructure to competing MCSPs; and/or
  - II. Whether these GSMSPs are abusing their collective dominant position in the market for access to 2G and 2.5G mobile network infrastructure by discriminating in the provision of access to their mobile network infrastructure to competing MCSPs.
- 3.3 On last note we humbly draw the attention of the Commission to § 4 (1) (d) NCA which provides that Commission *shall* have the following functions [emphasis ours] *inter alia: the promotion of fair competition in the communications industry and protection of communications services and facilities providers from misuse of market power or anti-competitive and unfair practices by other service or facilities providers or equipment suppliers*. National Assembly's use of the word "*shall*" connotes mandatory discharge of a duty or obligation<sup>71</sup>, and thus requires the Commission to act and as a minimum commence investigation into this particular matter. Should investigation determine that these GSMSPs are indeed engaged in a discriminatory conduct in providing access to competing MCSPs, we also humbly request that the Commission exercise its power to give direction remedying such conduct under § 34 and § 35 of CPR.

Respectfully submitted,

**CONSUMERS EMPOWERMENT ORGANIZATION OF NIGERIA**

**16 OCTOBER 2012**

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<sup>70</sup> See Business Day, *Rancard deepens Nigeria's mobile VAS market*, 21 August 2012 at <http://www.businessdayonline.com/NG/index.php/tech/telecoms/43135-rancard-deepens-nigerias-mobile-vas-market>

<sup>71</sup> *Tabik Investment Limited & Anor v. Guarantee Trust Bank Thisday Law Report, Tuesday, November 8<sup>th</sup>, 2011*