

**REGULATING ANTI-COMPETITIVE
PRACTICES**

in

NIGERIA'S COMMUNICATIONS SECTOR

by

Chukwuyere Ebere Izuogu



Regulating anti-competitive practices in Nigeria's communications sector
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List of contents

Foreword	vii
Preface	ix
Acknowledgments	xiii
Table of cases	xvii
Tables	xxiii
List of abbreviations	xxv
Author's biography	xxvi
CHAPTER 1	
THE REGULATORY LANDSCAPE OF NIGERIA'S COMMUNICATIONS SECTOR	1
Introduction	1
The Nigerian Communications Act CAP N97 LFN 2004	1
Regulations and Guidelines	2
The Wireless Telegraphy Act	35
Authorisation/licensing regime	37
CHAPTER 2	
INTRODUCTION TO COMPETITION LAW	41
Introduction	41
The meaning of competition	41
I. Anti-competitive agreements	42
II. Abuse of a dominant position	42
III Mergers and acquisition	43
Goals of competition law	43
I. Consumer welfare	43
II. Economic efficiency	44
III. Freedom of economic choice	45
IV. Wealth redistribution/transfer	46
V. Innovation	46
CHAPTER 3	
MARKET DEFINITION IN NIGERIA'S COMMUNICATIONS SECTOR	49
Introduction	49
The concept of market definition	49
Methodology for defining the relevant communications market under the Competition Regulations	51
The product market	52
The geographic market	59
Product markets in Nigeria's communications sector	60
Mobile call and SMS termination are separate product markets	63
Product market for different customer groups	64
EC recommendation of relevant product and service	64

markets within the electronic communications sector

CHAPTER 4

THE SUBSTANTIAL LESSENING OF COMPETITION TEST	67
Introduction	67
The substantive standard for assessing anti-competitiveness	67
Impact of the conduct on existing competitors in the identified markets	71
I. Foreclosure	71
II. Raising rivals' cost	76
III. Restriction of competitors' sales	77
Impact of the conduct on further market entry	77
Impact of the conduct on consumers, including the availability and pricing of products and services	77
I. Overcharges	78
II. Constrained choice	78
III. Retarded innovation	79
IV. Output restriction	79
Degree of interference with competition that results in identifiable injury to competitors or consumers	80
Conducts deemed to result in a substantial lessening of competition in the communications sector	82
a) Failing to supply interconnection or other essential facilities to a competing Licensee, ⁹⁴ in accordance with any interconnection agreement between the parties or any direction, rule or order issued by the Commission, pursuant to the Act or the Interconnection Regulations, except under the circumstance that are objectively justified on supply conditions, such as failure, based on shortage of available facilities	83
b) 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	89
c) Bundling of communications services, whereby the Licensee in question requires, as a condition of supplying a service to a competing Licensee, that the competing Licensee acquire another service that it does not require	96
d) Offering a competing Licensee more favourable terms or conditions that are not justified by cost differences, if it acquires another service that it does not require	100
e) Pre-emptively acquiring or securing scarce facilities or resources, including rights of way, required by another Licensee for the operation of its business, with the effect of denying the use of the facilities or resources to the other service provider	102
f) Supplying communications services, at prices below long run	103

LIST OF CONTENTS

	average incremental costs or such other cost standard, as is adopted by the Commission	
g)	Using revenues or the allocation of costs from one communications service to cross-subsidize another communications service, except where such cross subsidy is specifically approved by the Commission including, approval of tariffs or charges for the relevant communications services	106
h)	Failing to comply with interconnection or facilities access obligations, including the Telecommunications Networks Interconnection Regulations 2007, any other interconnection or access terms specified or approved by the Commission, or any interconnection or access related decisions, directions or guidelines of the Commission	107
i)	Performing any of the following actions, where such actions have the effect of impeding or preventing a competing Licensee's entry into, or expansion in, a communications market	108

CHAPTER 5

	ANTI-COMPETITIVE AGREEMENTS AND PRACTICES	115
	Introduction	115
	The meaning of understanding, agreement or arrangement	115
	The prohibited agreements	118
I.	Rate fixing	122
II.	Market sharing	126
III.	Boycott of another competitor, a supplier of apparatus or equipment, or of any other Licensee	127
IV.	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 also required to acquire or not to acquire any other product or service either from himself or from another person	128
	Part III of the Competition Regulations	130
a)	Price fixing agreements among competing Licensees	131
b)	Bid rigging between competing licensees	132
c)	Market allocation	133
d)	Resale price maintenance	133
e)	Exclusive dealing	133
f)	Any other agreement or practices between Licensees or between Licensees and third parties	133
	Effect of the prohibited agreements	134

CHAPTER 6

	ABUSE OF A DOMINANT POSITION	137
	Introduction	137
	The applicable provision	137
	The concept of dominance	139

The test of dominance	139
Other market circumstances	147
Procedural preliminaries	147
Market definition	148
Presumption of dominance	148
Determination of joint dominance	148
The concept of abuse	153
The regulation of market power for the purpose of applying ex anteregulatory obligations	155
 CHAPTER 7	
MERGERS, ACQUISITIONS AND TAKEOVERS	171
Introduction	171
Definition of terms	172
Anti-competitive effects of mergers	173
Merger review under the Competition Regulations	175
Jurisdictional threshold for merger review	175
"Licensee" for the purpose of merger review	176
Prior notification	177
The substantive assessment of mergers	179
Merger review under the ISA	200
Jurisdictional threshold for merger review under the ISA	200
Failure to notify	201
Substantive assessment of mergers by SEC	201
The treatment of efficiencies in merger analysis	203
The failing firm defence	206
Merger remedies	208
I. Merger remedies under the Competition Regulations	208
1. Structural remedies;	209
2. Conduct/behavioural remedies;	210
Non-discrimination provisions:	210
Firewall provisions	211
Prohibition on certain restrictive commercial practices:	211
Transparency provisions	212
Anti-retaliatory provisions	212
II. Merger remedies under ISA	215
 CHAPTER 8	
ENFORCEMENT AND REMEDIES	217
Introduction	217
General principles guiding the enforcement power of the Commission	217
Public enforcement by the Commission	219
I. Enforcement under the Act	219
II. Enforcement under the provisions of the Competition Regulations	223
Judicial review of the enforcement authority of the Commission,	226

LIST OF CONTENTS

Right to judicial review under the Act	228
Private enforcement	229
I. Enforcement under the Act	231
Injunction	231
Damages	232
Damages for loss of profit,	232
Damages for overcharges,	235
II. Enforcement under the Competition Provisions	236
Commencing a proceeding under the Competition Regulations by an interested person	236
CHAPTER 9	
A REVIEW OF A BILL FOR AN ACT TO ESTABLISH THE FEDERAL COMPETITION COMMISSION AND FOR PURPOSES CONNECTED THEREWITH	243
Introduction	243
Legislative history and overview of the Bill	243
Relevance of the Bill to Licensees	244
Part II - Agreements	244
The "agreement" requirement	245
Undertakings	245
Decisions by association of undertakings	246
Concerted practices	246
Agreements exempted under Part II	248
Part III - Abuse of Dominant Position	249
Part IV - Mergers, Takeovers and Acquisitions	251
The effect of the Bill on the regulatory oversight function of the Commission	252
Conclusion	253
INDEX	255

REGULATING ANTI-COMPETITIVE PRACTICES IN NIGERIA'S COMMUNICATIONS SECTOR

Foreword

It is a great pleasure to write a foreword to this academic work. As stated by the author, the work is a review of the Commission's effort in regulating competition in Nigeria's communications sector, particularly how the Commission has acted to protect consumers from the misuse of market power as may be exercised by a Licensee.

The objectives of the Federal Government for the Telecom sector were clearly set out in the National Telecommunications Policy (NTP) enacted in year 2000. Recognizing that the availability of efficient and reliable telecommunications services is a key ingredient for promoting rapid socio-economic development, the government declared its overriding objective as: to "achieve the modernization and rapid expansion of the telecommunications networks and services in Nigeria". We have indeed made tremendous progress since those early days.

To attain these far-reaching goals, the roles of policy makers and regulators as stated in the NTP revolved around serving the consumer interest; supporting universal access to ICT services at affordable cost; securing effective competition and the competitiveness of the industry as a whole; promoting quality, plurality, diversity and choice in services; encouraging investment in service and infrastructure; providing economically efficient management of scarce resources. Policy and Regulatory frameworks must therefore be continuously refined and updated in order to continue to attain these objectives.

One of the key enablers of the rapid and sustained growth in Nigeria's Communications sector was the enactment of the Nigerian Communications Act (NCA) of 2003. At a fundamental level, the Act provided the legal backing to the NTP as well as sought to ensure orderly development of all aspects of the Nigerian Communications Industry. As communications services become available and accessible nationwide, consumers should be consistently protected from service providers who may try to employ market power to suppress competition or take advantage of the consumer. The Act therefore empowers the Commission to act to protect consumers, and ensure fair market competition in Section 4 (b) and (d) respectively. The Act, in Section 91 (1), also forbids a Licensee from engaging (or partaking) in a conduct that has the "purpose" or "effect" of substantially lessening competition in an aspect of the Nigerian Communications market.

During my tenure at the Commission, we responded to the need for market competition by enacting both the Competition Practice Regulations 2007 and the Telecommunications Networks Interconnection Regulations 2007. These Regulations were designed with the key object of protecting market competition, and ultimately consumers from anti-competitive practices. While the Competition Practice Regulations was enacted 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, the Telecommunications Networks Interconnection Regulations in Part III, provides for a system of regulating Licensees with market power in an interconnection market, on an ex ante or prospective basis. In addition, all communications licenses in the individual category contain conditions that prohibits the holder from engaging in various types of anti-competitive conducts. The Commission till

date has also initiated two dominance determinations (in 2010 and 2013), whereby the market power of a Licensee is assessed to determine whether or not to subject it to ex ante regulatory obligations.

This book coming at this time is particularly timely, as recent events reported in the media especially the case of *Emerging Markets Telecommunications Services Limited v. Nigerian Communications Commission & MTN* and *Emerging Markets Telecommunications Services v. MTN & Visafone*, have generated a lot of public interest and comments both online and offline, with respect to the competition regulation of communications services in Nigeria. In addition, as the Commission presently seeks to attract new investment in broadband services provision, it is expected that consumers will be adequately protected from service providers with market power in the broadband ecosystem, underscoring the importance of this book.

On a forward-looking level, I see the Commission as continually building upon the post 2003 legacy in its effort to regulate competition so as to have a sophisticated regulatory environment that is responsive to consumer needs and welfare, and most importantly in leading the charge against anti-competitive practices in Nigeria's communications market.

As an industry practitioner, I am confident that this book will make its intended contribution to the communications industry in Nigeria, by assisting various industry practitioners to resolve the myriad of competition issues that arise in this industry, and in this area of law practice.

I commend the effort of this young scholar Mr Chukwuyere Izuogu in producing this quality work.

Dr. Ernest C. Ndukwe, OFR
Chairman Openmedia Communications Limited
Former Executive Vice Chairman/Chief Executive Officer of the Nigerian
Communications Commission

Preface

In most jurisdictions, no area of law has had a more profound impact in shaping the communications (in this book the word “communications” means “telecommunications” and *vice versa*) sector than competition law (or Antitrust law as is known in the United States). For instance, the regulatory obligations of collocation, infrastructure sharing, interconnection and unbundled access mandated by communications sector regulators have their roots in the competition law concept of *essential facilities*.

At present, the market for communications services in Nigeria is the largest in Africa with potential for further growth. The Nigerian Communications Commission (the Commission), the communications sector regulator continues to initiate proactive regulatory measures to improve upon growth and deepen broadband internet penetration while still ensuring that quality of service for mobile telecommunications service is improved and that consumers have value for money. More importantly, the strategic vision (2015 – 2020) of the Commission under the current leadership of Engr. Prof. Umar Garba Danbatta, FNSE is hinged on an 8-point agenda, which includes *inter alia* the promotion of fair competition and inclusive growth. To achieve this, the Commission will work to foster the assurance of fair competition through regulations that ensure strict compliance to obligations imposed on dominant operators in ways that stimulate the growth and sustainability of smaller players in the mainstream, value added services and ancillary services in the communications service sector.

Presently, the Competition Practices Regulations 2007 (the Competition Regulations) made by the Commission pursuant to its rule making powers under the Nigerian Communications Act 2003 (the Act) is the sector specific regulatory framework for anti-competitive practices (in this book, practices and conducts should be read as having the same meaning) in Nigeria’s communications sector, and is the most comprehensive competition law framework currently in force in Nigeria. Unfortunately, more than 8 years since the coming into force of the Competition Regulations, there have been very few instances in which its provisions have been asserted before any Nigerian court or applied by the Commission, in challenging anti-competitive practices. In addition, legal scholarship in this area of practice is close to non-existent in Nigeria.

In the light of these facts, the writing of the book has become necessary, as the book seeks to bridge the knowledge gap by providing competition and communications law practitioners, and industry practitioners with the required knowledge for regulating anti-competitive practices in this burgeoning industry, and the practical application of this knowledge to challenge these practices at their incipency.

The book, in addition to giving an overview of the Act, the Wireless Telegraphy Act 1990 and all other Regulations and Guidelines currently applicable in Nigeria’s Communications sector, it discusses in detail, the concept of a substantial lessening of competition which is the substantive standard used by the Commission for evaluating anti-competitive conducts in Nigeria’s communications sector. The book also discuss among other things, the substantive application of the competition rules by the Commission in the three broad areas of anti-competitive agreements and practices; abuse of a dominant position; and mergers, acquisitions and takeovers.

Where neither the Commission nor a Nigerian Court have applied these competition rules or made a determination as to their statutory meaning, the book refers to the

application of similar rules by competition authorities in other competition jurisdictions, particularly in the European Union (EU) and United States (US). As case laws of Nigerian origin are scant in this area of practice, due to the fact that most of the issues discussed in the book, would ordinarily be first impression matters before any Nigerian Court, the book relies mostly on case laws from the EU, particularly from the Court of Justice of the European Union (CJEU), including the decisional practices of the European Commission (EC), as persuasive authority for the relevant competition law principle, or as an illustration of the application of this principle. The choice of case laws from the CJEU is twofold, firstly, some of the provisions of the Competition Regulations are modelled after the provisions of the competition law framework applicable in the EU, secondly, a large number of the world's competition law cases appear to be litigated in the EU. In this context, any reference to the CJEU will generally refer to the European Court of Justice (ECJ), General Court (GC) or Court of First Instance (CFI), unless stated otherwise.

In some other parts, the book also refers to relevant case laws from the US (including the decisional practices of the Federal Communications Commission), and other competition jurisdictions. In this regard, I am quick to make clear, that the book reflects the position of Nigerian law, and the reference to authorities from other competition jurisdictions should in no way be construed as the position of law in these jurisdictions. In addition, the book regularly cites the policy/regulatory rationale underpinning the adoption of certain aspects of the regulatory regime in construing these provisions.

The book in discussing some of the issues under the relevant competition rule, important regulatory questions pertinent to the Commission's competition enforcement mandate are brought to light. However, the book does not attempt to answer these questions or articulate any particular position, but rather it presents an objective review on the state of the law in this area of practice, while leaving the unanswered questions for the Commission's determination pursuant to the administrative law doctrine of administrative deference.

It is important to state that while most academic works on competition regulation are normally based on an analysis from both a legal and economic standpoint, due to my background in law (and limited expertise in economic analysis), the book is primarily grounded in legal analysis save for a few economic concepts fundamental to the understanding of competition law. It is intended that the book will serve as a useful research guide for competition and communications law practitioners in Nigeria, and especially officials of the Commission investigating anti-competitive practices. Academics, Economists and law students with an interest in the competition regulation of communications services in Nigeria will also find the book useful.

I do not claim that the book is an exhaustive resource on the treatment of anti-competitive practices in Nigeria's communications sector but rather, I know that it is a good starting point for the discourse as case law jurisprudence, decisional practices of the Commission and legal scholarship in this area of practice continue to evolve. For the benefit of non-Nigerian readers, it is important to note that in writing the book, I have adopted the legal writing style commonly used in "written addresses" before Nigerian courts, while at the same time I tried to incorporate "Stylus, A Guide to Writing in the Law School" which I learnt during my European Legal Informatics Study Programme (euLISP) LL.M exchange at the University of Strathclyde in Glasgow, Scotland under the tutorship of Professor Ian Lloyd and Catherine Colston.

PREFACE

On a last note, it is interesting to state that the writing of the book coincided with the presentation of several competition bills at the National Assembly of the 8th Legislative Assembly, among which are the Federal Competition and Consumer Protection Bill 2015 (SB. 137) and Federal Competition and Consumer Protection Bill 2016 (SB. 257) currently before the Senate, and the Federal Competition Commission (Establishment) Bill, 2015 (HB. 01) and the Federal Competition and Consumer Protection Bill 2016 (HB. 60) currently before the House of Representatives. If SB. 137, SB. 257, HB. 01, HB. 60 or any of the other competition bill is eventually enacted into law, it will have serious legal ramifications on regulating competition in Nigeria, including in the Communications sector. In the light of this, Chapter 9 of the book reviews HB. 01, which is sponsored by Honourable Yakubu Dogara, the present Speaker of the House of Representatives, with a view to identifying its relevance to holders of a communications license, and in particular, how HB. 01 will affect the regulatory oversight functions of the Commission, if eventually enacted in its present form.

The book builds upon several articles I have written in the past on this subject matter, and I have stated the law in Nigeria as at 15 September 2016.

Acknowledgements

My journey to this book started in 2011 after reading “The Antitrust Enterprise: Principle and Execution” authored by Professor Herbert Hovenkamp and my subsequent writing in the first month of 2012, an article titled “A Summary Evaluation of the Antitrust Implications of Helios Towers’ Acquisition of Multilinks Telkom”, which was published in the February 9, 2012 edition of *BusinessDay Newspaper*. Thereafter my interest in the competition regulation of communications services escalated, and I have been closely following the work of the Commission in this area since then. Coming this far with several articles in this regard, and now this book, I will ever continue to be indebted and grateful to the following persons who have assisted me in this journey.

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I express my sincere gratitude to Dr. Ernest C. Ndukwe, OFR, Chairman of *Openmedia Communications Ltd*, and formerly Executive Vice Chairman/Chief Executive Officer at the Nigerian Communications Commission, for kindly agreeing to write the Foreword to the book.

My esteemed appreciation also go to Mr. Vytautas Paukstys, the founder and Chief Executive Officer (CEO) of *Eskimi*, who made personal contribution to see that the publication of the book becomes a reality and Mr. Emmanuel Anyaegbunam, Senior Legislative Aide at the National Assembly, for his never-ending support, encouragement and advice to me as a first time author.

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Special thanks go to Honourable Justice Dr. Nnamdi Dimgba who took time out of his busy schedule as a Judge of the Federal High Court, to review the first draft of the book and make constructive additional suggestions, to Ms. Theodora Kio-Lawson, Law Editor at *BusinessDay Media Limited* and present Chair of the Lawyers in the Media, for freely giving me a platform to share my earlier works, from which the initial motivation for the book arose. To Mr. Paul Usoro (SAN) Senior Partner at *Paul Usoro & Co. Legal Practitioners*, Mr. Basil Udotai, Managing Partner at *Technology Advisors*, and Dr. Chukwudiebube Bede Abraham Opata (of blessed memory) all of whom I regard as

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Lastly, I must acknowledge the following academics and practitioners; Professor Herbert Hovenkamp, Ben and Dorothy Willie Chair at the University of Iowa College of Law; Mr. Laurent Garziniti, Partner at the Brussels office of Freshfields Bruckhaus Deringer LLP; Professor Damien Geradin, Partner at EDGE Legal and Professor of Competition Law & Economics at Tilburg University; Professor Richard Whish, QC (Hon), at Kings College London; Professor Steven Salop, Professor of Economics and Law at Georgetown University Law; Mr. Gregory Sidak, Chairman of Criterion Economics; and Mr. Peter Alexiadis, Partner at the Brussels office of Gibson, Dunn & Crutcher LLP, neither of whom I have had the privilege and honour of meeting in person, but have nevertheless inspired me to write this book through my reading of their various legal scholarships on competition and/or communications law. It is my hope that the book will find its way across to each of you, one way or the other.

In all, I give thanks to the Almighty God.

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15 September 2016

Dedication

To my late Dad, Rapheal Ebere Izuogu (1945-2003) who toiled tirelessly that I may acquire knowledge, and to my Mum, Justina Nwanyibaku Izuogu who continues to be my moral and spiritual backbone.

To my son, Nathan Akachukwu Sobraye so that you will go farther than my footsteps and become a trailblazer exceeding me in every material way.

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 Circuit 2001
 Fédération nationale de la coopération bétail et viande (FNCBV) (T-217/03) and Fédération
 nationale des syndicats d'exploitants agricoles (FNSEA) and Others (T-245/03) v. Commission
 of the European Communities (Joined cases T-217/03 and T-245/03)
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 French Republic and Société commerciale des potasses et de l'azote (SCPA) and Entreprise
 minière et chimique (EMC) v. Commission [1998] ECR I-1375 (Joined Cases C-68/94 and C-
 30/95)
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TABLES

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 Kotoye v. C.B.N (1989) 1 N.W.L.R (Pt. 98) S.C 419
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 Mobile Netherlands [2009] ECR I – 4529 (Case C -8/08 T)
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TABLES

Mr. Effiok Archibong v. Ita Nkan (2010) LPELR – 3802
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 Muniyas (Nig.) Ltd v. Ashafa (2011) 6 N.W.L.R (Pt. 1242)
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 (Case C-393/92)
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 U.S. 85, 109 n.38 (1984)
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 News Ltd v. Australian Rugby Football League Ltd (1995) 58 FCR 447 at 527; 135 ALR 33
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 Nwaoboshi v. MILAD, Delta (2003) 11 N.W.L.R (Pt. 831)
 NVIAZ International Belgium and others v. The Commission [1983] ECR 3369 (Joined Cases
 96/102, 104, 105, 108, 110/82)
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 Ogidee v. The State (2005) 5 N.W.L.R (Pt. 918) 286 at 327
 Ohakim v. Agabaso (2010) 19 N.W.L.R (Pt. 1226) 172 S.C
 Omega Environment, Inc v. Gilbarco, Inc. 127 F. 3d 1157 - Court of Appeals, 9th Circuit 1997
 Orakul Resources Ltd & Anor v. NCC and Ors Part 1060, (2007) 16 N.W.L.R. 270 – 314
 Ortho Diagnostic Systems, Inc. v. Abbott Laboratories, Inc. 920 F. Supp. 455, 458 (S.D.N.Y.
 1996)
 Oscar Bronner GmbH and Co KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co.
 KG [1998] ECR I-7791 (Case C-7/97)
 Pan Bisbuilder v. First Bank of Nigeria Ltd (2000) 1 N.W.L.R (Pt. 612) 684
 Post Danmark A/S v. Konkurrencerådet (Case C-209/10)
 P.P.A. v. I.N.E.C. (2012) 9 N.W.L.R (Pt. 1304) 185 S.C, p. 226
 Princewill Eyo Asuquo & Ors. v. Mrs. Grace Godfrey Eyo & Anor (2013) LPELR-20199 (CA)
 Protimonopolný úrad Slovenskej republiky v Slovenská sporiteľňa a.s. (Case C-68/12)
 Queen v. District Officer (1961) 1 All N.L.R. 51
 Queen City Pizza, Incorporated v. Domino’s Pizza Incorporated., 922 F. Supp. 1055 (E.D. Pa.
 1996)
 Rebel Oil Co., Inc. v. Atlantic Richfield Co., 51 F. 3d 1421 Court of Appeals, 9th Circuit 1995
 Re National Sulphuric Acid Association Ltd OJ L260, 3.10.80, p24, [1980] 3 CMLR 429
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 Company, 532 F.3d 1111 (10th Cir. 2008)
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 Rural Press v ACCC [2002] FCAFC 213
 S.A.P (Nig.) Ltd v. C.B.N (2004) 15 N.W.L.R Pt. 897) C.A 665
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 Solvay v. Commission [2009] ECR II-4621 (Case T-57/01)

TABLES

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 Standard Oil Company of California et al. v. United States, 337 US 293
 Syndicat français de l'Express international (SFEI) and others v. La Poste and others European Court reports 1996 Page I03547 (Case C39/94)
 Tabik Investment Limited & Anor v. Guarantee Trust Bank (2011) LPELR-SC.101/2005
 Taiwo v. Adegboro (2011) 11 N.W.L.R (Pt. 1259) S.C 562
 Tasty Baking Co. v. Ralston Purina Inc. 653 F. Supp. 1250, 1260-62 (E.D.Pa 1987)
 Telcor Communications Incorporated v. Southwestern Bell Telephone Company 305 F.3d 1124, 1130-31 (10th Cir. 2002)
 Tetra Laval BV v. Commission (Case T-5/02)
 Tetra Pak v. Commission (Tetra Pak II) [1994] ECR II-755, [1997] 4 CMLR 726 (Case T-83/91)
 Tetra Pak International SA v. Commission [1996] ECR I-5951 (Case C-333/94 P)
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 United Brands Company and United Brands Continental BV v. Commission of the European Communities [1978] ECR 207 (Case 27/76)
 United States v. AT & T Corp. and McCaw Cellular Communications Inc, 59 Fed. Reg. 44, 158 (August 26, 1994)
 United States v. Bazzarvoice Inc, 2014 WL 203966, 260 (N.D. Cal.)
 United States v. Brighton Building & Maintenance Co., 598 F. 2d 1101 Court of Appeals, 7th Circuit 1979
 United States v. Continental Co., 378 U.S 441, 447 (1964)
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 United States v. Rockord Memorial Corp. 898 F.2d 1278 (7th Cir. 1990)
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 United States v. Topco Associates, Inc., 405 US 596 Supreme Court 1972
 United States v. Trenton Potteries Co., 273 U.S. 392

TABLES

United States v. United Tote, Inc., 768 F. Supp. 1064 Dist. Court, D. Delaware 1991
United States v. Waste Management, Inc., 743 F. 2d 976 Court of Appeals, 2nd Circuit 1984
Unitrust Insurance Co. Ltd. v. Ambico Sendirian Nigeria Ltd (2012) LPELR-15417 (CA)
Unity Bank Plc v. Kayode Olantunji Esq. (2014) LPELR-24027 (CA)
Universal Trust Bank Limited & Ors v. Dolmetsch Pharmacy (Nigeria) Limited (2002) 8 N.W.L.R (Pt. 770) 726
US v. Baker Hughes Inc., 908 F. 2d 981 Court of Appeals, Dist. of Columbia Circuit 1990
US v. H & R Block, Inc., et al., 833 F. Supp. 2d 36 Dist. Court, Dist. of Columbia 2011
U.S. Healthcare, Inc. v. Healthsource, Inc., 986 F.2d 589, 593 n. 2 (1st Cir.1993)
US v. Rockford Memorial Corporation & SwedishAmerican Corporation 717 F. Supp. 1251 Dist. Court, ND Illinois 1989
Ushie v. Edet (2010) 6 N.W.L.R (Pt. 1190) C.A 386
Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP 540 U.S. 398 (2004)
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Wanadoo España v. Telefónica (Case COMP/38.784)
Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 320 (2007)
Yellow Page Solutions, Inc v. Bell Atlantic Yellow Pages Co. (S.D.N.Y Nov. 19, 2001)
Zenith Bank PLC v. Dr. Solomon Omorodion & Ors (2013) LPELR-20755 (CA)

Tables**Table of Nigerian Communications Commission decisions**

Interconnect Clearinghouse Nigeria Limited v. MTN Nigeria Communications Limited

Table of European Commission decisions

Case COMP/M.1795 Vodafone Airtouch/Mannesman

Case COMP/M. 1795 Vodafone Airtouch/Mannesmann

Case M. 1430 Vodafone/Airtouch

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Case No. IV/M053 - Aerospatiale-Alenia/de Havilland

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Case No. IV/M042 - Alcatel/Telettra

Case C-202/07 P France Télécom v Commission

Case COMP/38.784 – Wanadoo España v. Telefónica

Joined Cases C-68/94 and C-30/95, French Republic and Société commerciale des potasses et de l'azote (SCPA) and Entreprise minière et chimique (EMC) v. Commission [1998] ECR I-1375

Case M. 1524, Airtours/First Choice

Case No COMP/M.3764. Belgacom / Swisscom / JV Notification of 08.04.2005 pursuant to Article 4 of Council Regulation No 139/2004

Case M.3916, T-Mobile Austria/tele.ring

Skansa/Scancem Case IV/M. 1157 [1999] O.J. L183/I

Case M.5532, Carphone Warehouse/Tiscali UK

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Case 92/163/EEC: Commission Decision of 24 July 1991 relating to a proceeding pursuant to Article 86 of the EEC Treaty (IV/31043 Tetra Pak II)

Case AT.39727 – CEZ Commission Decision of 10/04/2013

Case M.3920 France Télécom/Amena Commission Decision of October 24, 2005

Commission Decision No. 81/969/EEC (Bandengroothandel Frieschebrug BV/NV Nederlandsche Banden-Industrie Michelin), 1981 O.J.L 353

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TeliaSonera/Orange DK (M.3530)

Vodafone/Oskar Mobile (M.3776)

Telenor/Vodafone Sverige (M. 4034)

Commission Decision of 15 July 1975 relating to a proceeding under Article 85 of the EEC Treaty) (75/497/EEC)

Commission Decision of 16 May 2000 relating to a proceeding pursuant to Article 81 of the EC Treaty (IV/34.018 - Far East Trade Tariff Charges and Surcharges Agreement (FETTCSA)

TABLES

83/361/EEC: Commission Decision of 13 July 1983 relating to a proceeding under Article 85 of the EEC Treaty (IV/30.174 - Vimpoltu)

Table of Federal Communications Commission Orders

Applications of AT&T Inc. and Atlantic Tele-Network, Inc., Memorandum Opinion and Order, 28 FCC Rcd. 13670, (2013)

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

List of abbreviations

BEREC	Body of European Regulators of Electronic Communications
BPE	Bureau of Public Enterprise
CDMA	Code Division Multiple Access
CFI	Court of First Instance
CJEU	Court of Justice of the European Union
DoJ	Department of Justice
EC	European Commission
ECJ	European Court of Justice
ECT	European Community Treaty
ERG	European Regulators Group
EU	European Union
FCC	Federal Communications Commission
GSM	Global System for Mobile Communications
ISP	Internet Service Provider
LEC	Local Exchange Carrier
MNO	Mobile Network Operator
MVNO	Mobile Virtual Network Operator
mVAS	Mobile Value Added Service
Ofcom	Office of Communications
OTT	Over-The-Top
SMS	Short Message Service
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom
US	United States of America
WWASL	Wholesale Wireless Access Service License

Author's biography

Born September 20, 1979, Chukwuyere Ebere Izuogu is a legal practitioner who litigates and counsels clients in all areas of communications law, with particular focus on the competition regulation of communications services. Chukwuyere also undertakes work in the area of intellectual property law, particularly patent and copyright law. His most recent engagement include advising the largest online social networking service in the world, and the largest instant messaging service provider in the world, on the legal aspects of implementing a zero-rated data service in Nigeria. Presently he provides, pro bono legal advice to the Wireless Service Providers of Nigeria (WASPAN), the largest industry group in Nigeria's communications sector in terms of membership and the Consumer Empowerment Organisation of Nigeria (CEON) a consumer advocacy group in Nigeria. Chukwuyere also renders advice to Eskimi, a European based mobile social networking service with a large subscriber base in Africa and Asia.

Chukwuyere's articles on various areas of communications, competition and intellectual property law regularly appear in the BusinessDay Law column of Businessday. Since 2013, he has been a contributor to the Nigerian chapter of Getting the Deal Through on Telecoms and Media published by Law Business Research in the United Kingdom. Chukwuyere studied law at the University of Benin (2003), Nigerian Law School (2005), University of Strathclyde (2009) and University of Hannover (2009). He has attended professional courses at WIPO Worldwide Academy (Geneva), Institute for Public Private Partnership (IPP) (Washington), and CUTS Institute for Regulation and Competition (New Delhi). He is an Associate of the Chartered Institute of Arbitrators (CI Arb, UK) and an Associate Member of BSC – The Chartered Institute for IT.

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Quotation

“Competition is not only the basis of protection to the consumer, but is the incentive to progress”

Herbert Hoover

CHAPTER 1

THE REGULATORY LANDSCAPE OF NIGERIA'S COMMUNICATIONS SECTOR

Introduction

This chapter will give a general overview of the Nigerian Communications Act 2003 (hereinafter referred to as the Act), the Wireless Telegraphy Act 1990 and all Regulations and Guidelines currently applicable in the Nigeria's communications sector, as at the time of this writing. Of particular note is Section 70 (1) of the Act, which authorises the Commission to make Regulations and Guidelines for among other things, on such other matters as are necessary for giving full effect to its provisions. To this end, the Commission in exercising its rule making power under this section has issued several of these Regulations and Guidelines since the enactment of the Act more than a decade ago. Draft Regulations and Guidelines currently considered by the Commission as at the time of this writing will not be discussed.

Finally, the chapter concludes with a description of the authorisation/licensing regime for certain types of communication services and radio frequency (spectrum) in Nigeria.

The Nigerian Communications Act CAP N97 LFN 2004

The present Nigerian Communications Act is a bye product of the work of the committee for telecommunications policy for Nigeria. In 1999, the President of the Federal Government of Nigeria (the Government or FGN) in order to promote total liberalisation, competition and private sector led investment in Nigeria's telecommunications sector inaugurated the committee for telecommunications policy, which was tasked with reviewing the earlier National Policy on Telecommunications 1998.

The report of the committee formed the working papers for the current National Policy on Telecommunications 2000. Chapter three of the 2000 policy sets out as one of the roles of the FGN "*Enacting necessary laws and taking other measures promptly in support of the National Telecommunications Policy*" thus giving birth to the Act.

The Act was signed into law on 8th July 2003. In its explanatory memorandum, the Act provides, amongst other things for the; repeal of the Nigerian Communications Commission Act 1992 as amended; reform of the Nigerian communications 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 Nigerian Communications Commission (hereinafter referred to as the Commission or NCC). Under the Act, the Commission is charged with

the responsibility of regulating the communications sector¹ and has a number of specified functions. The Act also makes detailed provisions for licenses,² establishment and function of the National Frequency Management Council,³ powers and procedures of the Commission,⁴ rule making powers of the Commission,⁵ the Commission's power to resolve communications disputes,⁶ the Commission's exclusive competence on competition laws,⁷ interconnection,⁸ access,⁹ quality of service,¹⁰ tariff rate regulation,¹¹ universal service provision¹² and technical regulation.¹³

Under the Act, the Minister of Communications Technology (the Minister) is vested with the following functions and responsibilities; the formulation, determination and monitoring, of the general policy for the communications sector in Nigeria with a view to ensuring, amongst others, the utilisation of the sector as a platform for the economic and social development of Nigeria;¹⁴ the negotiation and execution of international communications treaties and agreements, on behalf of Nigeria, between sovereign countries and international organisations and bodies;¹⁵ and the representation of Nigeria, in conjunction with the Commission, at proceedings of international organisations and fora on matters relating to communications.¹⁶

The Commission in exercising its rule making power under the Act¹⁷ has issued the following Regulations and Guidelines. They are;

I. The Frequency Spectrum (Fees and Pricing, Etc.) Regulations 2004

The Frequency Spectrum (Fees and Pricing, Etc.) Regulations 2004 (the Frequency Spectrum Regulations) relates to the determination of all frequency spectrum fees for commercial activities in the telecommunications¹⁸ sector in Nigeria.¹⁹ The objectives of the Frequency Spectrum Regulations are to; establish a transparent, fair, competitive and non-discriminatory pricing structure that includes (but is not limited to) auctions, beauty contest and other internationally accepted methods of bidding for the acquisition of frequency spectrum;²⁰

¹ Section 3 (1).

² Chapter IV.

³ Sections 26 and 28.

⁴ Chapter V.

⁵ Sections 70 – 72.

⁶ Section 73.

⁷ Section 90.

⁸ Sections 96 – 100.

⁹ Sections 101 – 103.

¹⁰ Section 104.

¹¹ Sections 108 – 111.

¹² Sections 112 – 120.

¹³ Chapter VIII

¹⁴ Section 23 (a).

¹⁵ Section 23 (b).

¹⁶ Section 23 (c).

¹⁷ See generally Section 70 of the Act.

¹⁸ Means the same as communications.

¹⁹ Regulation 1.

²⁰ Regulation 2 (a).

INTRODUCTION

standardise frequency spectrum fees and pricing system in order to promote uniformity, consistency and efficiency in spectrum management in Nigeria in conformity with international standards;²¹ ensure that the prices reflect the market value and are directly proportional to frequency spectrum size;²² promote efficiency and competition in the usage of frequency spectrum;²³ facilitate access to frequency spectrum by simplifying and harmonising the electronic magnetic wave spectrum pricing process;²⁴ and to achieve government policy objectives of even development of telecommunications infrastructure across Nigeria and the universal service goals.²⁵ Under the Frequency Spectrum Regulations, the Commission is mandated to categorise the licence on frequency spectrum that are capable of being shared by several operatives on a simultaneous basis for which the Commission has power to grant under the Act.²⁶

Upon commencement of the Frequency Spectrum Regulations, frequency spectrum pricing shall in accordance with international best practices, be determined by empirical formula derived from market conditions and, where appropriate, competitive methods as may be determined by the Commission, from time to time.²⁷

The issuance of frequency spectrum under the Frequency Spectrum Regulations shall be in accordance with the licensing areas corresponding to the states in the Federation or the Federal Capital Territory and categorised into tiers as specified.²⁸ The Commission is authorised by the Frequency Spectrum Regulations to review the categorisation of licensing areas into tiers from time to time.²⁹ The pricing of frequency spectrum under the Frequency Spectrum Regulations shall be on a state by state basis subject to market potentials and economic activities.³⁰

Under the Frequency Spectrum Regulations, frequency spectrum is classified as follows; short-term permit with a tenure of 4 months;³¹ or medium-term permit with a tenure of one year;³² or long-term licence with a tenure of 5, 10 or 15 years.³³ The Frequency Spectrum Regulations requires that every frequency spectrum allocated, to be utilised or used up within a period of one year or such other period of validity as may be specified by the Commission from time to

²¹ Regulation 2 (b).

²² Regulation 2 (c).

²³ Regulation 2 (d).

²⁴ Regulation 2 (e).

²⁵ Regulation 2 (f).

²⁶ Regulation 3.

²⁷ Regulation 4.

²⁸ Regulation 5 (1).

²⁹ Regulation 5 (2).

³⁰ Regulation 6.

³¹ Regulation 7 (1) (a).

³² Regulation 7 (1) (b).

³³ Regulation 7 (1) (c).

time, in the terms and conditions of allocation.³⁴ The Commission may revoke any frequency not so utilised.³⁵

The Frequency Spectrum Regulations requires the Commission to adopt a pricing formula for frequency spectrum that reflects the economic value of frequency spectrum so as to encourage the efficient usage and stimulate growth,³⁶ and fees payable for frequency spectrum shall be sufficient and adequate to encourage the optimal use of the frequency spectrum and to cover the administrative cost of the frequency spectrum management.³⁷

Lastly, the Frequency Spectrum Regulations amends Regulations 11 and 12 of the Wireless Telegraphy Regulations.³⁸

II. The Nigerian Communications (Enforcement Processes, Etc.) Regulations 2005

The Nigerian Communications (Enforcement Processes, Etc.) Regulations 2005 (the Enforcement Regulations) sets out a framework for the exercise of Commission's monitoring and enforcement powers.³⁹ Under the Enforcement Regulations, the monitoring and enforcement powers of the Commission can be exercised either on the Commission's own initiative⁴⁰ or in response to a written enforcement report made by any person in the manner prescribed by the Enforcement Regulations.⁴¹ In exercising its powers under the Enforcement Regulations, the Commission will be guided by; transparency, fairness and non-discrimination;⁴² the need to provide modern, qualitative, affordable and readily available communications services in all parts of Nigeria;⁴³ the need to promote fair competition and investment in the communications industry;⁴⁴ the proportionality of the enforcement sanctions with the contravention;⁴⁵ and national interest considerations.⁴⁶

In exercising its powers of entry and investigation in accordance with Section 141 (2) of the Act, the Commission (its authorised officers or appointed inspectors) is authorised by the Enforcement Regulations to amongst other things; demand the testing or operation or use howsoever of any radio communication station or apparatus or other communication equipment or facilities by the person in

³⁴ Regulation 13 (1).

³⁵ Regulation 13 (2).

³⁶ Regulation 14 (1).

³⁷ Regulation 15.

³⁸ Regulation 17.

³⁹ Regulation 1.

⁴⁰ Regulation 2 (1) (a).

⁴¹ Regulation 2 (1) (b).

⁴² Regulation 3 (a).

⁴³ Regulation 3 (b).

⁴⁴ Regulation 3 (c).

⁴⁵ Regulation 3 (d).

⁴⁶ Regulation 3 (e).

INTRODUCTION

whose custody the equipment or facility is;⁴⁷ and seal off or seize and detain in the custody of the Commission for such period and on such terms as the Commission may consider expedient or necessary to carry out and conclude the relevant monitoring and enforcement procedure— any such radio communication station or apparatus or other communications equipment or facilities, any building or premises, or any book, record, document or other information storage system.⁴⁸

However such seizure or sealing of a premises can only be done in the following circumstances; where the item seized constitutes part of an unlawful (or unauthorised) operation;⁴⁹ is relevant and required for the prosecution in court of any person under the Act or any regulations made there under;⁵⁰ or such other circumstances that are provided for under the Act.⁵¹ In addition, when seizing an item and/or sealing off any premises, the Commission must obtain a warrant from a Magistrate or Judge of a court of competent jurisdiction⁵² and provide the owner of his agent a written inventory of the items seized unless the item still remains in the custody of the owner or agent.⁵³

Under the Enforcement Regulations, the following will constitute a contravention for the purpose of enforcement; harmful interference of frequency;⁵⁴ or breach or violation of any guideline and standards issued by the Commission on advertisement and promotions;⁵⁵ or failure to meet such power limits specified by the Commission;⁵⁶ or failure to fulfil or satisfy the type approval provisions and requirements under the Act.⁵⁷ In addition, failure to meet the Quality of Service standards prescribed by the Commission will constitute a contravention under the Enforcement Regulations.⁵⁸

Lastly, the Enforcement Regulations prescribes administrative fines in the nature of “*general*” administrative fines and “*specific*” administrative fines, and circumstances, under which a license can be revoked, with such fines imposed by the Commission liable to be paid with 14 days of receipt by the offending communications Licensee.⁵⁹

⁴⁷ Regulation 5 (1) (a).

⁴⁸ Regulation 5 (1) (b). This power of the Commission is however subject to Regulation 5 (2) and (3) of the Enforcement Regulations.

⁴⁹ Regulation 5 (2) (a).

⁵⁰ Regulation 5 (2) (b).

⁵¹ Regulation 5 (2) (c).

⁵² Regulation 5 (3) (a).

⁵³ Regulation 5 (3) (b).

⁵⁴ Regulation 11 (a).

⁵⁵ Regulation 11 (b).

⁵⁶ Regulation 11 (c).

⁵⁷ Regulation 11 (d).

⁵⁸ Regulation 12.

⁵⁹ See generally Regulation 15. Henceforth, any reference to the word “*Licensee*” in this book should be construed as a reference to a communications Licensee within the meaning of Section 157 of the Act.

III. The Consumer Code of Practice Regulations 2007

The Consumer Code of Practice Regulations 2007 (the Consumer Regulations) was made pursuant to Section 106 of the Act and the functions of the Commission under Sections 4 (1) (b) and 4 (1) (p) of the Act.⁶⁰ The Consumer Regulations provide further definitions of the procedures and substantive requirements for developing consumer codes to govern the provision of services by Licensees.⁶¹

The Consumer Regulations requires a Licensee to prepare an individual consumer code for the provision of its communications services, and submit it to the Commission for approval.⁶² The Consumer Regulations require the individual code prepared by a Licensee to contain the following minimum standards in the area of; provision of information to consumers;⁶³ advertising and representation of services; consumer billing, charging, collection and credit practices; consumer obligations; protection of consumer information; complaint handling; and code compliance.⁶⁴

Lastly, a Licensee who breaches any provision of the Consumer Regulations is liable to such fines, sanctions or penalties, including any penalties determined under the Enforcement Regulations, as may be determined by the Commission from time to time.⁶⁵

IV. The Telecommunications Networks Interconnection Regulations 2007

The Telecommunications Networks Interconnection Regulations 2007 (hereinafter referred to as the Interconnection Regulations) repealed the Telecommunications Networks Interconnection Regulations of 2003 and the Guidelines on Interconnection of Telecommunications Networks, 2003.⁶⁶ The Interconnection Regulations creates the right of a “*licensed telecommunications operator*” to interconnect its telecommunications network with that of a licensed telecommunications operator’s network; and obligation to comply with a request for interconnection from another licensed telecommunications operator in accordance with the principles set forth in Section 97 of the Act, Interconnection Regulations and any guidelines on interconnection adopted by the Commission.⁶⁷ A licensed telecommunications operator is defined by the Interconnection Regulations to mean “*a network services provider or a network facilities provider licensed under section 32 of the Act and for the avoidance of doubt, “licensed telecommunications operator” shall include interconnect*

⁶⁰ Regulation 1 (2).

⁶¹ Regulation 1 (1).

⁶² Regulation 4 (1).

⁶³ Except in Chapter 2, references to *customers* in this book should primarily be construed as reference to either *subscribers* or *consumers* or *users of communications services*.

⁶⁴ See generally Regulation 4 (3).

⁶⁵ Regulation 9.

⁶⁶ Regulation 20.

⁶⁷ Regulation 1 (1).

exchange operators".⁶⁸ The Interconnection Regulations makes provision on the principles guiding the negotiating an interconnection agreement⁶⁹ and minimum content of an interconnection agreement.⁷⁰

The Interconnection Regulations also makes detailed provision on interconnection procedures by which; interconnection requests are made,⁷¹ interconnection charges and costs are set,⁷² points of interconnection and interconnection links are requested,⁷³ particular points of interconnection and interconnection links are determined,⁷⁴ telecommunications network interconnection specification is clarified,⁷⁵ and request for new services and system change is made.⁷⁶

In addition, the Interconnection Regulations impose particular obligations on a licensed telecommunications operator determined by the Commission under the Act and the Competition Regulations to have a dominant position in one or more communications markets relating to interconnection.⁷⁷

Lastly, the Interconnection Regulations sets out the interconnection principles applicable to all licensed telecommunications operators⁷⁸ and the procedures by which interconnection disputes may be resolved.⁷⁹

V. **The Universal Access and Universal Service Regulations 2007**

The Universal Access and Universal Service Regulations 2007 (the Universal Service Regulations) provides a framework for the design and implementation of a system of universal access and universal service provision pursuant to Chapter VII of the Act and all matters related thereto,⁸⁰ with the ultimate objectives of promoting greater social equity and inclusion for the people of Nigeria;⁸¹ and contributing to national economic, social, and cultural development of Nigeria.⁸² The Universal Service Regulations also provides for; the functions and procedure of the USP Board established in Section 115 of the Act⁸³ to supervise and provide broad policy directions for the management of the USP Fund; the establishment

⁶⁸ Regulation 19.

⁶⁹ Regulation 3 (1).

⁷⁰ Regulation 3 (4).

⁷¹ Regulation 5.

⁷² Regulation 6.

⁷³ Regulation 7 (1).

⁷⁴ Regulation 7 (2).

⁷⁵ Regulation 8.

⁷⁶ Regulation 9.

⁷⁷ Regulation 10.

⁷⁸ Regulations 13 – 16.

⁷⁹ Regulation 17.

⁸⁰ Regulation 1 (1).

⁸¹ Regulation 1 (2) (a)

⁸² Regulation 1 (2) (b).

⁸³ See generally Part II of the Universal Service Regulations.

of the USP Secretariat;⁸⁴ and the functions and procedure USP Fund Managers appointed in accordance with Section 119 of the Act.⁸⁵

The Universal Service Regulations requires the USP Secretariat to prepare USP Programs and USP Projects as follows; "USP Programs" which are the general macro-level USP initiatives aimed at achieving one or more of the USP Objectives, typically over the course of several years. USP Programs defines specific targets in terms of specific sets of networks and/or services to be implemented in stages over the course of the USP Program;⁸⁶ and "USP Projects" that are the specific micro-level implementation activities related to each USP Program. One or more USP Projects may be implemented at the same time under a given USP Program. USP Projects may be designed by the USP Secretariat or may be proposed by other persons for consideration of the USP Secretariat.⁸⁷

In accordance with the Universal Service Regulations to achieve; "universal access" means that 100% of a designated population can obtain, at a minimum, public access to a particular service at a specified quality, through reasonably available and affordable public or community facilities;⁸⁸ and "universal service" means that 100% of a designated population are reasonably able to privately subscribe to and use a particular service at a specified quality on an individual, household or institutional basis.⁸⁹ Under the Universal Service Regulations, in determining the scope of the USP Fund, the USP Secretariat shall undertake analysis and make related decisions with respect to the following broad issues: whether the USP Fund shall provide universal access or universal service or both to the USP Areas and Populations;⁹⁰ what specific types of services and network facilities are to be provided to the USP Areas and Populations,⁹¹ whether the USP Fund is to be used to finance the maintenance of existing services and network facilities for the USP Areas and Populations or only the provision of new networks and services for the USP Areas and Populations,⁹² what methodology and economic criteria are to be used for selecting which types of USP Projects are eligible to receive financing from the USP Fund.⁹³

In concluding, the Universal Services Regulations creates a detailed competitive selection process designed and implemented by the USP Secretariat by which USP Projects shall be awarded to one or more bidders.⁹⁴

⁸⁴ Regulation 22.

⁸⁵ See generally Part IV of the Universal Service Regulations.

⁸⁶ Regulation 35 (a).

⁸⁷ Regulation 35 (b).

⁸⁸ Regulation 43 (a).

⁸⁹ Regulation 43 (b).

⁹⁰ Regulation 46 (a).

⁹¹ Regulation 46 (b).

⁹² Regulation 46 (c).

⁹³ Regulation 46 (d).

⁹⁴ See generally Part VII of the Universal Service Regulations.

VI. The Competition Practice Regulation 2007

The Competition Practice Regulations 2007 (hereinafter referred to as the Competition Regulations) was made by the Commission pursuant to its powers under the 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.⁹⁵

In this regard, the Competition Regulations provides further guidance on the standards and procedures which the Commission will apply in determining whether particular conduct constitutes substantial lessening of competition for the purposes of the Act;⁹⁶ clarify what agreements or practices the Commission will find to be anti-competitive, and so prohibited under the Act;⁹⁷ provide further guidance on the standards and processes which the Commission will apply in determining whether a Licensee has a dominant position in one or more communications markets;⁹⁸ clarify what conduct the Commission will find to be an abuse of dominance, and subject to a “cease conduct” direction under the Act;⁹⁹ and provide further guidance on the merger review procedures to be applied by the Commission.¹⁰⁰ The Competition Regulations also sets out the factors to consider in assessing whether a conduct (or any conduct) constitutes a substantial lessening of competition¹⁰¹ and a non-exhaustive list of conducts deemed by the Commission to result in a substantial lessening of competition.¹⁰²

In addition, the Competition Regulations prohibits anti-competitive agreements and practices, and abuse of a dominant position.¹⁰³ In this regard, the Competition Regulations authorises the 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 Licensee¹⁰⁴ and sets out the criteria considered by the Commission in determining whether any person occupies a dominant position in a relevant communications market.¹⁰⁵ The Competition Regulations also sets out the criteria considered by the Commission in defining a relevant communications market.¹⁰⁶

⁹⁵ Regulation 1.

⁹⁶ Regulation 2 (a).

⁹⁷ Regulation 2 (b).

⁹⁸ Regulation 2 (c).

⁹⁹ Regulation 2 (d).

¹⁰⁰ Regulation 2 (e).

¹⁰¹ Regulations 6 and 7.

¹⁰² 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.

¹⁰³ Regulations 11 and 23.

¹⁰⁴ Regulations 12 and 27.

¹⁰⁵ Regulation 18.

¹⁰⁶ Regulation 19.

Finally, the Competition Regulations provides penalty for its breach¹⁰⁷ and the power of the 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.¹⁰⁸

VII. The Numbering Regulations 2008

The Numbering Regulations 2008 (the Numbering Regulations) provides a regulatory framework for the control, planning, administration, management and assignment of Numbers, pursuant to Section 128(1) of the Act. In particular, they set out the rules for the assignment, transfer, porting and use of numbers under the national numbering and electronic addressing plan, pursuant to Section 128(3) of the Act.¹⁰⁹ Under the Numbering Regulations; telephone numbers and short codes are numbers within the meaning of the Numbering Regulations;¹¹⁰ and internet protocol (IP) addresses and domain names are not numbers within the meaning of the Numbering Regulations.¹¹¹

Lastly, if a Licensee fails to fulfil an obligation under the Numbering Regulations, the Commission may take one or more of the following enforcement measure; refuse applications for Assignments;¹¹² impose administrative fines pursuant to Regulation 14 of the Enforcement Regulations;¹¹³ and issue one or more directions pursuant to Section 53 of the Act.¹¹⁴

VIII. The Type Approval Regulations 2008

The Type Approval Regulations 2008 (the Type Approval Regulations) provide a framework for the approval of communications equipment for connection to communications networks in Nigeria, pursuant to Sections 130 to 134 of the Act and in particular they describe rules and processes for the exercise of functions of the Commission identified in Sections 4(1)(i), 4(1)(m), and 4(1)(n) of the Act.¹¹⁵

The Type Approval Regulations is accompanied by (and to be read in conjunction with) the Type Approval Guidelines¹¹⁶ and the Type Approval Standards,¹¹⁷ which provide further definition of applicable processes and

¹⁰⁷ Regulation 33.

¹⁰⁸ Regulation 34.

¹⁰⁹ Regulation 1 (1).

¹¹⁰ Regulation 2(a).

¹¹¹ Regulation 2 (b).

¹¹² Regulation 49 (a).

¹¹³ Regulation 49 (b).

¹¹⁴ Regulation 49 (c).

¹¹⁵ Regulation 1 (1).

¹¹⁶ Under Regulation 32, "Type Approval Guidelines" ("Guidelines") means *any guidelines published by the Commission pursuant to Section 70(2) of the Act and these Regulations, identifying applicable Type Approval processes, including the initial Guidelines published with these Regulations.*

¹¹⁷ Under Regulation 32, "Type Approval Standards" ("Standards") means *any standards published by the Commission pursuant to Section 70(2) of the Act and these Regulations, which shall be*

equipment standards.¹¹⁸ The Type Approval Regulations apply to every person that provides communications services or supplies communications equipment and such a person is hereinafter called an “Equipment Holder”.¹¹⁹

Failure of an equipment holder to fulfil an obligation in the Type Approval Regulations is a contravention and, the Commission may take one or more of the following enforcement measures, without prejudice to the application of Sections 131 and 133 of the Act; impose administrative fines pursuant to Regulations 12 and 14 of the Enforcement Regulations;¹²⁰ exercise any of the testing, seizure, detention or sealing of premises powers pursuant to Regulation 5 of the Enforcement Regulations;¹²¹ and issue one or more directions pursuant to Section 53 of the Act.¹²²

IX. The Nigerian Communications Commission (Registration of Telephone Subscribers) Regulations, 2011

The Nigerian Communications Commission (Registration of Telephone Subscribers) Regulations, 2011 (the Registration of Telephone Subscribers Regulations), has the objectives of providing; a regulatory framework for the registration of subscribers to Mobile Telephone Services utilising subscription medium¹²³ in the Federal Republic of Nigeria;¹²⁴ and for the establishment, control, administration and management of the Central Database.¹²⁵ The Registration of Telephone Subscribers Regulations applies to all persons and Licensees¹²⁶ including; corporate, private and commercial subscribers to Mobile Telephone Services utilising a subscription medium in the Federal Republic of Nigeria; and subscribers of foreign Licensees¹²⁷ who are roaming on the network of a Licensee in Nigeria.¹²⁸

the applicable technical standards and specifications for identified Equipment Types, including the initial standards set out in Schedule I to the Guidelines.

¹¹⁸ Regulation 1 (2). Also see below on Type Approval Guidelines.

¹¹⁹ Under Regulation 32, “Equipment Holder” means *a provider of communications services or a supplier of communications equipment.*

¹²⁰ Regulation 28 (a).

¹²¹ Regulation 28 (b).

¹²² Regulation 28 (c).

¹²³ Under Regulation 1 (2) subscriber identity module (SIM) means *smart card, a Removable User Identity Module (R-UIM) smart card, a CDMA Subscriber Identity Module (CSIM) smart card, a Universal Subscriber Identity Module (USIM) smart card or any other mobile phone subscription medium marketed from time to time by Licensees, containing the telephone number of a subscriber, encoded network identification details, the personal identification number and other user data normally provided by a Licensee for the provision of Network Services.*

¹²⁴ Regulation 2 (a).

¹²⁵ Regulation 2 (b). Central Database under Regulation 1 (2) means *subscriber information database, containing the biometric and other registration information of all Subscribers.*

¹²⁶ Means a provider of Mobile Telephone Services that utilises a subscription Medium in the Federal Republic of Nigeria under Regulation 1 (2).

¹²⁷ Under Regulation 1 (2), “Foreign Licensee” refers to a *Network Service provider licensed by a telecommunications regulator other than the Commission, to provide telecommunication services in a country other than Nigeria.*

¹²⁸ Regulation 3.

The Registration of Telephone Subscribers Regulations requires the Commission to establish and maintain a Central Database of all registered subscribers' information,¹²⁹ domiciled within the Commission.¹³⁰ Upon commencement of the Registration of Telephone Subscribers Regulations, Licensees, Independent Registration Agents¹³¹ and Subscriber Registration Solution Providers¹³² shall capture, register and transmit to the Central Database the; biometrics and other personal information of subscribers who requests for the activation of the Licensee's subscription medium;¹³³ and in the case of a corporate body or other juristic person, the biometrics and other personal information of the authorised representative of the corporate body or other juristic person and the name, address and where applicable, the registration number of the juristic person issued by the Corporate Affairs Commission.¹³⁴ In accordance with the Registration of Telephone Subscribers Regulations, new subscribers on a network shall be granted limited access¹³⁵ to network services by Licensees for one month, within which they are required to register their biometric and personal information into the Central Database.¹³⁶ Also, Licensees providing roaming services of a subscriber of a foreign Licensee are required to register the personal information of such subscriber.¹³⁷

Finally, the Registration of Telephone Subscribers Regulations provides penalties; for failure of a Licensee to capture, register, deregister or transmit the details of any individual or corporate subscribers to the Central Database,¹³⁸ activating any subscription medium without capturing, registering and transmitting the personal information to the Central Database,¹³⁹ for a Licensee who activates or fails to deactivate a subscription medium in violation of any provision of the Registration of Telephone Subscribers Regulations¹⁴⁰ and Dealing with subscriber information in a manner inconsistent with the provisions of the Registration of Telephone Subscribers Regulations.¹⁴¹

¹²⁹ Regulation 4 (1).

¹³⁰ Regulation 4 (2).

¹³¹ Under Regulation 1 (2), "*Independent Registration Agent*" means a company contracted by the Commission for the registration of existing subscribers on such terms as may be agreed upon between the Commission and the company.

¹³² Under Regulation 1 (2) "*Subscribers Registration Solution Provider*" refers to a company contracted by the Commission for the conceptualisation, design, development and delivery of Registration Solutions covering all Licensees and providing detailed Subscriber Information in a manner facilitating seamless integration into the Central Database.

¹³³ Regulation 11 (2) (a).

¹³⁴ Regulation 11 (2) (b).

¹³⁵ Under Regulation 1 (2), "*limited access*" means the limitation by a Licensee of services available to a subscriber to receive calls and short message services and making of calls to emergency centre numbers and the Licensee's call centre only.

¹³⁶ Regulation 12.

¹³⁷ Regulation 14 (1). This Regulation is however subject to Regulation 3.

¹³⁸ Regulation 19 (1).

¹³⁹ Regulation 19 (2).

¹⁴⁰ Regulation 20 (1).

¹⁴¹ Regulation 21.

X. The Quality of Service Regulations 2012

The Quality of Service (QoS) Regulations 2012 (the QoS Regulations) establishes the quality of service standards and/or parameters and associated measurement, reporting and record keeping tasks imposed on categories of Licensees¹⁴² in accordance with Section 104 of the Act. QoS according to the International Telecommunications Union (ITU) is 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*”.¹⁴³ Thus, QoS provides an indication of what telecommunications customers experience when using a particular network or service. The QoS parameters, (also known as QoS metrics, QoS indicators, QoS measures or QoS determinants) are used to characterise the quality level of a certain aspect of a service being offered and ultimately the customer satisfaction. These QoS parameters primarily relate to services and service features and not to the technology used to provide the services. For mobile telecommunications services, typical examples of parameters reportable are; call set-up time; blocked call ratio; billing accuracy and dropped call ratio.

Licensees under the Act are required by the QoS Regulations to report, measure (these parameters in accordance with the defined measurement method) and submit the measurements to the Commission for publication within the stated period. Only two services are subject to reporting in accordance with the reporting parameters under the QoS Regulations. They are; Wireline Services (fixed wireline telephone services for end users) and Wireless Service (which are mobile/wireless telephone services for end users and mobile internet/data services).

The targets or key performance indicators (KPIs) have been defined by the QoS Regulations as the “*a value that is reached by a given parameter where the relevant service identified in these Regulations or its Schedules is satisfactory*”.¹⁴⁴ In other words, the KPIs are the range of values to be obtained for a particular service to be regarded as satisfactory. Some of the aspects of these services required to be measured under the QoS Regulations are disconnection complaint rate, disconnection complaint resolution time, charging for services not rendered, losing credited amounts from the account, failed attempts to check/determine the account balance, inability to activate offered service, inability to send or receive SMS (local and international), unsolicited messages, disconnection resolution time and customer care lines that can be accessible through other networks.

¹⁴² See generally Regulation 3 on the scope of the QoS Regulations.

¹⁴³ International Telecommunications Union, (2009) ‘ITU-T Recommendation E.800, Terms and definitions related to quality of service and network performance including dependability’ [WWW document] URL <http://www.itu.int/rec/T-REC-E.800> (visited 2015, January 5), p. 3.

¹⁴⁴ See Regulation 1 (1).

The reporting period when the Licensees are required to perform QoS measurements, reporting and record keeping is every month starting from the 1st day of a calendar month to the last day or as the Commission may determine¹⁴⁵ while the geographical areas for which QoS measurements are to be reported and recorded are; a specific geographical area, the States of the Federal Republic of Nigeria, or the Federal Capital Territory; taken separately unless the prior written approval of the Commission has been obtained that two or more reporting areas be combined into one reporting Area for particular Licensees, parameters, services and reporting periods.¹⁴⁶ Licensees are required by the QoS Regulations to submit the measurements taken and reported to the Commission with one week after the end of the reporting period¹⁴⁷ and publish the measurements within one month after the end of the reporting period in the prescribed format or as may otherwise be directed by the Commission.¹⁴⁸ In addition, Licensees are required to submit any additional information requested by the Commission, including details of the times, places, network segments and other particulars of the measurements, within one month after the end of the reporting period or as may be directed by the Commission.¹⁴⁹ Licensees are also required to retain the QoS data including all measurements and related records for a minimum of twelve months after the end of the reporting period.¹⁵⁰ The QoS Regulations also impose on Licensees the obligations to resolve a consumer complaint within the resolution time prescribed by the QoS Regulations.¹⁵¹ Where this obligation is not met, then the consumer has a right to be compensated in addition to any fine the Commission may impose.¹⁵² A Licensee will also be sanctioned where the rate of occurrence of a particular complaint exceeds the maximum number allowed under the regulations.¹⁵³

The Commission may decide to publish all or part of the QoS measurements received from Licensees with or without additional notes or comments and such publishing must be done within two (2) months after the end of the relevant reporting period.¹⁵⁴ The QoS Regulations also authorise the Commission to audit some or all the QoS data received or retained by Licensees.¹⁵⁵

A Licensee shall have contravened the QoS Regulations if the Licensee; fails to perform QoS measurement and record keeping tasks mandated by the QoS Regulations,¹⁵⁶ fails to attain the target set for a parameter and the service,¹⁵⁷

¹⁴⁵ Regulation 5 (1).

¹⁴⁶ Regulation 6 (1).

¹⁴⁷ Regulation 7 (b).

¹⁴⁸ Regulation 7 (d).

¹⁴⁹ Regulation 7 (c).

¹⁵⁰ Regulation 7 (e).

¹⁵¹ Regulation 8 (1).

¹⁵² Regulation 8 (2).

¹⁵³ Regulation 8 (3).

¹⁵⁴ Regulation 9 (2).

¹⁵⁵ Regulation 11 (1).

¹⁵⁶ Regulation 13 (a).

¹⁵⁷ Regulation 13 (b).

fails to submit the QoS data within the time specified by the QoS Regulation,¹⁵⁸ submits or publishes false or misleading information about the QoS measurements,¹⁵⁹ or obstructs or prevents an investigation or real-time collection of performance data by the Commission in respect of quality of service measurement, reporting and record keeping procedures.¹⁶⁰ The QoS Regulations authorises the Commission to take one or more of the following enforcement measures against Licensees who commits any of these offences. These enforcement measures are; requiring that the Licensee submit and publish additional information about its QoS measurements including (but not limited to) implementing a remedial action plan to improve its QoS KPIs,¹⁶¹ issuing directions pursuant to its power under Section 53 of the Act including but not limited to effect that consumers been compensated for poor QoS,¹⁶² imposing fines on the Licensee in accordance with the QoS Regulations.¹⁶³

XI. The Annual Operating Levy Regulations 2014

The objectives of the Annual Operating Levy Regulations 2014 (The AOL Regulations) are to; create and provide a regulatory framework for the effective and efficient administration by the Commission of the Annual Operating Levy regime and all matters related thereto;¹⁶⁴ stipulate the mode and methods of assessment of Annual Operating Levy and the payment modes thereof;¹⁶⁵ and specify guiding standards and principles for the administration by the Commission of the Annual Operating Levy regime.¹⁶⁶

Under the AOL Regulations, every Licensee that is a network operator¹⁶⁷ shall pay to the Commission an annual operating levy assessed at two and a half percent of the Licensee’s net revenue for the relevant period being its gross revenue less its roaming, interconnect and bandwidth costs for the period,¹⁶⁸ while every Licensee that is a non-network operator¹⁶⁹ shall pay annually to the Commission an annual operating levy assessed at one percent of the Licensee’s net revenue for the relevant period being its gross revenue less its roaming, interconnect and bandwidth costs for the period.¹⁷⁰

¹⁵⁸ Regulation 13 (c).

¹⁵⁹ Regulation 13 (d).

¹⁶⁰ Regulation 13 (e).

¹⁶¹ Regulations 14 (a).

¹⁶² Regulations 14 (b).

¹⁶³ Regulations 14 (c).

¹⁶⁴ Regulation 2 (a).

¹⁶⁵ Regulation 2 (b).

¹⁶⁶ Regulation 2 (c).

¹⁶⁷ “*Network Operator*” under Regulation 11 of the AOL Regulations means “*any Licensee who owns and operates a communications network including in particular network facilities provider and network services provider as defined in the Act*”.

¹⁶⁸ Regulation 3 (1).

¹⁶⁹ “*Non-Network Operator*” under Regulation 11 of the AOL Regulations means “*any Licensee who is a value added service provider and relies on the Network Operators to provide its value added services*”.

¹⁷⁰ Regulation 3 (2).

In accordance with the AOL Regulations all Licensees are required to; maintain account records of its business in the AOL prescribed format,¹⁷¹ and within one hundred and eighty days from its financial year end, submit annually, to the Commission its audited accounts for the elapsed financial year including all such financial records and documentation as the Commission may specify from time to time.¹⁷² The audited financial statements of every Licensee shall conform to the International Financial Reporting Standard and Statement of Accounting Standards or such other Accounting Standards as may from time to time be prescribed and published by the relevant international or national accounting body authorised to do so.¹⁷³

Finally, the AOL Regulations imposes sanctions and penalties on Licensees for non-compliance with its requirements.¹⁷⁴

XII. The Mobile Number Portability Regulations 2014

The Mobile Number Portability Regulations 2014 (the MNP Regulations) was made to provide a regulatory framework for the operation of Mobile Number Portability¹⁷⁵ in Nigeria;¹⁷⁶ ensure an effective and efficient porting¹⁷⁷ regime;¹⁷⁸ foster and strengthen the relationships between mobile service providers¹⁷⁹ and other authorised parties and create a harmonious level playing field for all operators;¹⁸⁰ safeguard subscribers' rights and ensure subscribers' satisfaction with the MNP process;¹⁸¹ and sustain quality service delivery by mobile service providers and other authorised parties in order to ensure a seamless launch and continued improvement in the MNP process and the telecommunications sector in Nigeria.¹⁸² The MNP Regulations applies to; the administration and operation of Mobile Number Portability in Nigeria;¹⁸³ the NPC Administrator;¹⁸⁴ all

¹⁷¹ Regulation 6.

¹⁷² Regulation 7.

¹⁷³ Regulation 8.

¹⁷⁴ Regulation 10.

¹⁷⁵ Under Regulation 26 of the MNP Regulations, "*Mobile Number Portability*" or "*MNP*" means *the facility that enables subscribers to move their mobile subscriptions from the donor network to the recipient network whilst retaining their mobile numbers.*

¹⁷⁶ Regulation 2 (a).

¹⁷⁷ Under Regulation 26 of the MNP Regulations, "*Porting*" means *the act of initiating a request to the number portability clearinghouse and donor operator for approval to transfer a number from its network to the recipient service provider, the subsequent receipt of answers from the number portability clearinghouse and donor network, the provisioning of a number on the recipient network, the deactivation of a number from the donor network, and the act of informing all operators that a number has been successfully transferred and is now active on the recipient network.*

¹⁷⁸ Regulation 2 (b).

¹⁷⁹ Under the Regulation 26 of the MNP Regulation, "*Mobile Service Provider*" means *any person granted a licence by the Commission to provide mobile telecommunications service in Nigeria.*

¹⁸⁰ Regulation 2 (c).

¹⁸¹ Regulation 2 (d).

¹⁸² Regulation 2 (e).

¹⁸³ Regulation 1 (a).

licensed telecommunication service providers in Nigeria;¹⁸⁵ other authorised parties;¹⁸⁶ and subscribers.¹⁸⁷

Under the MNP Regulations, a number portability clearinghouse¹⁸⁸ is established to be administered by the NPC Administrator.¹⁸⁹ The NPC Administrator shall be licensed by the Commission to manage the MNP System in Nigeria;¹⁹⁰ and use the number portability clearinghouse for the performance of the following functions; relaying of messages between the donor and recipient operators¹⁹¹ and maintaining of status information for each individual and bulk porting transaction;¹⁹² management of the porting process to monitor the compliance with target porting timescales by the mobile service providers;¹⁹³ verification of the validity of porting transactions;¹⁹⁴ interworking with the subscriber information database to verify subscriber registration status and mandatory data matches to validate subscriber porting transactions;¹⁹⁵ reception and checking of SMS from subscribers confirming the request to port;¹⁹⁶ communicating with the subscribers and advising them by SMS on the status of their porting requests;¹⁹⁷ real-time broadcasting of information to all mobile service operators of the identity of the recipient operator serving a number after porting for the purpose of updating routing arrangements;¹⁹⁸ updating the subscriber information database to reflect the migration of successfully ported numbers from donor operators to recipient operators;¹⁹⁹ collection of logs on all port activities;²⁰⁰ collection of statistics on porting;²⁰¹ maintenance of the servicing operator status for every mobile number in Nigeria in real-time to reflect changes effected through the completion of porting transactions;²⁰² storage of information of the history of each porting transaction excluding any personal subscriber data, which should be deleted once a porting has been

¹⁸⁴ Regulation 1 (b). Under Regulation 26, “NPC Administrator” means *the Number Portability clearinghouse administrator licensed by the NCC to establish the NPC implement and manage the MNP System in Nigeria.*

¹⁸⁵ Regulation 1 (c).

¹⁸⁶ Regulation 1 (d).

¹⁸⁷ Regulation 1 (e).

¹⁸⁸ Under Regulation 26 of the MNP Regulations, “Number Portability Clearinghouse or NPC” means *the centralised clearinghouse established to carry out MNP Administrative Services in Nigeria.*

¹⁸⁹ Regulation 4 (1).

¹⁹⁰ Regulation 4 (2) (a).

¹⁹¹ Under Regulation 26 of the MNP Regulations, “Donor Operator” means *the operator from which the number is being ported* while “Recipient Operator” means *the operator to which the number is being ported.*

¹⁹² Regulation 4 (2) (b) (i).

¹⁹³ Regulation 4 (2) (b) (ii).

¹⁹⁴ Regulation 4 (2) (b) (iii).

¹⁹⁵ Regulation 4 (2) (b) (iv).

¹⁹⁶ Regulation 4 (2) (b) (v).

¹⁹⁷ Regulation 4 (2) (b) (vi).

¹⁹⁸ Regulation 4 (2) (b) (vii).

¹⁹⁹ Regulation 4 (2) (b) (viii).

²⁰⁰ Regulation 4 (2) (b) (ix).

²⁰¹ Regulation 4 (2) (b) (x).

²⁰² Regulation 4 (2) (b) (xi).

completed;²⁰³ coordinating porting transactions between mobile service providers and ensuring consistency in the porting performance and adherence to the porting timescales set from time to time in the business rules;²⁰⁴ maintaining a central reference database²⁰⁵ of all ported numbers and making provision for the download of such information by any mobile service provider, especially new entrants;²⁰⁶ and management of ancillary porting functions as required, including return to number range holder²⁰⁷ and emergency repatriation processes.²⁰⁸

The MNP Regulations defines the relationship between mobile service providers, particularly with respect to; compliance with MNP Operator User Agreement²⁰⁹ and MNP Business Rules,²¹⁰ routing of traffic and interconnectivity between operators and NPC,²¹¹ rights and obligations of the donor operator,²¹² rights and obligations of the recipient operator,²¹³ rights and obligations of the NPC Administrator²¹⁴ and dispute resolution.²¹⁵ In addition, the MNP Regulations makes provision relating to porting guidelines.²¹⁶

Finally, the MNP Regulations provides sanctions and penalties against the NPC operator, any licensed operator or mobile service provider for non-compliance with its provisions.²¹⁷

XIII. The Guidelines on Advertisements and Promotions

The Guidelines on Advertisement and Promotions (the Guidelines on Adverts) were developed to set minimum requirements and standards for advertisements and promotions by licensed telecommunications operators in Nigeria.²¹⁸

²⁰³ Regulation 4 (2) (b) (xii).

²⁰⁴ Regulation 4 (2) (b) (xiii).

²⁰⁵ Under Regulation 26 of the MNP Regulations, “*Central Reference Database*” means *the database maintained by the MNP service provider in electronic form, holding the details of all ported numbers, along with complete history of all transactions relating to the porting of such numbers.*

²⁰⁶ Regulation 4 (2) (b) (xiv).

²⁰⁷ Under Regulation 26 of the MNP Regulations, “*Number Range Holder*” means *the original operator to which the number that is subject to porting, is or was originally allocated by the Commission.*

²⁰⁸ Regulation 4 (2) (b) (xv).

²⁰⁹ Under Regulation 26 of the MNP Regulations, “*MNP Operator User Agreement*” means *the Agreement between Mobile Service Provider and the NPC Administrator.*

²¹⁰ Regulation 8. Under Regulation 26 of the MNP Regulations, “*MNP Business Rules*” means *the rules and port order processes as may be amended from time to time, which are issued by the Commission to manage the processes of porting mobile number (MSISDN) between the NPC and mobile service providers.*

²¹¹ Regulation 9.

²¹² Regulation 10.

²¹³ Regulation 11.

²¹⁴ Regulation 12.

²¹⁵ Regulation 13.

²¹⁶ See part IV of the MNP Regulations.

²¹⁷ See part VI of the MNP Regulations.

²¹⁸ Paragraph 1 (2).

INTRODUCTION

Under the Guidelines on Adverts, the Commission shall receive written notification from the Licensees for all advertisements for goods and services within a minimum of seven (7) days of the proposed or planned publication of an advertisement, in order to ensure such advertisements meet the following minimum standards and requirements.²¹⁹ The written notice must set out a detailed report of the advertisement clearly specifying the goods and/or services and the target consumers,²²⁰ and if the goods and services on which an advertised claim or representation depends can be tested by survey or data, provide such data which must be reasonably competent and reliable, reflecting the true and accepted principles of such research.²²¹ In addition, the Licensee must adhere to set standards for quality and grade of service set by the Commission,²²² the set standards on telecommunications products and equipment that are manufactured, imported or sold in Nigeria,²²³ and any other standards or requirements of a specific or general nature that may be specified from time to time by the Commission.²²⁴ In terms of pricing, the Guidelines on Adverts provides that the Licensee must communicate all prices and financial implications clearly and have no hidden or disguised price adjustments, discounts, unrealistic price comparisons or exaggerated claims as to worth or value.²²⁵

The Guidelines on Adverts obligates a Licensee to make advertisements and advertisements for promotions only via print, radio, mail, Licensee's website, text messages, electronic mail (where permitted by recipient to send such promotional material), and/or visual media, with accuracy and clarity of the goods and services being offered.²²⁶ Advertisement or advertisement for a promotion shall not contain any obscenities or profanities unsuitable for young persons and children or contain any racial or prejudicial content relating to national origin, religion, sex, gender or age.²²⁷ Advertisements must not unfairly discredit, disparage or attack other products, services, advertisements or companies, or exaggerate the nature or importance of competitive differences.²²⁸ Licensee shall not imitate the slogans or illustrations of another advertiser in such a manner as to mislead the consumer.²²⁹ When advertising internet services, Licensees should state the internet connection speed available to end-users as well as specific upload and download speed. If the connection speed

²¹⁹ Paragraph 3.

²²⁰ Paragraph 3 (a) (i).

²²¹ Paragraph 3 (a) (ii).

²²² Paragraph 3 (a) (iii).

²²³ Paragraph 3 (a) (iv).

²²⁴ Paragraph 3 (a) (v).

²²⁵ Paragraph 3 (b) (i).

²²⁶ Paragraph 3 (c) (i).

²²⁷ Paragraph 3 (c) (ii).

²²⁸ Paragraph 3 (d) (i).

²²⁹ Paragraph 3 (d) (ii).

quoted is only obtainable under special circumstances, then these circumstances should be clearly stated.²³⁰

In accordance with the Guidelines on Adverts, Licensees are required to apply to the Commission for approval of a promotion²³¹ and such application must be in the prescribed form and submitted to the Commission after payment of the applicable fee.²³²

XIV. Guidelines on Commercial Satellite Communications

The objectives of the Guidelines on Commercial Satellite Communications are to; ensure a well developed and organised satellite communications market in Nigeria with appropriate legal framework that meets international best practices, encourages innovation and guarantees public safety in the rendering of commercial satellite services;²³³ manage scarce frequency resource, especially in bands where satellite shares frequency with terrestrial systems and to encourage the use of satellite connectivity to un-served areas that lack terrestrial transmission infrastructure backbone;²³⁴ encourage the use of satellite communication infrastructure in Nigeria as a means of providing long-haul transmission facilities and ensure that investors are adequately protected;²³⁵ provide guidelines for protection from impermissible levels of interference to reception of signals by earth stations²³⁶ in the Fixed/Mobile Satellite Service from terrestrial stations in a co-equally shared band;²³⁷ ensure that satellite space segment²³⁸ providers provide reliable, cost effective and secured service to users in Nigeria under fair and favourable commercial and technical conditions;²³⁹ ensure a standard means of obtaining accurate records of all users of satellite services in Nigeria in order to simplify and facilitate interference resolution among satellite service providers, or between satellite and terrestrial systems;²⁴⁰ ensure regular update of facilities' database for use in processing satellite coordination requests from neighbouring countries, International Telecommunications Union (ITU), regional telecommunications organisations and regulatory authorities in other countries;²⁴¹ and ensure that the general public and workers in telecom companies are well protected from possible health

²³⁰ Paragraph 3 (e) (i).

²³¹ Paragraph 4 (i).

²³² Paragraph 4 (ii).

²³³ Paragraph 1 (a) (i).

²³⁴ Paragraph 1 (a) (ii).

²³⁵ Paragraph 1 (a) (iii).

²³⁶ Paragraph 24 of the Guidelines defines "Earth station" as "the ground component of satellite Tx/Rx component".

²³⁷ Paragraph 1 (a) (iv).

²³⁸ Paragraph 24 of the Guidelines defines "Space segment" as "any satellite station in orbit".

²³⁹ Paragraph 1 (a) (v). This provision, by extension, covers associated players in the supply chain as well as Earth Station service providers, Bandwidth Re-sellers and vendors of terminal equipment or franchise holders

²⁴⁰ Paragraph 1 (a) (vi).

²⁴¹ Paragraph 1 (a) (vii).

hazards that can arise from over exposure to high level electric fields at high frequencies.²⁴²

The Guidelines on Commercial Satellite Communications applies to commercial satellite²⁴³ services, i.e. those who provide service to third parties or who own satellite space segments or earth station for self provision support of their businesses,²⁴⁴ space segment providers,²⁴⁵ earth station providers, Bandwidth resellers, International Data Gateway Access (IDA) operators, Global Mobile Personal Communications Systems (GMPCS) providers and suppliers of user terminal,²⁴⁶ Geo-Stationary Orbit (GSO) and non-GSO satellites including Low Earth Orbit's (LEO), Medium Earth Orbit's (MEO), Highly Elliptical Orbit's (HEO), Highly Altitude Platform Station (HAPS), and other similar orbits that may be developed in future,²⁴⁷ and those already providing services to Nigerian users prior to the Guidelines of and future satellite service providers.²⁴⁸ The Guidelines on Commercial Satellite Communications does not apply to military satellites,²⁴⁹ non-commercial government satellites, radio navigation satellites,²⁵⁰ amateur satellites, earth exploration satellites,²⁵¹ space research satellites,²⁵² broadcasting satellites²⁵³ and receive-only ground stations.²⁵⁴

The Guidelines on Commercial Satellite Communications sets out detailed provisions relating to the licensing criteria for commercial satellites particularly in respect of the technical and operational issues and service capabilities that would be taken into consideration when authorising a commercial satellite services,²⁵⁵ licensing process,²⁵⁶ authorisation for landing rights,²⁵⁷ and obligations of a commercial satellite communications Licensee.²⁵⁸ Other issues provided for in the Guidelines on Commercial Satellite Communications are;

²⁴² Paragraph 1 (a) (viii).

²⁴³ Paragraph 24 of the Guidelines defines “Commercial satellite” as “a satellite launched for profit making or business purpose”.

²⁴⁴ Paragraph 1 (b) (i).

²⁴⁵ Paragraph 24 of the Guidelines defines “Space segment provider” as “means an owner of a satellite in space”.

²⁴⁶ Paragraph 1 (b) (ii).

²⁴⁷ Paragraph 1 (b) (iii).

²⁴⁸ Paragraph 1 (b) (iv).

²⁴⁹ Paragraph 24 of the Guidelines defines “Military satellite” as “a satellite with payload for military applications”.

²⁵⁰ Paragraph 24 of the Guidelines defines “Radio navigation satellite” as “any satellite that uses radio frequency to provide location based services”.

²⁵¹ Paragraph 24 of the Guidelines defines “Earth exploration satellite” as “any satellite that provides pictures or images”.

²⁵² Paragraph 24 of the Guidelines defines “Space research satellite” as “any satellite for scientific research”.

²⁵³ Paragraph 24 of the Guidelines defines “Broadcast satellite” as “as any radio or TV broadcast satellite”.

²⁵⁴ Paragraph 1 (c).

²⁵⁵ See generally paragraph 2 (a).

²⁵⁶ See generally paragraph.

²⁵⁷ See generally paragraphs 4 – 6.

²⁵⁸ See generally paragraphs 7 and 8.

license categories,²⁵⁹ license duration,²⁶⁰ license renewal,²⁶¹ licence processing time²⁶² and how to obtain the application form for a license.²⁶³ In addition, the Guidelines on Commercial Satellite Communications address various consumer issues such service outage,²⁶⁴ health and safety,²⁶⁵ suspension of services to a customer & quality of service.²⁶⁶

Lastly, the Guidelines on Commercial Satellite Communications makes provision in respect of the fees and charges applicable to various commercial satellite licenses,²⁶⁷ the procedure for satellite filing,²⁶⁸ coordination procedure to be adopted,²⁶⁹ type approval obligation,²⁷⁰ technical parameters,²⁷¹ interference mitigating techniques,²⁷² radiation limits to be adhered by commercial satellite communications Licensees,²⁷³ and conditions for VSAT provision.²⁷⁴

XV. Guidelines on Collocation and Infrastructure Sharing

The primary object of the Guidelines on Collocation and Infrastructure Sharing (the Guidelines on C/IS) is to establish a framework within which operators²⁷⁵ can negotiate C/IS arrangements, and for that purpose, specifically to; ensure that the incidence of unnecessary duplication of infrastructure is minimised or completely avoided;²⁷⁶ protect the environment by reducing the proliferation of infrastructure and facilities installations;²⁷⁷ promote fair competition through equal access being granted to the installations and facilities of operators on mutually agreed terms;²⁷⁸ ensure that the economic advantages derivable from the sharing of facilities are harnessed for the overall benefit of all telecommunications stakeholders;²⁷⁹ minimise capital expenditure on supporting infrastructures and to free more funds for investment in core

²⁵⁹ Paragraph 9 (a).

²⁶⁰ Paragraph 9 (c).

²⁶¹ Paragraph 9 (d).

²⁶² Paragraph 9 (f).

²⁶³ Paragraph 9 (g).

²⁶⁴ Paragraph 12.

²⁶⁵ Paragraph 12.

²⁶⁶ Paragraph 14.

²⁶⁷ See generally paragraph 16.

²⁶⁸ Paragraph 17.

²⁶⁹ Paragraph 18.

²⁷⁰ Paragraph 19.

²⁷¹ Paragraph 20.

²⁷² Paragraph 21.

²⁷³ Paragraph 22.

²⁷⁴ Paragraph 23.

²⁷⁵ *Operator* is defined under paragraph 18 of the Guidelines on C/IS as “an undertaking holding a license granted under the Act to operate a communications system or facility and to provide communications services”

²⁷⁶ Paragraph 3 (1) (a).

²⁷⁷ Paragraph 3 (1) (b).

²⁷⁸ Paragraph 3 (1) (c).

²⁷⁹ Paragraph 3 (1) (d).

network equipment;²⁸⁰ encourage operators to pursue a cost-oriented policy with the added effect of a reduction in the tariffs chargeable to consumers.²⁸¹

Accordingly, the Guidelines on C/IS sets out the types of infrastructure amenable to sharing²⁸² and types of infrastructure not amenable to sharing,²⁸³ the procedure for negotiating a C/IS²⁸⁴ and the terms and conditions for infrastructure sharing.²⁸⁵ The Guidelines on C/IS also sets out a description of how collocation can be implemented for seamless interconnectivity amongst operators,²⁸⁶ and the general rules guiding collocation and infrastructure sharing.²⁸⁷

Lastly, the Guidelines on C/IS defines the role of the Commission in resolving collocation and infrastructure sharing dispute between operators²⁸⁸ and in providing supportive action.²⁸⁹

XVI. The Consultation Guidelines of the Nigerian Communications Commission 2007

The Consultation Guidelines of the Nigerian Communications Commission 2007 (the Guidelines on Consultation) stipulate the method for the Commissions' interaction with stakeholders in regard to rulemaking, and other subjects that the Commission may wish to consult upon.²⁹⁰ The objectives of the Commission's consultation are to: ensure that the Commission has investigated the necessary aspects of an issue and stakeholders and the general public are adequately informed of the issues surrounding a particular subject matter;²⁹¹ acquire substantive information and knowledge from stakeholders, regulatory and industry professionals on any issue;²⁹² obtain input, information and feedback from persons affected by the proposed decision, other stakeholders and the public;²⁹³ ensure that stakeholders and the general public are given the opportunity to express their views;²⁹⁴ ensure regulatory transparency and objectivity,²⁹⁵ ensure adequate and accurate information is shared between stakeholders and the Commission;²⁹⁶ make informed decisions and also ensure

²⁸⁰ Paragraph 3 (1) (e).

²⁸¹ Paragraph 3 (1) (f).

²⁸² See generally paragraph 4.

²⁸³ See generally paragraph 5.

²⁸⁴ See generally paragraph 6.

²⁸⁵ See generally paragraph 7.

²⁸⁶ See generally paragraph 8.

²⁸⁷ See generally Part IV.

²⁸⁸ Paragraph 16.

²⁸⁹ Paragraph 17.

²⁹⁰ Paragraph 1 (2).

²⁹¹ Paragraph 4 (a).

²⁹² Paragraph 4 (b).

²⁹³ Paragraph 4 (c).

²⁹⁴ Paragraph 4 (d).

²⁹⁵ Paragraph 4 (e).

²⁹⁶ Paragraph 4 (f).

that every aspect of the issue has been considered,²⁹⁷ protection of public interest and the consumers,²⁹⁸ and to strengthen consumer understanding, participation and confidence in the regulatory processes.²⁹⁹

Under the Guidelines on Consultation the Commission is authorised to hold consultation at the instance of the Commission, whenever it deems it necessary;³⁰⁰ upon request or petition for consultation by stakeholders, provided that the Commission may decline the request or petition or may modify the issues or subject matter, or may defer or postpone the commencement of the consultation,³⁰¹ or where a complaint or a number of complaints raise substantial issues affecting the industry, and which the Commission deems appropriate to hold consultations on,³⁰² or where the Act stipulates that a public inquiry should be held.³⁰³ The Commission is authorised to determine the form of the Consultation, which may take the form of formal consultations³⁰⁴ such as individual meetings with one or more stakeholders; issuing a draft document and soliciting comments from the public at large before a final decision is taken; a request or invitation (open or restricted) for comments on certain issues; an invitation to affected persons to submit written submissions on the subject matter of the consultation within the stipulated period in the request; public hearings; or informal consultations³⁰⁵ such as general meetings, seminars, and workshops with representative groups and other interested parties and stakeholders; market, industry or citizen surveys; field interviews; key group sessions; consumer fora; or any combination or modification of the above.

The Guidelines on Consultation also sets out the manner of notification for formal consultation³⁰⁶ and instructions and procedures for informal consultations.³⁰⁷ The Guidelines on Consultation also specifies the minimum content for a consultation document³⁰⁸, and the rules relating to formal responses.³⁰⁹

Lastly, the Guidelines on Consultation provides for rules to safeguard the confidentiality of information submitted to the Commission pursuant to a

²⁹⁷ Paragraph 4 (g).

²⁹⁸ Paragraph 4 (h).

²⁹⁹ Paragraph 4 (i).

³⁰⁰ Paragraph 5 (i).

³⁰¹ Paragraph 5 (ii).

³⁰² Paragraph 5 (iii).

³⁰³ Paragraph 5 (iv).

³⁰⁴ See generally paragraph 6 (a)

³⁰⁵ See generally paragraph 6 (b).

³⁰⁶ See generally paragraphs 7 and 13.

³⁰⁷ See generally paragraphs 9 – 12.

³⁰⁸ Paragraph 18.

³⁰⁹ Part 6.

consultation³¹⁰ and how the Commission may issue its decisions on consultations.³¹¹

XVII. The Regulatory Guidelines for the Deployment of Broadband Services on the 5.2 – 5.9 GHz Band

The Regulatory Guidelines for the Deployment of Broadband Services on the 5.2 – 5.9 GHz Band (the Guidelines for Broadband Services on the 5.2 – 5.9 GHz) harmonises the use of frequency bands, sets up technical and operational parameters, specific national procedures for deployment and market access for broadband wireless possibilities in the stated frequency band; and ensures easy market entry, interference free operation, and guaranteed quality and grade of service.³¹² The Guidelines for Broadband Services on the 5.2 – 5.9 GHz also sets out the operational guidelines for 5.3 GHz band = 5.25-5.35 GHz, 5.4 GHz band = 5.47-5.725 GHz, and 5.8 GHz band = 5.725-5.85 GHz³¹³ and the types of services permitted. Specifically, the three bands are available for Wireless Access Service (WAS).³¹⁴ The 5.4 GHz band is designated for unshared, coordinated and protected use of WAS³¹⁵ while the 5.3 and 5.725 – 5.8 GHz bands are designated for the shared, uncoordinated and unprotected use of WAS.³¹⁶

Pursant to the Guidelines for Broadband Services on the 5.2 – 5.9 GHz, operators are advised to provide services with operational parameters flexible enough to accommodate all classes of users based on the followings: flexible class of service per subscriber, configurable up/down link data rate, configurable RF channel separation, dynamic bandwidth allocation to subscriber station based on demand, remote software downloads, automatic channel search for subscriber stations.³¹⁷ In addition, there is no coverage restriction imposed on services deployed on the bands; however, every technical restriction provided in this guideline must be strictly adhered to.³¹⁸ The Guidelines for Broadband Services on the 5.2 – 5.9 GHz also sets out robust provisions relating to the technical conditions for the use of these bands³¹⁹ and their licensing conditions.³²⁰

Finally, the Guidelines for Broadband Services on the 5.2 – 5.9 GHz makes provision on aspects of quality of service for broadband services deployed in these bands.³²¹

³¹⁰ Part 7.

³¹¹ Part 8.

³¹² Page 1.

³¹³ Pages 1 – 2.

³¹⁴ Page 2.

³¹⁵ *Ibid.*

³¹⁶ *Ibid.*

³¹⁷ *Ibid.*

³¹⁸ *Ibid.*

³¹⁹ Pages 3 – 6.

³²⁰ Page 7.

³²¹ *Ibid.*

XVIII. The Guidelines for Dispute Resolution

The Guidelines for Dispute Resolution provides an alternative dispute resolution scheme for small claims Communications consumer disputes involving amount not exceeding N1,000,000:00 (One million naira). In this regard, the Guidelines for Dispute Resolution makes detailed provisions relating to arbitration, mediation and arbitration of interconnection issues.

XIX. The Guidelines on International Gateway Access and Voice over Internet Protocol (VoIP)

The Guidelines on International Gateway Access and Voice over Internet Protocol (the Guidelines on IDA and VoIP³²²) provides guidance the issuance of full gateway³²³ and international data access (IDA) gateway³²⁴ licenses.³²⁵ Under the Guidelines on IDA and VoIP only operational Licensees of the Commission who owns a network shall be eligible for an IDA license.³²⁶ A Licensee would be deemed to be an operational Licensee only upon fulfilling the following conditions: a customer base of at least 5000 connected subscribers or justifiable traffic volume,³²⁷ a known and identifiable address and operational base,³²⁸ up to date payment of its annual operating levy,³²⁹ submission of up to date audited accounts,³³⁰ up to date settlement of interconnection obligations.³³¹

Full Gateway Licensees under the Guidelines on IDA and VoIP shall be assigned an International signalling point code,³³² who shall also continue to enjoy the ability to transmit direct voice signals,³³³ and deploy time division multiplexing and IP transport protocols.³³⁴ The Guidelines on IDA and VoIP makes provision relating to the cost of a full gateway license, and IDA license, and their respective

³²² Pursuant to paragraph 9 in the Guidelines on IDA and VoIP, “*any reference to Voice over IP includes the carriage of Voice signal by means of any packet-oriented transport protocol or data circuits such as Voice over Frame Relay, Voice over WiFi, Voice over Wimax, Voice over ATM, etc*”.

³²³ The Guidelines on IDA and VoIP in paragraph 9 defines Full Gateway as “*an interface switch with its associated equipment with capability for protocol conversion and which can be used to link a telecommunication network in Nigeria with those of other countries. Information exchange is based on circuit-switched technology and makes use of international signaling point code as a means of identification in the SS7- based global signalling network*”.

³²⁴ The Guidelines on IDA and VoIP in paragraph 9 defines International Data Access Gateway as “*a soft switch that performs interface functions for the purpose of linking data networks in Nigeria to the global Internet highway or other managed IP-based international networks. Information exchange is based on packet-switching (IP) technology while making use of IP address as a means of identification*”

³²⁵ Paragraph 1(2).

³²⁶ Paragraph 3 (1).

³²⁷ Paragraph 3 (2) (a).

³²⁸ Paragraph 3 (2) (b).

³²⁹ Paragraph 3 (2) (c).

³³⁰ Paragraph 3 (2) (d).

³³¹ Paragraph 3 (2) (e).

³³² Paragraph 4 (1).

³³³ Paragraph 4 (2) (a).

³³⁴ Paragraph 4 (2) (b).

validity period.³³⁵

In addition, the status of existing operators is clarified by the Guidelines on IDA and VoIP. In this respect, operators under an existing Digital Mobile Licenses (DML) may only carry traffic generated from their own networks,³³⁶ any DML Operator desirous of carrying third party traffic through the upgrade of its international access authorisations, must apply for, and be issued with a gateway license to reflect the new status,³³⁷ the issuance of an upgraded gateway license to desiring DML Operators shall be precedent upon the payment of additional license fee of N25 million,³³⁸ an operator who has been issued an International V-SAT License will be upgraded to IDA License and may continue to render services within the scope of operation of that license until its expiration,³³⁹ that organisations that have private national networks are free to implement VoIP over such networks.³⁴⁰ The Guidelines on IDA and VoIP also creates the right of every operator under a gateway license to interconnect and remain interconnected with the PSTN.³⁴¹

Lastly, the Guidelines on IDA and VoIP creates special IDA permits for certain categories of organisations.³⁴²

XX. The Guidelines on Procedure for Granting Approval to Disconnect Telecommunications Operators

The Guidelines on Procedure for Granting Approval to Disconnect Telecommunications Operators (the Guidelines to disconnect operators) were developed to ensure that the procedure for granting approval by the Commission for the disconnection of a Licensee is founded on a predetermined framework to engender transparency, certainty and fairness.³⁴³

Pursuant to the Guidelines to disconnect operators, the Commission shall not consider any disconnection request except: there is a subsisting interconnect agreement between both parties duly filed with the Commission;³⁴⁴ the interconnected operators must have accurate billing systems consistent with the standard and specifications determined by the Commission;³⁴⁵ and parties must have fully exhausted all the options contained in their interconnection

³³⁵ See generally paragraph 5.

³³⁶ Paragraph 6 (1).

³³⁷ Paragraph 6 (2).

³³⁸ Paragraph 6 (3).

³³⁹ Paragraph 6 (4).

³⁴⁰ Paragraph 6 (6).

³⁴¹ Paragraph 7.

³⁴² Paragraph 8.

³⁴³ Paragraph 1.1.

³⁴⁴ Paragraph 2 (1) (a).

³⁴⁵ Paragraph 2 (1) (b).

agreements for resolving the dispute, billing or other interconnect debt issues in question.³⁴⁶

The Commission shall in granting approval for the disconnection of an operator be guided by the need to ensure that the interest of subscribers of the affected network is protected,³⁴⁷ and may only allow the disconnection of out-bound calls from a respondent’s network, provided howsoever that in the case of disconnection on grounds of indebtedness that any revenue generated from the termination of calls on a debtor operators network will be specifically used to set off the level of indebtedness of the debtor operator.³⁴⁸ In granting a decision to disconnect a telecommunications operator, the Commission is guided by a number of factors including the public interest in observing the rule of law and the need to entrench good corporate governance practices among operators.³⁴⁹

In accordance with the Guidelines to disconnect operators, every operator (hereinafter referred to as the “Applicant”) has a right to apply to the Commission for approval to disconnect an interconnected operator (hereinafter referred to as “Respondent”) for any of the following reasons. Where; the Respondent fails to settle its interconnect indebtedness after it becomes due;³⁵⁰ an interconnection agreement has been terminated in accordance with the terms thereof;³⁵¹ there is a fundamental breach of interconnection agreement;³⁵² the Respondent is engaged in acts contrary to the terms of its licence with regards to interconnection;³⁵³ and for any other reasons established under the Act or any subsidiary legislation made by the Commission.

In considering a request for approval to disconnect an operator, the Commission will take into account the following: that the applicant has paid all its regulatory fees to the Commission;³⁵⁴ that the applicant had prior to the request for approval to disconnect exchanged Call Data Records (CDRs) with the respondent on demand;³⁵⁵ and that such CDRs had been reconciled and the outstanding amount agreed by both operators.³⁵⁶ In addition, the decision of the Commission on a request for approval shall be guided by the following considerations: previous payment record of the respondent with the applicant;³⁵⁷ and the antecedents of the respondent vis-à-vis payment of interconnection indebtedness to its interconnecting parties.³⁵⁸ For purposes connected with the

³⁴⁶ Paragraph 2 (1) (c).

³⁴⁷ Paragraph 2 (2).

³⁴⁸ Paragraph 2 (3).

³⁴⁹ Paragraph 2 (4).

³⁵⁰ Paragraph 3 (1) (a).

³⁵¹ Paragraph 3 (1) (b).

³⁵² Paragraph 3 (1) (c).

³⁵³ Paragraph 3 (1) (d).

³⁵⁴ Paragraph 5 (1) (a).

³⁵⁵ Paragraph 5 (1) (b).

³⁵⁶ Paragraph 5 (1) (c).

³⁵⁷ Paragraph 5 (4) (a).

³⁵⁸ Paragraph 5 (4) (b).

INTRODUCTION

determination of the total amount of indebtedness owed by parties, where an operator fails to exchange reliable CDRs after fifteen (15) calendar days of the demand thereof, the CDRs of the other interconnecting party shall be deemed as the proper and correct records of indebtedness of the other party,³⁵⁹ and such shall be communicated to the parties by the Commission within a period of three (3) working days.³⁶⁰

Under the Guidelines to disconnect operators, the Commission may at any time before rendering its decision on a request for approval to disconnect; opt to invite the parties to a hearing meeting on the application. Where at such a meeting a respondent shows demonstrable efforts by the payment of at least 50% of the indebtedness, the respondent would be required to sign an undertaking³⁶¹ on terms acceptable to the applicant.³⁶² However, refusal to execute an undertaking or non-compliance with the terms of an undertaking will result in the grant of approval to disconnect the respondent.³⁶³

The decision by the Commission either in granting or refusing a request for approval to disconnect shall be taken and communicated to the parties within fifteen (15) working days of the receipt of all requested comments or conclusion of hearing.³⁶⁴ In the event that the Commission is unable to give its decision within the stipulated timeframe, the reasons shall be communicated to both parties.³⁶⁵ If the indebtedness or a part thereof remains unpaid as at the date agreed for payment, the Commission shall publish a notice to the subscribers of the debtor operator informing them that the operator is unable to pay its indebtedness and is likely to be disconnected from the network of the applicant³⁶⁶ provided the Commission has made a decision to grant approval to disconnect any debtor operator or any other case other non-settlement of interconnection indebtedness.³⁶⁷ Upon the issuance of such notification, the Commission shall at its discretion allow a grace period not exceeding ten (10) working days within which desiring subscribers would be at liberty to make arrangements to migrate or port from the Respondent's network to another network.³⁶⁸ The Guidelines to disconnect operators also provides that where a determination is made on the merits that a request for approval to disconnect should be granted, the Commission reserves the right to authorise an applicant to partially disconnect the respondent on terms to be decided by the

³⁵⁹ Paragraph 5 (5).

³⁶⁰ Paragraph 6 (1).

³⁶¹ Paragraph 16 of the Guidelines defines "Undertaking" to mean "a signed commitment by the respondent to settle its interconnect obligations by a definite date and according to a specified schedule".

³⁶² Paragraph 6 (2).

³⁶³ Paragraph 6 (3).

³⁶⁴ Paragraph 6 (4).

³⁶⁵ Paragraph 6 (5).

³⁶⁶ Paragraph 7 (1).

³⁶⁷ Paragraph 7 (3).

³⁶⁸ Paragraph 7 (4).

Commission. For purpose of these Guidelines, partial disconnection shall be limited to the disconnection of only outbound calls from the respondent's network to the applicant's network.³⁶⁹

In addition, the Guidelines to disconnect operators also provides remedial steps for non-payment of Interconnect debts that can be taken by the Commission in any event where approval for partial disconnection has been granted³⁷⁰, the disconnection of interconnect exchange Licensee by operators,³⁷¹ and the reconnection of disconnected operators.³⁷²

Lastly, the Guidelines to disconnect operators deems a payment plan negotiated on the basis of the repayment of outstanding interconnection debts as an "undertaking"³⁷³ and requires that such undertaking be registered with the Commission.³⁷⁴

XXI. The Guidelines for the provision of Internet Service

The Guidelines for the provision of Internet Service (the Guidelines for ISPs) applies to all Licensees providing internet protocol based telecommunications services. The Guidelines for ISPs require that all internet service providers (ISPs) comply with the Consumer Regulations in providing their services.³⁷⁵ In accordance with the Guidelines for ISPs, ISPs must ensure that they disclose the following information regarding their provision of internet access services. This information are; a full and fair disclosure of information regarding bandwidth (including whether bandwidth is shared or dedicated to the user) and bit transfer rates to consumers before the process of subscription is concluded;³⁷⁶ 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;³⁷⁷ notice to their subscribers of any winding-up or other discontinuation of the services at least six (6) months before such discontinuation;³⁷⁸ and an up-to-date list of their subscribers, particularly commercial subscribers such as cybercafés or other resellers to which they provide service.³⁷⁹

Under the Guidelines for ISPs, ISPs must ensure that its users are informed of any statements of cybercrime prevention or acceptable Internet use published by the Commission or any other authority, and that failure to comply with these

³⁶⁹ Paragraph 9.

³⁷⁰ Paragraph 10.

³⁷¹ Paragraph 12.

³⁷² Paragraph 13.

³⁷³ See generally paragraph 14.

³⁷⁴ *Ibid.*

³⁷⁵ Part I.

³⁷⁶ Paragraph 3 (a).

³⁷⁷ Paragraph 3 (b).

³⁷⁸ Paragraph 3 (c).

³⁷⁹ Paragraph 3 (d).

acceptable use requirements may lead to criminal prosecution, including with respect to: unlawful access or fraudulent use of a computer;³⁸⁰ identity theft, impersonation or unauthorised disclosure of access codes;³⁸¹ unlawful interception, or any form of system interference;³⁸² violation of intellectual property rights;³⁸³ any other use for unlawful purposes, including terrorism, promoting racial, religious or other hatred or any unlawful sexual purposes.³⁸⁴ ISPs are also required by the Guidelines for ISPs to cooperate with all law enforcement and regulatory agencies investigating cybercrime or other illegal activity.³⁸⁵ In this regard, the Guidelines for ISPs also specify the manner in which ISPs are required to provide this cooperation.³⁸⁶

ISPs are also required by the Guidelines for ISPs to include a provision in their service agreements that permits the immediate disconnection or suspension of a user's account, and the termination of their service agreement, when the ISP becomes aware that any of its services are being used by the user contrary to the requirements of the Guidelines for ISPs or other applicable laws or regulation,³⁸⁷ and retain internet service related information, including user identification, the content of user messages and traffic or routing data, for a minimum period of twelve (12) months or as otherwise directed by the Commission from time to time.³⁸⁸

For content related activities, the Guidelines for ISPs require ISPs to protect end users by displaying instructions regarding online safety on their home pages, including: describing methods of controlling access to content, particularly any filters available for persons who wish to control access to content;³⁸⁹ notifying users of their rights and obligations under applicable laws with respect to placing content on the internet;³⁹⁰ and informing end users of the procedures to follow for making a complaint regarding content,³⁹¹ and to take additional steps to protect minors by ensuring that internet service accounts are not provided to minors without the consent of a parent or guardian.³⁹² The Guidelines for ISPs also absolves ISPs from liability when they; act as mere conduits;³⁹³ cache;³⁹⁴ and host content.³⁹⁵ In this regard, ISPs are required to have in place a

³⁸⁰ Paragraph 5 (a).

³⁸¹ Paragraph 5 (b).

³⁸² Paragraph 5 (c).

³⁸³ Paragraph 5 (d).

³⁸⁴ Paragraph 5 (e).

³⁸⁵ Paragraph 6 (a).

³⁸⁶ Paragraph 6 (b) – (d).

³⁸⁷ Paragraph 7.

³⁸⁸ Paragraph 8.

³⁸⁹ Paragraph 9 (a).

³⁹⁰ Paragraph 9 (b).

³⁹¹ Paragraph 9 (c).

³⁹² See generally paragraph 10.

³⁹³ Paragraph 11 (a)

³⁹⁴ Paragraph 11 (b).

³⁹⁵ Paragraph 11 (c).

procedure for receiving and promptly responding to content related complaints, including any notice to withdraw or disable access to identified content issued by the Commission or other legal authority ("takedown notices").³⁹⁶ In addition, the Guidelines for ISPs provide for circumstance in which commercial email or communication would be regarded as unsolicited (spam).³⁹⁷

Finally, the Guidelines for ISPs impose various obligations on ISPs that supply internet access services to other ISPs for resale.³⁹⁸

XXII. The Guidelines on Short code Operation in Nigeria

The Guidelines on Short code Operation in Nigeria (the Guidelines on Short code) prescribes a standard of practice for providers of short code³⁹⁹ services and to provide a framework for the provision of these services.⁴⁰⁰ Short codes issued by the Commission under the Guidelines on Short code are in bulk and in 3, 4 or 5 digit numbers to Network Operators and Content Aggregators.⁴⁰¹ The objectives of the Guidelines on Short code are; to prescribe a regulatory framework for the provision of a minimum standard of practice for providers of short code services and to provide a procedure for the provision of these services,⁴⁰² provide guidance on the standard and procedure which network operators and content aggregators are expected to adhere to in the provision of the Short Code Services,⁴⁰³ and ensure a well developed and organised short codes market in Nigeria with appropriate legal framework that meets international best practice.⁴⁰⁴ The Guidelines on Short code were also made to provide a framework for the operation of short codes, licensing of Content Aggregators and for the protection against misuse.⁴⁰⁵

Accordingly, the Guidelines on Short code sets out the application process for short codes.⁴⁰⁶ Pursuant to this, the assignment of short codes by either the Commission or the industry group⁴⁰⁷ shall be free of charge,⁴⁰⁸ subject to

³⁹⁶ Paragraph 12.

³⁹⁷ Part IV.

³⁹⁸ Paragraph 16.

³⁹⁹ Short Codes are numbers shorter than full numbers which can be used to address wireless SMS and MMS messages and Voice Services from mobile phones or fixed lines, *see* paragraph 1, explanatory notes to the Guidelines.

⁴⁰⁰ Paragraph 1.2.

⁴⁰¹ Paragraph 1.3. Under paragraph 8.1 of the Guidelines, "*Content Aggregator*" means *a person or a business that gathers Web content (and/or sometimes applications) from different sources for reuse or resale and who holds a license issued by the Commission.*

⁴⁰² Paragraph 2.1.

⁴⁰³ Paragraph 2.2.

⁴⁰⁴ Paragraph 2.3.

⁴⁰⁵ Paragraph 3.1.

⁴⁰⁶ Paragraph 4.

⁴⁰⁷ Paragraph 8.3 of the Guidelines defines "*Industry group*" to mean "*a private industry, professional organisation or group of persons that monitors and analyses industry trends and published industry documents*".

⁴⁰⁸ Paragraph 4.3.

fairness and transparency in assignment⁴⁰⁹ and proper usage/proper purpose.⁴¹⁰ The network operators or content aggregators shall ensure proper usage of the numbers and assign the codes, in a fair and transparent manner.⁴¹¹ They will also ensure that codes are used for the purpose for which they were assigned.⁴¹² Also, pursuant to the Guidelines on Short code revenue sharing arrangement/agreements as may be determined between Network Operators, Content Aggregators and Service Providers are strictly commercial agreements. However, such charges should be cost based and fair, in cases where a dispute arises, such cases shall be referred to the Commission or the industry group to resolve such disputes.⁴¹³

The Guidelines on Short code also sets out detailed provisions on the code of practice/operational guidelines for the use of short codes,⁴¹⁴ and advertising and promotions.⁴¹⁵

Lastly, the Guidelines on Short code authorises either the Commission or the Industry group to resolve any dispute arising from its operation.⁴¹⁶

XXIII. The Guidelines on technical specifications for the Installation of Telecommunications Masts and Towers

The Guidelines on technical specifications for the Installation of Telecommunications Masts and Towers (the Guidelines on telecoms masts and towers) provide standards to be adhered to by telecommunications services providers/operators, designers, fabricators and installers of telecommunications towers towards ensuring environmental safety and sound engineering practices.⁴¹⁷

Under the Guidelines on telecoms masts and towers, there are 4 type of towers and masts. They are monopole towers or post masts,⁴¹⁸ guyed towers,⁴¹⁹ self-supporting towers⁴²⁰ and roof mounts.⁴²¹ The Guidelines on telecoms masts and towers makes detailed provisions for the siting of towers and masts,⁴²² design and constructions of towers and masts,⁴²³ earthing and lightning protection of

⁴⁰⁹ Paragraph 4.3 (a).

⁴¹⁰ Paragraph 4.3 (b).

⁴¹¹ Paragraph

⁴¹² *Ibid.*

⁴¹³ Paragraph 4.5.

⁴¹⁴ See generally paragraph 5.

⁴¹⁵ Paragraph 6.

⁴¹⁶ Paragraph 7.

⁴¹⁷ Paragraph 1.1.

⁴¹⁸ Paragraph 2.1.

⁴¹⁹ Paragraph 2.2.

⁴²⁰ Paragraph 2.3.

⁴²¹ Paragraph 2.4.

⁴²² Paragraph 3.

⁴²³ Paragraph 4.

towers and masts,⁴²⁴ safety devices for towers and masts,⁴²⁵ general specifications for towers and masts,⁴²⁶ types of maintenance and testing to be carried out on towers and masts,⁴²⁷ environmental requirements of towers and masts,⁴²⁸ circumstance in which a permit to erect towers or masts must be obtained from the Commission,⁴²⁹ requirement for applying for a tower or mast certification/licences,⁴³⁰ and the requirement of structural certification for towers or masts.⁴³¹

Finally, the Guidelines on telecoms masts and towers makes provision on general matters in respect of; the terrain;⁴³² basic wind speed;⁴³³ requirement for insurance and compensation on towers and masts;⁴³⁴ service life of towers and masts;⁴³⁵ tolerable radiation level of towers and masts;⁴³⁶ and permissible generator setback, sound level, smoke and vibration.⁴³⁷

XXIV. The Guidelines on Technical Standards for Interconnectivity of Networks

The Guidelines on Technical Standards for Interconnectivity of Networks (the Guidelines for Interconnectivity) deals with only technical issues in interconnection, that is, the physical connection of separate networks to allow users of those networks to communicate with each other.⁴³⁸ The objectives of the guidelines are to ensure; interoperability;⁴³⁹ technical compatibility and effective interconnection between different service providers;⁴⁴⁰ and a successful and easily operable interconnectivity regime without making private carriers into common carriers and establishing complex regulations.⁴⁴¹

XXV. The Guidelines for the use of 2.4 GHz ISM band for Commercial Telecom Services

The main objectives of the Regulatory Guidelines for the use of 2.4 GHz ISM band for Commercial Telecom Services (Guidelines for use of 2.4 GHz ISM band) is to ensure interference- free operation by all users of the band and to

⁴²⁴ Paragraph 5.

⁴²⁵ Paragraph 6.

⁴²⁶ Paragraph 7.

⁴²⁷ Paragraph 8.

⁴²⁸ Paragraph 9.

⁴²⁹ Paragraph 10.

⁴³⁰ Paragraph 11.

⁴³¹ Paragraph 12.

⁴³² Paragraph 13 (1).

⁴³³ Paragraph 13 (2).

⁴³⁴ Paragraph 13 (3).

⁴³⁵ Paragraph 13 (4).

⁴³⁶ Paragraph 13 (5).

⁴³⁷ Paragraph 13 (6).

⁴³⁸ Paragraph 2.1.

⁴³⁹ Paragraph 2.2.

⁴⁴⁰ Paragraph 2.3.

⁴⁴¹ Paragraph 2.4.

ensure that a guaranteed grade of service is available to the subscribers through established quality of service benchmarks, and consumer code of practice.

The Guidelines for use of 2.4 GHz ISM band makes provisions for the operational use of the 2.4 GHz band,⁴⁴² licensing of 2.GHz band for telecoms services,⁴⁴³ technical specifications,⁴⁴⁴ quality of service,⁴⁴⁵ type approval of all equipment to be deployed for use in the 2.4 GHz ISM band,⁴⁴⁶ backhaul frequencies,⁴⁴⁷ and approved industry standards for use in the 2.4 GHz ISM band.⁴⁴⁸

XXVI. The Type Approval Guidelines

The Type Approval Guidelines are to be read in conjunction with the Type Approval Regulations.⁴⁴⁹

The Type Approval Guidelines apply to all Equipment Holders. The Guidelines sets out the procedures to be followed before communications equipment (also referred to as “products”) is used or supplied.⁴⁵⁰

The Wireless Telegraphy Act

The Wireless Telegraph Act (WTA) has as its principal purpose, the regulation of wireless telegraphy in Nigeria. Wireless telegraphy is defined in the WTA to mean;

“the emitting or receiving, over paths which are not provided by any material substance constructed or arranged for that purpose, of electromagnetic energy of a frequency not exceeding three million megacycles a second, being energy which either-

- a) serves for the conveying of messages, sound or visual images (whether the messages, sound or images are actually received by any person or not), or for the actuation or control of machinery or apparatus; or*
- b) is used in connection with the determination of position, bearing or distance, or for the gaining of information as to the presence, absence, position or motion of any object or of any objects of any class”⁴⁵¹*

Under the WTA, no person shall establish or use any station for wireless telegraphy or install or use any apparatus for wireless telegraphy except under and in accordance with

⁴⁴² Paragraph 1.

⁴⁴³ Paragraph 2.

⁴⁴⁴ Paragraph 3.

⁴⁴⁵ Paragraph 4.

⁴⁴⁶ Paragraph 5.

⁴⁴⁷ Paragraph 6.

⁴⁴⁸ Paragraph 7.

⁴⁴⁹ Paragraph 1.

⁴⁵⁰ Paragraph 3.

⁴⁵¹ Section 2 WTA.

a licence in that behalf.⁴⁵² Any person who contravenes this provision shall be guilty of an offence.⁴⁵³ In addition, the WTA makes provision for the dealing in wireless telegraphy apparatus.⁴⁵⁴ In this regard, no person shall offer for sale, sell or have in his possession with a view to sale in the course of his business any installation, mechanism, instrument, material or other apparatus constructed for the purpose of or intended to be used for wireless telegraphy except under and in accordance with a licence in that behalf.⁴⁵⁵ Any person who contravenes this provision shall be guilty of an offence.⁴⁵⁶

Under the WTA, the Commission may grant licences for the purposes of offering for sale, selling or having in his possession with a view to selling in the course of his business any installation, mechanism, instrument, material or other apparatus constructed for the purpose of or intended to be used for wireless telegraphy, in the prescribed form or in such other for any particular case as he may approve and may renew licenses so granted.⁴⁵⁷ However the grant or renewal of a licence shall be in the discretion of the Commission.⁴⁵⁸ A licence may be issued subject to such terms, provisions and limitations as the Commission may think fit, including in particular in the case of a licence to establish a station, limitations as to the position and nature of the station, the purposes for which, the circumstances in which, and the person by whom the station may be used, and the apparatus which may be installed or used therein, and, in the case of any other licence, limitation as to the apparatus which be installed or used, and the places where, the purposes for which, the circumstances in which and the persons by whom the apparatus may be used.⁴⁵⁹ A licence issued under the WTA shall, unless previously revoked, continue in force for such period as may be specified in the licence.⁴⁶⁰ Also, a licence may be revoked, or the terms, provisions or limitations thereof varied, by a notice in writing of the Commission served on the holder of the licence or by a general notice applicable to licences of the class to which the licence in question belongs published in the Federal *Gazette*.⁴⁶¹ Where a licence has expired or has been revoked, it shall be the duty of the person to whom the licence was issued, and of every other person in whose possession or under whose control the licence may be, to cause the licence to be surrendered to the Commission if required by the Commission to do so, and any person who without reasonable excuse fails or refuses to comply with the provisions of this subsection shall be guilty of an offence.⁴⁶²

The WTA also makes provision for the grant of experimental licenses,⁴⁶³ that is where the purpose for which the license is granted is to enable the holder of the license to

⁴⁵² Section 4 (1) WTA.

⁴⁵³ Section 4 (2) WTA.

⁴⁵⁴ See, Section 5 of the WTA.

⁴⁵⁵ Section 5 (1) WTA.

⁴⁵⁶ Section 5 (2) WTA.

⁴⁵⁷ See, Section 6 (1) WTA

⁴⁵⁸ Section 6 (2) WTA.

⁴⁵⁹ Section 6 (3) WTA.

⁴⁶⁰ Section 6 (4) WTA.

⁴⁶¹ Section 6 (5) WTA.

⁴⁶² Section 6 (6) WTA.

⁴⁶³ Section 8 WTA.

conduct experiments in wireless telegraphy for the purpose of scientific research.⁴⁶⁴ The WTA also authorise the Commission to make Regulations on several matters, provided such Regulations are made with the approval of the Minister of Communications Technology.⁴⁶⁵ Lastly, the WTA creates offences in relation to misleading messages and disclosure of messages⁴⁶⁶ and the powers of the Commission in respect of the competence of the persons examined to fill positions in connection with the operation of stations for wireless telegraphy apparatus.⁴⁶⁷

Authorisation/licensing regime

I. Communications services

Under the Act, there are two broad licensing frameworks for communications services;

- a) An individual license, which is operator and service specific, allowing the holder to provide a specific type of service. Some of the services authorised by an individual license are; fixed wireless access (FWA), digital mobile service (GSM), unified access service, electronic directory services, internet exchange, international gate way, international cable infrastructure and landing station services, infrastructure sharing & collocation services, domestic VSAT network, global mobile personal communications system (GMPCS), international data access gateway, internet services, value added services, local exchange operator, metropolitan (fibre) cable network, mobile payment system, national long distance services and wholesale wireless access service.
- b) A class license, which generally authorise a class of service providers to provide a specific service or operate a particular network. Some of the services subject to a class license are sales and installation of terminal equipment (including mobile cellular phones, HF, VHF/UHF radio, etc), repairs and maintenance of telecoms facilities, cabling services, telecentres/cybercafes and operation of public payphones.

An entity intending to carry out a service subject to an individual license shall apply to the Commission in the prescribed form upon the payment of the processing or administrative fee (usually 5% of the license fee), and the license fee while a person intending to operate under a class Licensee is to submit a registration notice in the prescribed form and a registration fee of ₦ 10, 000:00 (Ten thousand Naira only) to the Commission.

In accordance with the Act, a license applicant must receive a response to the application within 90 days of submitting it. However, an offer letter will be issued to applicants for a class license if the application is complete. For individual licenses, depending on the

⁴⁶⁴ See, Section 8 (2) WTA.

⁴⁶⁵ See, Section 9 WTA.

⁴⁶⁶ See, Section 10 WTA

⁴⁶⁷ See, Section 12 WTA.

service and completeness of the required information, the conclusion of the process can take between 4 and 12 weeks.

The duration of a license depends on the type of service authorised or the spectrum licensed. The national carrier Licensee (NCL) and international gateway license (IGL) are valid for 20 years. The unified access service license (UASL) is valid for a term of 15 years while a digital mobil license (DML) authorising the use of a specified mobile spectrum is valid for a term of 15 years. On the other hand, an internet service, paging, prepaid calling card and special numbering service license are all valid for a term of 5 years.

The license fees payable depends on the type of service. Fees payable are fixed by the Commission and published on its website. In addition to license fees, a prospective Licensee is required to pay an administratiive charge and, upon grant of the license, the Licensee shall pay an annual operating levy (AOL) calculated on the basis of net revenue for network operators and gross revenue for non-network operators.

In Nigeria, mobile telecommunications services are differentiated on the basis of whether it is authorised by a DML, fixed wireless access license (FWAL) or UASL. A DML authorises the holder to use appropriate equipment in a designated part of the electromagnetic spectrum and permits it to operate a network for the provision of public telecommunications services. In 2001, the Commission licensed 4 spectrum packages in the 900MHz and 1,800MHz bands to Mobile Telecommunications Limited (which has since suspended operations), Econet Wireless Nigeria Limited (now Airtel) and MTN Nigeria Communications Limited for use in the provision of GSM services. These were later joined by Globacom and Etisalat.

An FWAL authorises an operator to use appropriate equipment in a designated part of the elctromagnetic spectrum for a term for 5 years (renewal for a further 5 years) and permits the holder to operate a network for the provision of public telecommunications service. FWALs are granted on a regional basis to reflect the 36 states of the Federal Republic of Nigeria (FRN), and the Federal Capital Territory (FCT), with operators who wish to achieve national coverage required to obtain licenses in each of the licensing regions. In 2002, the Commission in authorising FWAL services, also offered 42MHz paired in the 3.5GHz band, and a total of 28MHz paired in 3.5GHz band across the 37 licensing regions of the FRN to 22 new Licensees.

In 2007, the Commission introduced the UASL scheme and allocated 40MHz of paired spectrum in the 2GHz band in 4 equal blocks of 10MHz paired spectrum. On succesful allocation of the spectrum, the allottees were issued with a spectrum license and where necessary, a UASL. The UASL authorises the holder to provide both fixed and mobile services including voice and data, and imposes special conditions requiring the holder to build and operate a telecommunincations network to provide voice telephony, video services, multimedia services, web browsing, real time video streaming, video surveillance, network gaming, email, SMS, file transfer, broadband data and location-

based services, and other services that may be authorised, and that the 3G network be built and operated according to certain defined technical standards.

In the broadband ecosystem, a WWASL authorises the holder to construct, maintain, operate and use a network consisting of a mobile communications system, a fixed wireless access telecommunications system, or a combination of any of these systems comprising radio or satellite or their combination, within the FRN, deployed for providing point-to-point or switched/unswitched point-to-multipoint communications for the conveyance of voice, data or video or any kind of message. The WWASL also authorises the holder to construct, own, operate and maintain an international gateway, while an infrastructure company (InfraCo) license authorises the holder to provide and operate on a wholesale basis an open access metropolitan fibre network within a designated geographical area in FRN, in particular among other things, to construct, maintain and operate a fibre optic network facilities.

Satellite services in Nigeria are normally authorised by a global mobile personal communications by satellite (GMPCS) license. In addition to the general conditions applicable to fixed, mobile and satellite services, a GMPCS license imposes special conditions requiring the holder to, among other things, construct, operate, implement and maintain a GMPCS land earth station for the purpose of establishing, maintaining, validating and controlling command functions and communications within the space segment of a GMPCS system; deploy a GMPCS network for the purpose of providing one-way or two point-to-point or point-to-multipoint communications for the conveyance of voice, data or video; sell telecommunications components and accessories used or intended for use in the installation of GMPCS terminals; install GMPCS terminals; and provide activation, billing, maintenance and related management services for subscribers to GMPCS services. Licensing of satellite services continues to be by way of a separate license.

II. Radio-frequency (spectrum)

A radio frequency (spectrum) licence is also required in addition to the license authorising the provision of a public telecommunications service. The Commission has the sole and exclusive power to manage and administer the spectrum for the communications sector and to grant licences for the use of spectrum pursuant to the WTA. In assigning a spectrum, the Commission will use any of the following mechanisms: first-come-first-served - when there is surplus spectrum and low demand;⁴⁶⁸ comparative qualitative evaluation of bids (beauty contest)/sealed bids - when there is medium availability and moderate;⁴⁶⁹ auction - where there is scarcity of spectrum and high demand;⁴⁷⁰ lottery;⁴⁷¹ automatic assignment - where there is

⁴⁶⁸ Nigerian Communications Commission. (2007, January). 'Commercial Frequency Management Policy, Administrative Procedures and Technical Guidelines' [WWW document] URL http://www.ncc.gov.ng/index.php?option=com_docman&task=doc_download&gid=379&Itemid= (visited 2013, April 9), p. 6.

⁴⁶⁹ *Ibid.*

⁴⁷⁰ *Ibid.*

⁴⁷¹ *Ibid.*

unlimited sharing capability;⁴⁷² or a combination of any of the above methods.⁴⁷³ Frequency allocation for microwave transmission links are assigned on a hop-by-hop basis.⁴⁷⁴

Spectrum license holders are required by their licenses not to interfere with the spectrum of another spectrum Licensee, also users of Licensee free bands are normally required to comply with technical guidelines issued by the Commission. A spectrum licence cannot be transferred or assigned either in whole or in part without the approval of the Commission and there is a Use-or-Lose policy which applies to all spectrum licences. By this rule, any spectrum license that is not used within the time stipulated in the license will automatically lapse and be forfeited. Lastly, licensed spectrum is not tradable. A spectrum license cannot be assigned or transferred to a third party either in whole or in part without the approval of the Commission.

⁴⁷² *Ibid.*

⁴⁷³ *Ibid.*

⁴⁷⁴ *Ibid.*, p. 9.

CHAPTER 2

INTRODUCTION TO COMPETITION LAW

Introduction

This chapter will discuss from an elementary perspective the concept of “competition” and “competition law”, and typical situations in which competition law applies. This chapter will conclude by discussing the goal of competition law or why most national governments enact a competition law.

The meaning of competition

Black’s Law Dictionary (9th Edition) defines competition as “*The struggle for commercial advantage; the effort or action of two or more commercial interests to obtain the same business from third parties*”¹ while the Oxford Advanced Learners’ Dictionary (International Student’s Edition) defines competition as “*a situation in which people or organisations compete with each other for something that not everybody can have*”.² Thus, competition is taken to be a process of economic rivalry between market players to sell their products and/or services to customers.³ Competition in this regard could be fair or unfair.

In fair competition, market players use fair means of competing such as producing good quality products, becoming cost efficient, charging appropriate price to all their customers, optimising the use of resources, etc, while in unfair competition, market players adopt unfair means such as price fixing with rivals, predatory pricing, excessive pricing, bundling & tying and other similar practices which impedes economic growth.

The general rule in most competition jurisdictions is that the primary task of competition law is to protect *competition and not competitions* as a means of enhancing consumer welfare. This rule was articulated by the EC in their European competition policy as “*to protect competition in the market as a means of enhancing consumer welfare and ensuring an efficient allocation of resources*”.⁴ According to the EC, the primary aim of enforcing EU competition law is to ensure that dominant firms in the market do not unduly restrain competition by foreclosing their competitors either by charging excessive price, constraining consumer choice or by limiting quality, thus

¹ Page 322.

² Page 293.

³ According to Office of Fair Trade (OFT) in the Merger Assessment Guidelines at paragraph 4.1.2 available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284449/OFT_1254.pdf (visited 2015, January 28), “*Competition is viewed by the Authorities as a process of rivalry between firms seeking to win customers’ business over time by offering them a better deal*”.

⁴ Neelie Kroes (2005, September 15). European Competition Policy – Delivering Better Markets and Better Choices [WWW document]. URL http://europa.eu/rapid/press-release_SPEECH-05-512_en.htm?locale=en (visited 2015, January 26), p. 2.

harming consumer welfare.⁵ In the US, the DoJ is of the view that consumer welfare can be served by protecting competition in the market, thus the preservation of market condition is a means of promoting consumer welfare.⁶ Under US competition framework, competition could take the form of price competition, as well as aspects such as quality, variety, and innovation.⁷

The primary concern of competition law is that a dominant firm (or monopolist)⁸ has the incentive to engage in certain anti-competitive conducts that results in consumer harm by foreclosing competing firms. Some of these conducts are raising prices, degrading the quality of products, raising rivals costs, reducing output, retarding innovation, foreclosing market and constraining the choice of consumers.

Competition laws refer generally to a regulatory framework in respect of; agreements between firms that restrict competition; abuse of dominant position by a firm; or mergers and acquisitions. Stated differently, a competition law framework intervenes by requiring firms operating in a particular market from engaging in certain market behaviour that distorts or substantially lessens competition. Typically, modern competition law will seek to control the following situations;

I. Anti-competitive agreements⁹

Competition law recognises that certain types of agreements may have as its object or effect¹⁰ the restriction of competition. Such anti-competitive agreements could either be horizontal in nature between competitors to; fix prices; share markets; or collectively boycott another business; or vertical type between firms at different levels of the distribution chain to; set resale price; or exclusively deal with each other. As a general proposition of competition law, horizontal agreements termed *per se* or “hard-core” agreements are more likely to restrict competition due to their lack of redeeming pro-competitive value, than vertical agreements, which are normally analysed (under the “rule of reason” standard) for any anti-competitive effects.¹¹

II. Abuse of a dominant position¹²

A firm occupying a dominant position in a market has the ability to behave

⁵ Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (EC, 2009), paragraph 19.

⁶ International Competition Network, (2011, May 17 - 20) Competition Enforcement and Consumer Welfare – Setting the Agenda [WWW document]. URL <http://www.internationalcompetitionnetwork.org/uploads/library/doc857.pdf> (visited 2015, January 26), p. 10.

⁷ *Ibid.*

⁸ Or two or more market players occupying a dominant position in the market.

⁹ Anti-competitive agreements are discussed fully in Chapter 5.

¹⁰ Some competition jurisdictions use “*purpose or effect*” and “*substantially lessens competition/substantial lessening of competition*” instead of “*object or effect*” and “*restriction of competition*”.

¹¹ See also Richard Whish, David Bailey, *Competition Law* (New York: Oxford University Press, 2012), p. 3.

¹² Abuse of a dominant position is discussed fully in Chapter 6.

independently of competitive pressures from other competitors in that market. Occupying a position of dominance is not anti-competitive, however it is the abuse of such position that is anti-competitive. Thus, the objective of competition law in this regard is to prohibit a dominant firm from abusing its position of dominance. A dominant firm would be abusing its position of dominance if it engages in; price discrimination, predatory pricing, excessive pricing, refusal to deal/supply; tying/bundling or exclusive dealing.

III. Mergers and acquisition¹³

Competition law is also concerned with mergers and acquisitions that are likely to impact negatively on competition. For instance; a merger involving two competitors is likely to eliminate competition thereby allowing the post-merger firm to profitably raise prices absent any competitive pressure (*unilateral effects*); a merger may enable coordination through which several firms and the merged firm collectively increase their price (*coordinated effects*); or it may result in the successor firm being able to leverage its market power in one market in order to distort competition in another market (*vertical or conglomerate effects*).

Goals of competition law

I. Consumer welfare

Consumer welfare is defined, as “*the maximisation of consumer surplus, which is the part of total surplus given to consumers*”.¹⁴ In economic terms, consumer welfare is the benefit a consumer gets from consuming a particular good minus what the consumer paid to buy that good.¹⁵ It has been argued that protecting the competition process will ensure that consumer welfare is safeguarded.¹⁶ Once the competition process is impaired, there is a presumption that consumer welfare may also be harmed.¹⁷ In this regard, competition law coincides with consumer protection law in that the ultimate benefit is directed towards consumers.¹⁸ Indeed, judicial decisions from European Community Courts and other competition jurisdictions appear to suggest that one of the main goals of competition law is to prevent “consumer harm” or improve “consumer welfare”.¹⁹

¹³ Mergers and acquisition is discussed fully in Chapter 7.

¹⁴ Katalin Judit Cseres, ‘The Controversies of the Consumer Welfare Standard’ *The Competition Law Review* (March 2007), Volume 3 Issue 2, pp 121-173, p. 124.

¹⁵ Mishra Rajan, *Industrial Economics and Management Principles* (Firewall Media, 2008), p. 73.

¹⁶ Philip Marsden, Peter Whelan, ‘Consumer Detriment and its application in EC and UK Competition Law’ *European Competition Law Review* (2006), pp. 569- 589, p. 569.

¹⁷ *Ibid.*

¹⁸ Richard Whish, David Bailey, *supra*, p.20.

¹⁹ See, for instance the Case C-209/10 *Post Danmark A/S v. Konkurrencerådet* where the ECJ stated that “*It is apparent from case-law that Article 82 EC [now Article 102 TFEU of the EU competition law] covers not only those practices that directly cause harm to consumers but also practices that cause consumers harm through their impact on competition*” and in the US case of *Reiter v. Sonotone Corp.*, 442 US 330 Supreme Court 1979 where the Supreme Court stated “*that Congress designed the Sherman Act [the first federal antitrust statute in the US] as a consumer welfare prescription*”.

In a real life market scenario, consumer welfare is impaired where; goods are sold at an excessive price, consumer choices are constrained, sellers tie the sale of a good to another good, or distributors set resale price limit. Accordingly, competition law seeks to maximise consumer welfare by prohibiting market players from engaging in these anti-competitive practices.

II. Economic efficiency

In addition to the consumer welfare goal of competition law, another key objective why national governments enact a competition law framework is to promote economic efficiency.²⁰ Economic efficiency has three elements, which are *allocative efficiency*, *productive efficiency* and *dynamic efficiency*. *Allocative efficiency* occurs in situations where goods and services are allocated between consumers such that the prices they are willing to pay never exceeds the marginal cost of production.²¹ Allocative efficiency can only be achieved in perfect market competition by reducing output as a given producer in reducing prices is unable to affect the price and thus will have no incentive for doing so.²² On the other hand allocative inefficiency is a situation in which the distribution of resources between alternatives does not fit with consumer taste.²³ *Productive efficiency* arises when the actual cost of production is at a minimum.²⁴ Productive efficiency is the resultant effect of economies of scale.²⁵ In microeconomics, economies of scale are the cost advantages that firms obtain due to size, output, or scale of operation, with cost per unit of output generally decreasing with increasing scale as fixed costs are spread out over more units of output.²⁶ An economy of scale exists whenever the cost of some production input declines as production volume increase.²⁷ Thirdly, *dynamic efficiency* is when producers innovate in their product offerings through the adoption of technology as part of their sales strategy in order to gain more customers.²⁸

The absence of effective competition on either the demand or supply side of the market is likely to increase market power whereby the dominant firm is able to set price above competitive levels²⁹ thus undermining the efficient allocation of resources. Competition law in this regard promotes market efficiency through the allocation of resources to

²⁰ *The Objectives of Competition Law and Policy* (Organisation for Economic Co-operation and Development, 29 January 2003), paragraph 20.

²¹ Damien Geradin, (2004, November 12- 13). Efficiency Claims in EC Competition law and sector-specific regulations [WWW document] http://papers.ssrn.com/sol3/papers.cfm?abstract_id=617922 (visited 2015, January 26), p. 4.

²² Josef Drexl, editor, *Research Handbook on Intellectual Property and Competition Law* (Edward Elgar Pub, 2008), p. 82.

²³ Harold O. Fried, C. A. Knox Lovell, Shelton S. Schmidt. (no date.) 'Efficiency and Productivity' [WWW document] URL <http://pages.stern.nyu.edu/~wgreene/FrontierModeling/SurveyPapers/Lovell-Fried-Schmidt.pdf> (visited 2016, February 1), p. 4.

²⁴ Alistair Lindsay, *The EC Merger Regulation: Substantive Issues* (London: Sweet & Maxwell, 2006), p. 9.

²⁵ *Ibid.*

²⁶ Herbert Hovenkamp, *Antitrust* (West Publishing Co., 2011), p. 90.

²⁷ *Ibid.*

²⁸ Damien Geradin, *supra*.

²⁹ Or in other cases to engage in predatory pricing practices.

ensure that the production of goods and services are done at minimal costs.³⁰ For markets to remain competitive, governments must intervene by regulating market conduct pursuant to the provisions of a competition law framework.

Thus, the main goal of competition law in this regard is to curb the ability of dominant firms to influence price (or to eliminate such market power) whenever it occurs. Consistent with the promotion of economic efficiency, competition law imposes specific negative obligations enjoining firms from engaging in certain prohibited conducts, and authorises the blocking of anti-competitive mergers including mergers that will create market power, at its incipient stage.

III. Freedom of economic choice

A reduction of choice opportunities in a market is undermining of competition because in a competitive market, both the producers/sellers and consumers are guaranteed the freedom of economic choice- the right to freely choose your contractual partner(s) (or the right to compete).³¹ Competition law in this regard has the goal of prohibiting (or condemning) unilateral acts of dominant firms, which constrain the choice of consumers to a particular good(s) or compel other market participants to act in a particular way.³²

In Commission Decision No. 81/969/EEC (*Bandengroothandel Frieschebrug BV/NV Nederlandsche Banden-Industrie Michelin*), 1981 O.J.L 353, 9.12.1981, p. 33–47, the EC sheds some light in this regard. In that case, the EC held at paragraph 37 that “[Michelin’s] commercial conduct [in the market in new replacement tyres for trucks, buses and similar vehicles] constitutes an abuse of a dominant position. It restricts dealers’ freedom of choice and results in inequality of treatment as between tyre dealers”. Choice from a consumer’s perspective also features prominently in the CJEU case of Case C-202/07 P *France Télécom SA v. Commission of the European Communities* where the Court concluded at paragraph 112 that the predatory pricing practices of France Télécom eliminated competition in the market for internet access services thus resulting in consumers suffering loss as a result of the limitation of the choices available to them.

In the US, the DoJ maintains that the “goal of antitrust laws is to protect economic freedom and opportunity by promoting free and fair competition in the marketplace”.³³ Historically speaking, the Sherman Antitrust Act, the first competition law in the US, is

³⁰ Frank Emert, Franz Kronthaler & Johannes Florian Stephan. (2005, June 1) ‘Analysis of Statements Made in Favour of and Against the Adoption of Competition Law in Developing and Transition Economies’ [WWW document] URL http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2341766 (visited 2015, February 2).

³¹ Josef Drexler, Wolfgang Kerber, Rupprecht Podszun, editors, *Competition Policy and the Economic Approach: Foundations and Limitations* (Edward Elgar Publishing, 2011) pp. 52–53.

³² See generally, Paul Nihoul (2012, June 12) ‘Freedom of choice: The emergence of a powerful concept in European Competition Law’ [WWW document] URL http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2077694

³³ See the mission statement of the DoJ at <http://www.justice.gov/atr/about/mission.html> (visited 2015, January 28).

often touted as a charter of economic freedom.³⁴ According to Mr. Justice Black in *Northern Pacific Railway Company v. United States*, 356 U.S. 1 (1958), the “*Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition*”.

In order to make markets more pro-competitive, freedom of economic choice plays a critical role in achieving the policy objectives of a competition law regime. Consequently, the focus of competition law will be to eliminate all manner of abusive practices by dominant firms, which, from the perspective of competition authorities, are detrimental to the freedom of economic choice.

IV. Wealth redistribution/transfer

The application of market power by a firm or a group of firms constrains economic choice and opportunity.³⁵ Competition enforcement measures taken to remedy competition law infractions also remedy transfer of wealth injuries arising from these infractions.³⁶ For instance, a transfer of wealth from the consumers or small buyers to the dominant firm occurs whenever the dominant firm engages in anti-competitive conducts such as output reduction and/or price increase.³⁷ The incentive for the dominant firm to exercise its market power by charging excessive price is the “wealth transfer gain”,³⁸ which results in an injury greater than allocative inefficiency.³⁹

In this regard, the goal of competition law is to protect the consumers from the exploitative conducts of dominant firms, conduct that unfairly transfers their wealth to these dominant firms, thus preventing consumers from becoming poorer while the dominant firms becomes richer.⁴⁰

V. Innovation

Competition law fosters innovation especially in high technology industries such as the telecommunications industry. At its most fundamental level, competition will ensure

³⁴ Morton Mintz, Jerry S. Cohen, *America, Inc: Who Owns and Operates the United States* (Dial Press, 1971), p. 135.

³⁵ Richard Whish, David Bailey, *supra*, p. 21.

³⁶ Grimes, Warren. S. (2012, January 18). ‘Wealth Distribution, Free Trade, and Competition Law’ [WWW document] URL http://www.swlaw.edu/pdfs/lawjournal/18_1grimes.pdf (visited 2015, February 2), p. 6.

³⁷ *Ibid.*, citing Lawrence A. Sullivan & Warren S. Grimes, *The Law of Antitrust: An Integrated Handbook* §1.5b2 (2d ed. 2005).

³⁸ Warren. S, *supra*.

³⁹ John B. Kirkwood, ‘The Essence of Antitrust: Protecting Consumers and Small Suppliers from Anticompetitive Conduct’, *Fordham Law Review*, Vol. 81, (2013), pp. 2425 – 2469, p.2431.

⁴⁰ However, former Assistant Attorney General William Baxter argues that the antitrust laws were not intended to address wealth distribution issues. (See William Baxter, ‘*Separation of Powers, Prosecutorial Discretion, and the ‘Common Law’ Nature of Antitrust Law*’, 60 *TEX. L. REV.* 661, 693-94 (1982).) This view is shared with some antitrust professionals of the Chicago School of thought, who are also of the view that antitrust should concern itself with only allocative efficiency, and that the abusive conduct of a monopolist should be condemned only when it reduces output, not when a transfer of wealth injury occurs. (See Warren. S, *supra*, pp. 5-6).

that consumer prices are kept to the barest minimum.⁴¹ When firms compete on price, in order to attract more customers, some will improve the quality of their goods, thus resulting in cheaper and better goods for consumers.⁴²

On another front, competition enhances research & development (R & D). For example, a dominant firm that is not constrained by competition is unlikely to engage in R & D, than another firm in a competitive market.⁴³ According to Professor Baker, there are four (4) important principles that are directly connected to both competition law and innovation.⁴⁴ These principles are; firstly, *competition in innovation itself—that is, competition among firms seeking to develop the same new product or process—encourages innovation*:- that is the more firms compete to innovate first, they try harder to win.⁴⁵ Secondly, *competition among rivals producing an existing product encourages those firms to find ways to lower costs, improve quality, or develop better products*:- that is innovation leads to cheaper and better product, and more profits.⁴⁶ Thirdly, *firms that expect to face more product market competition after innovating have less incentive to invest in R&D*:- that is innovation spurs firm to engage in more R & D in order to differentiate their products from that of their competitors.⁴⁷ That way, the products face less post-innovation competition than do products similar to those sold by other firms.⁴⁸ Lastly and fourthly, *a firm will have an extra incentive to innovate if in doing so it can discourage potential rivals from investing in R&D*:- R & D heightens barriers to entry into a particular market, thereby allowing a dominant firm that actively engages in R & D to maintain its market power.⁴⁹

⁴¹ Jonathan B. Baker, 'Beyond Schumpeter vs. Arrow: How Antitrust Fosters Innovation', *Antitrust Law Journal*, Vol. 74, No. 3 (2007), pp. 575-602, p. 577.

⁴² *Ibid.*

⁴³ Richard J. Gilbert (no date). 'Competition and Innovation' [WWW document] URL http://eml.berkeley.edu/~gilbert/wp/competition_and_innovation.pdf (visited 2016, February 2), p. 14.

⁴⁴ Jonathan B. Baker, 'Beyond Schumpeter vs. Arrow: How Antitrust Fosters Innovation', *supra*, p. 579.

⁴⁵ *Ibid.*, pp. 579 – 580.

⁴⁶ *Ibid.*, p. 580.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*, pp. 582 – 583.

CHAPTER 3

MARKET DEFINITION IN NIGERIA'S COMMUNICATIONS SECTOR

Introduction

This chapter will discuss the importance of market definition in the enforcement of competition law. In addition, the market definition methodology applied by the Commission pursuant to the provisions of the Competition Regulations, will be reviewed in conjunction with the methodology adopted by the EC and DoJ. Case laws highlighting several aspects of market definition from both the CJEU and US courts will also be referred to, in addition to decisional practices of the EC and the DoJ Guidelines respectively. In this chapter, the reference to case laws from the CJEU and US courts, is to help illuminate how market definition rules are applied in these competition jurisdictions, especially as the Commission is yet to articulate a precise formula for its application in the communications sector in Nigeria.

Lastly, this chapter will list the various product markets in Nigeria's communications sector that have been identified by the Commission in comparison with those recommended by the EC.

The concept of market definition

Market definition is the starting point for any competitive analysis.¹ It is primarily an economic analysis grounded in competition law. Market definition is fundamental to the application of competition law, in order to assess a substantial lessening of competition² either for a finding of whether an agreement (or understanding or arrangement) is anti-competitive, to determine market power and if an abuse of such power has occurred, or when investigating a merger transaction. Market definition will always consist of both the relevant product market and the geographic market components.

Market definition is necessary in order to identify the extent of competition between firms. The main purpose of market definition is to identify the range of products (or services) that are considered substitutes to other products (or services), which constrains the ability of a firm (or a group of firms) wishing to raise the price for those products and thus preventing the firm from exercising market power.³ In the US case of *Geneva Pharms Tech Corp v. Barr Labbs Inc.* 386 F.3d 485, 509 (2d Cir. 2004), the Court stated at paragraph 496 that “*the goal in defining the relevant market is to identify the market participants and competitive pressures that restrains an individual's firm's ability to raise prices or restrict output*”

¹ Alistair Lindsay, *The EC Merger Regulation: Substantive Issues* (London: Sweet & Maxwell, 2006), p. 95.

² The concept of a substantial lessening of competition under the Act is discussed fully in Chapter 4.

³ *Commission Notice on the definition of the relevant market for the purposes of Community competition law* (97/C 372 /03), paragraph 2.

The concept of relevant market has developed over the years to the generally accepted small but significant and non-transitory increase in price (SSNIP) test (otherwise known as the hypothetical monopolist test) which is currently applied by the EC⁴ and DoJ⁵ as an analytical framework for market definition. The SSNIP test focuses on whether consumers faced with a hypothetical small but permanent increase (in the range of 5% to 10%)⁶ in the price of a product would switch to another substitute product, (or whether suppliers of a similar product located elsewhere would come into the area under review).⁷ Thus if a price increase compels a sufficient number of consumers to switch to substitute products, or compels suppliers of these substitute products to move into this area, so as to make the price increase unprofitable, these substitute products are regarded as part of the relevant market because the market under review is deemed too narrow.⁸ This test is repeated until consumers are unable to switch due to the unavailability of a substitute.⁹ As a general rule, products that are substitutable are considered to be in the same relevant market.¹⁰

Accurate market definition is important in any analysis to determine the anti-competitive impact of a particular conduct or merger transaction. In *C6/72 Europemballage Corporation and Continental Can Company Inc. v. Commission of the European Communities* [1973] CMLR 199, the ECJ held at paragraph 32 that in the appraisal of market power for the purpose of a merger review, “*the definition of the relevant market is of essential [s]ignificance*”. Also, the Court in *Case 27/76 United Brands Company and United Brands Continental BV v. Commission of the European Communities* [1978] ECR 207, at paragraph 10, made clear that in order to determine market power, it is necessary to first define the relevant market. As was exemplified by *Europemballage Corporation and Continental Can Company Inc. v. Commission of the European Communities* (supra), the EC’s failure to properly define the relevant market resulted in the nullification of its decision by the ECJ. According to the ECJ in that case, “*the decision [of the European Commission] has not, as a matter of law, sufficiently shown the facts and the assessments on which it is based*”.

Case laws from several courts in the US have also highlighted the importance of market definition in Antitrust matters. For example, in *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962) the US Supreme Court stated at paragraph 41 that:

⁴ In its Notice of market definition, *Ibid.*

⁵ In its Horizontal Merger Guidelines 2010.

⁶ Although the judgement of the US Court of Appeals 6th Circuit in *Marathon Oil Co. v. Mobil Corp.*, 669 F. 2d 378 (6th Cir. 1981), seems to suggest that for the purpose of market definition, the SSNIP test can be adjusted to increase or decrease the range of values.

⁷ *Commission Notice on the definition of the relevant market for the purposes of Community competition law*, supra, paragraph 17.

⁸ ABA Section of Antitrust Law, *Telecoms Antitrust Handbook* (first edition, ABA Publishing, 2005) p. 15.

⁹ *Ibid.*

¹⁰ Janice Hauge, Mark Jamison, ‘Analyzing Telecommunications Market Competition: Foundations for Best Practices’ (29 October 2009), p. 11.

“[d]etermination of the relevant market is a necessary predicate to a finding of a violation of the Clayton Act because the threatened monopoly must be one which will substantially lessen competition within the area of effective competition. Substantiality can be determined only in terms of the market affected. The area of effective competition must be determined by reference to a product market (the “line of commerce”) and a geographic market (the “section of the country”).”

In *Queen City Pizza, Incorporated v. Domino's Pizza Incorporated.*, 922 F. Supp. 1055 (E.D. Pa. 1996), the U.S. District Court for the Eastern District of Pennsylvania held that in order to state a claim under the Sherman Act, “a plaintiff must identify the relevant product and geographic markets”. The Court in *United States v. El du Pont de Nemours & Co.*, 353 US 586 Supreme Court 1957, stated at paragraph 649 that “[t]he relevant market is the area of effective competition within which [an Antitrust defendant] operates”. Without a well defined relevant market, a court is unable to determine the effect that an alleged anti-competitive conduct has on competition.¹¹

As a general rule, a market defined broadly is unlikely to yield positive result in the identification of competition concerns, hence the reason why markets are defined narrowly by competition authorities.¹² Lastly, market definition is dependent on the facts of each case and the anti-competitive conduct under review.¹³

Methodology for defining the relevant communications market under the Competition Regulations

The relevant market comprises of the products or services, and the geographic area implicated by the alleged anti-competitive conduct and/or in which market power is assessed.¹⁴ Market definition is provided for under the Competition Regulations. In assessing whether any conduct constitutes a substantial lessening of competition, the Commission is required to consider the definition of the relevant market or markets using the market analysis methodology used for defining the relevant communications market(s) when the Commission is evaluating market power under Part IV of the Competition Regulations.¹⁵

In this regard, Part IV of the Competition Regulations, particularly Regulation 19 (2) obligates the Commission to consider the following in its assessment and definition of the relevant communications market or markets;

¹¹ *Southeast Missouri Hospital v. C.R.Bard Inc.* 642 F. 3d 608, 613 (8th Cir. 2011), paragraph 613.

¹² Laurent Garzaniti & Matthew O’ Regan, editors, *Telecommunications, Broadcasting and the Internet EU Competition Law & Regulation* (London: Thomson Reuters (Legal) Limited, 2010), p. 411.

¹³ *Report of the Public Inquiry on Competition Practices Regulations* (the Nigerian Communications Commission, 2006), Commission’s response to 2nd comment; Laurent Garzaniti, *Telecommunications, Broadcasting and the Internet: EU Competition Law and Regulation*, (London: Sweet & Maxwell, 2003), p. 274.

¹⁴ Miles, Jeff. (2012, November 8). ‘Principles of Antitrust Law’ [WWW document] URL https://www.healthlawyers.org/Events/Programs/Materials/Documents/FHL12/e_miles.pdf (visited 2013, December 25), p. 13.

¹⁵ Regulation 6 (a).

- a) Products and services that make up a specific market, as well as the geographic scope of the market (product and geographic market);
- b) Demand-side substitutability, in order to measure the extent to which consumers are prepared or able to substitute other products or services for the products or services supplied by the Licensee in question; and
- c) Supply-side substitutability, to determine the extent to which suppliers other than the Licensee in question are able to supply products or services that provide a competitive alternative to consumers.

Pursuant to the foregoing provisions, the relevant communications market will have both a product and geographic component. In defining the relevant communications market, the Commission adopts the same market definition methodology for the purpose of assessing whether a particular conduct constitutes a substantial lessening of competition under Regulation 6 (a) of the Competition Regulations¹⁶ or when evaluating dominance under Regulation 19 of the Competition Regulations. Thus, the methodology applied by the Commission in defining a communications market is equally valid whether it is reviewing an agreement (understanding or arrangement), investigating the abuse of a dominant position,¹⁷ or conducting a merger review.

It should be noted that the Commission has not been consistent in its application of Regulation 19 (2) in defining the relevant communications markets. For instance, the definition of the relevant product market in the *Determination of Dominance in Selected Communications Market in Nigeria, 2010* (the 2010 Dominance Determination) relied primarily on demand-side substitutability in accordance with Regulation 19 (2) (b) of the Competition Regulations,¹⁸ while “*product/service definitions*”¹⁹ formed the basis of the Commission’s market definition in its *Determination of Dominance in Selected Communications Market in Nigeria, 2013* (the 2013 Dominance Determination).²⁰

The product market

As at the time of writing this book, the Commission has not issued any guidance that clarifies the meaning of “product market” for the purpose of market definition in the communications sector. According to Black’s Law Dictionary (9th Edition), the product market is “*the part of the relevant market that applies to a firm’s particular product by*

¹⁶ Including merger analysis under the substantial lessening of competition test.

¹⁷ Or determining whether a licensee is in a dominant position in any aspect of the communications market pursuant to Section 92 (1) of the Act.

¹⁸ Nigerian Communications Commission (NCC), *Determination of Dominance in Selected Communications Market in Nigeria* (March 26 2010), pp. 3 - 4.

¹⁹ The Commission however gives no further explanation or details with regard to the interpretation of “*product/service definitions*” for the purpose of the 2013 Dominance Determination. For an appraisal of how the Commission defined communications markets in the 2013 Dominance Determination see, Chukwuyere Ebere Izuogu, ‘Revisiting the NCC’s Market Definition in its 2013 Determination of Dominance’, *Businessday*, Thursday 19 February 2015, p. 34.

²⁰ Nigerian Communications Commission (NCC), *Determination of Dominance in Selected Communications Market in Nigeria* (April 25 2013), p. 3.

identifying all reasonable substitutes for the product and by determining whether these substitutes limit the firm's ability to affect prices".²¹ From the EU perspective, the relevant product market is understood as a market comprising "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".²² In defining the relevant communications market, the Commission is yet to issue any guidance articulating the circumstance in which it will consider demand-side substitutability or supply-side substitutability when assessing products and services that make up a specific product and geographic market,²³ however decisional practices from several competition authorities indicates that demand-side substitutability is the primary criterion by which the relevant product market is defined. For instance, demand-side substitutability plays a central role in defining the relevant product market when the EC is applying EU competition law.²⁴ According to the EC, demand-side substitutability is the most immediate competitive force on the supplier of a given product,²⁵ and involves a finding of the range of products, which are regarded as substitutes by the consumer.²⁶ Similarly, the DoJ in its Guidelines²⁷ views demand-side substitutability as the customers' ability and willingness to substitute one product for another in response to a price increase, and/or a reduction in product quality or service.²⁸

Also, judgements handed down by CJEU courts indicate that substitutability (or interchangeability) is the legal test for market definition.²⁹ The ECJ in reference to market definition held at paragraphs 3 and 28 in Case 85/76 *Hoffmann-La Roche & Co. AG v. Commission of the European Communities* [1979] ECR 461 that;

"the concept of the relevant market in fact implies that there can be effective competition between the products which forms part of it and this presupposes that there is a sufficient degree of interchangeability between all the products forming part of the same market insofar as a specific use of such products is concerned".

And in Case 322/81 *NV Nederlandsche Banden Industrie Michelin v. Commission of the European Communities* European Court Reports 1983 -03461 where the ECJ (citing Case 31/80, *L'Oreal v. DeNieuwe AMCK*, [1980] ECR 3775) at paragraph 37 stated that:

²¹ Page 1056.

²² *Commission Notice on the definition of the relevant market for the purposes of Community competition law, supra*, paragraph 7.

²³ This view is also shared by Dr. Opatá in Chukwudieebube Bede Abraham Opatá, 'Looking towards Europe: Regulation of Dominance in Nigerian Telecommunications', *Competition and Regulation in Network Industries*, Volume 14, (2013), pp. 345-346.

²⁴ Laurent Garzaniti, *supra*, p. 268.

²⁵ *Commission Notice on the definition of the relevant market for the purposes of Community competition law, supra*, paragraph 13.

²⁶ *Ibid.*, paragraph 15.

²⁷ U.S Department of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines*, (August 19, 2010).

²⁸ *Ibid.*, paragraph 4.

²⁹ Richard Whish, David Bailey, *Competition Law* (New York: Oxford University Press, 2012), p. 30.

“The possibilities of competition must be judged in the context of the market comprising the totality of the products which, with respect to their characteristics, are particularly suitable for satisfying constant needs and are only to a limited extent interchangeable with other products”.

Accordingly, the relevant product market from the perspective of CJEU courts will exclude products that are not fully interchangeable with other similar products. Where goods are interchangeable they belong to the same product market.³⁰ However, the EC notes that products' characteristics and its intended use may not be reliable evidence of whether it is substitutable.³¹ The EC in its determination of functional interchangeability normally takes into consideration evidence of substitution in recent past, the views of customers and competitors, consumer preference, barriers and costs associated with switching demand to potential substitutes and different categories of customers and price discrimination between them.³²

Interchangeability of products is also the primary factor considered by courts in the US in their definition of the relevant product market. The US Supreme Court in *Brown Shoe Co. v. United States* (supra) held at paragraph 41 that; *“The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it”*, and in *Telecor Communications Incorporated v. Southwestern Bell Telephone Company* 305 F.3d 1124, 1130-31 (10th Cir. 2002), the US Court of Appeals, 10th Circuit explained that: *“... [the relevant] market is composed of products that have reasonable interchangeability for the purposes for which they are produced – price, use and qualities considered”*³³ and that *“Interchangeability may be measured by, and is substantially synonymous with, cross elasticity.... A market is elastic³⁴ if demand goes down as price goes up. A market is cross elastic if rising prices for product A cause consumers to switch to product B.”*³⁵ In other words, where an increase in the price of one product leads to an increase in demand for another, both products should be included in the relevant product market.³⁶ According to *Telecor Communications Incorporated v. Southwestern Bell Telephone Company* (supra), *“[r]easonable interchangeability does not depend on product similarity”*.³⁷ The pertinent issue when considering interchangeability is the difference in type that renders the products poor substitutes.³⁸ Thus, in the US the definition of a relevant product market primarily *“focuses solely on demand substitution factors”*,³⁹ that is what consumers will regard as

³⁰ Richard Whish, *Competition Law*, (Oxford: Oxford University Press, 2009), p. 28.

³¹ *Commission Notice on the definition of the relevant market for the purposes of Community competition law*, supra, paragraph 36.

³² *Ibid.*, paragraphs 38 - 43.

³³ Paragraph 1130.

³⁴ Elasticity of demand is a relationship between the change in the price of a product and the quantity demanded by a consumer (See Herbert Hovenkamp, *Antitrust*, 2011, p. 83).

³⁵ Paragraph 1131.

³⁶ *Olin Corp. v. F.T.C.*, 986 F.2d 1298 (9th Cir. 1993).

³⁷ At paragraph 24.

³⁸ American Bar Association, *Antitrust Law Developments* (Chicago: ABA Book Publishing, 2007), p. 566.

³⁹ *Ibid.*, p. 1551.

substitutes.⁴⁰ In other words, the clearest indication that products should be included in the same product market is if they are actually used by consumers in a readily interchangeable manner.⁴¹ Conversely, where products are not deemed by consumers to be substantially interchangeable, they constitute separate product markets.⁴²

In addition, case laws from US courts appear to indicate that failure of an Antitrust claim to state a factual allegation regarding the substitutability of products within a relevant product market is very fatal, and can render the claim liable to be dismissed by the trial court. For example in *Commercial Data Servers, Inc. v. IBM*, 166 F. Supp. 2d 891 Dist. Court, SD New York 2001, where the Plaintiff defined the relevant product market as “S/390 compatible mainframes”, the Court in rejecting this definition held that the Plaintiff failed to explain why “*other types of computers would not be functionally interchangeable with, and/or exhibit cross-elasticity of demand for mainframes*”.⁴³

The DoJ in assessing demand-side substitutability will consider how customers have shifted purchases in the past in response to relative changes in price or other terms and conditions, information from buyers, including surveys, concerning how they would respond to price changes, the conduct of industry participants, (such as sellers’ business decisions or business documents indicating sellers’ informed beliefs concerning how customers would substitute among products in response to relative changes in price and/or industry participants’ behaviour in tracking and responding to price changes by some or all rivals, objective information about product characteristics and the costs and delays of switching products, especially switching from products in the candidate market to products outside the candidate market, the percentage of sales lost by one product in the candidate market, when its price alone rises, that is recaptured by other products in the candidate market, with a higher recapture percentage making a price increase more profitable for the hypothetical monopolist, evidence from other industry participants, such as sellers of complementary products, legal or regulatory requirements, and the influence of downstream competition faced by customers in their output markets.⁴⁴

In addition, the DoJ depending on the available empirical evidence may also consider a “critical loss analysis” to assess the extent to which it corroborates inferences drawn

⁴⁰ Herbert Hovenkamp, *Federal Antitrust Policy: The Law of Competition and its Practices* (Thompson/West, 2005), p. 100.

⁴¹ *Kaiser Aluminum Chemical Corporation v. Federal Trade Commission* 652 F.2d 1324 (7th Cir. 1981), paragraph 30.

⁴² *See, F.T.C v. Warner Communications*, 72 2 F.2d 1156, 1163 (9th Cir. 1984), where the Court found that prerecorded music and home tapes were not sufficiently interchangeable to be in the same product market; *Ansell Inc. v. Schmid Labs, Inc.* 757 F. Supp 467, 472 – 73 (D.N.J), where the Court held that wholesale and brand name condoms constituted separate product markets as a result of their limited interchangeability.

⁴³ At paragraph 897; *see also, Yellow Page Solutions, Inc v. Bell Atlantic Yellow Pages Co.* (S.D.N.Y Nov. 19, 2001), a case in which the relevant product market was defined as “the sale of Yellow Pages advertising”, the Court in dismissing the case held that the Plaintiffs failed to show “*why other forms of advertising, such as television, radio, or other print media, are not reasonably interchangeable with Yellow Pages advertising*”.

⁴⁴ U.S Department of Justice and the Federal Trade Commission, *supra*, paragraph 4.1.3

from the evidence noted above.⁴⁵ Critical loss analysis by the DoJ determines “*whether imposing at least a SSNIP on one or more products in a candidate market would raise or lower the hypothetical monopolist’s profits*”⁴⁶ because “*a price increase raises profits on sales made at the higher price, but this will be offset to the extent customers substitute away from products in the candidate market. Critical loss analysis compares the magnitude of these two offsetting effects resulting from the price increase*”.⁴⁷ Thus, critical loss analysis identifies the amount that *can be lost* in sales in response to a price increase⁴⁸ and next, whether the *actual loss* suffered because of the price increase exceeds the amount that can be lost.⁴⁹ If it does exceed, then the price increase is unprofitable and the market under review must be expanded.⁵⁰

Demand-side substitutability in the context of the Competition Regulations measures the extent to which a range of products (or services) offered by a Licensee may be viewed as reasonable substitutes for one another by the users of those products.⁵¹ Thus, demand-side substitutability within the meaning of the Competition Regulations examines the extent to which consumers are able to switch to substitute products that they consider sufficiently similar in use, where a Licensee decides to impose a “*small but significant and non-transitory increase in price*”, or with particular reference to the product’s characteristics and intended use.⁵² The question of demand-side substitutability is a question of whether consumers have choice, and the ability to switch to another substitute communications service. In defining a communications market on the basis of demand-side substitutability, a 2014 study⁵³ notes that;

“If multiple technologies can be used for the same purpose, all providers of these different technologies are competing in the same market.... In particular, consumers may switch to OTT services if they experience a price increase for traditional voice services. Also, they may substitute parts of their calls by messages (SMS or substitute services by OTTs such as WhatsApp)”.⁵⁴

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ Barry C. Harris (no date) ‘Recent Observations About Critical Loss Analysis’ [WWW document]. URL <http://www.justice.gov/atr/public/workshops/docs/202599.pdf> (visited 2015, February 13).

⁴⁹ Philip Areeda, Herbert Hovenkamp, *Fundamentals of Antitrust Law* (2012 Supplement, Aspen Publishers), p. 26.

⁵⁰ *Ibid.*

⁵¹ See Regulation 19 (2) (b).

⁵² It is pertinent to note that the SSNIP test (an increase of 5% - 10% in the price of a product which compels consumers to switch to another substitute product) is inapplicable to aspects of the Communications market subject to price regulation, see, Mira Burri Nenova, *EC Electronic Communications and Competition Law* (London: Cameron May Ltd, 2007), p. 137.

⁵³ Martin Peitz, Heike Schweitzer, Tommaso Valletti. (2014, October 29). ‘Market Definition, Market Power and Regulatory Interaction in Electronic Communications Markets, (CERRE Study)’ [WWW document] URL http://www.cerre.eu/sites/cerre/files/141029_CERRE_MktDefMktPwrRegInt_ECMs_Final.pdf (visited 2016, August 16).

⁵⁴ *Ibid.*, p. 7.

Another hypothetical example in the communications context is whether a consumer faced with an increase in the price of mobile telephone services would be willing to switch to the cheaper priced fixed (or landline) telephone services. If so, then mobile telephone services and fixed telephone services are part of the same product market.⁵⁵ Where competition on non-price parameters exists, quality or other product characteristics may provide a useful indication of whether customers would be willing to switch to another product. For example, a variation to the SSNIP test such as the small but significant and non-transitory decrease in quality (SSNDQ) test may be applied in defining a relevant product market on the basis of consumer demand.⁵⁶ The SSNDQ test asks whether a decrease in quality would be profitable, thus if a change in quality of a product does not lead to customers' switch, to another product then the product is the relevant market.⁵⁷ It is also worth noting that in defining a retail product market within the communications sector based on demand-side substitutability, factors like the cost of terminal equipment, length of communications contracts, ability to port to another number (or conveniently change MNO) which may influence switching cost should normally be taken into account.⁵⁸

Supply-side substitutability is used to define a relevant product market when such market is examined from the perspective of the supplier, rather than from the consumer's perspective.⁵⁹ The EC for instance, considers supply-side substitutability in its definition of the relevant product market in situations "... *in which its effects are equivalent to those of demand substitution in terms of effectiveness and immediacy*",⁶⁰ and does not consider it when it would "*entail the need to adjust significantly existing tangible and intangible assets, additional investments, strategic decisions or time delays...*".⁶¹ Thus, suppliers currently producing another product, would be considered as part of a relevant market if they are able "*to switch production to the relevant products and market them in the short term without incurring significant additional costs or risks in response to small and permanent changes in relative prices*".⁶² In this regard, the EC views supply-side substitutability as an equally effective competitive constraint on market power, to the extent that firms in one market are readily able to enter another market at a minimal cost.

⁵⁵ However, note the conclusion of the Commission in Nigerian Communications Commission (NCC) (2010), *supra*, p. 4, that mobile telephone services and fixed telephone services are not substitutable.

⁵⁶ S. Gal, Daniel L. Rubinfeld, 'The Hidden Costs of Free Goods: Implications for Antitrust Enforcement' NYU Law and Economics Research Paper, No. 14-44 (2015), p. 35.

⁵⁷ *Ibid.*

⁵⁸ See, Squire Sanders. (2002). 'Market Definitions for Regulatory Obligations in Communications Markets A Study for the European Commission' [WWW document] URL http://www.itu.int/ITU-D/treg/Events/Seminars/2005/Thailand/Reference%20Material/Reference%20Material%20-%20Market_definitions_exec_sum.pdf (visited 2012, September 9), p. 2.

⁵⁹ See Laurent Garzaniti & Matthew O' Regan, *supra*, p. 413.

⁶⁰ *Commission Notice on the definition of the relevant market for the purposes of Community competition law, supra*, paragraph 20.

⁶¹ *Ibid.*, paragraph 23.

⁶² *Ibid.*, paragraph 20.

In assessing supply-side substitutability, the EC will also consider elements such as the overall cost of switching production to the product in question as well as any legal, statutory or other regulatory requirements constituting a barrier to entry, denying a timely and efficient entry into the relevant market.⁶³ An example of CJEU case law where substitutability was considered from the supplier's perspective is *Tetra Pak 1 (BTG License)*⁶⁴ where the Court in defining the relevant market took into account the cost implication and difficulties encountered by manufacturers of milk packaging cartons in entering the market for aseptic cartons and systems.

Courts in the US also recognise supply substitution or "cross elasticity of production facilities"⁶⁵ as an important factor in market definition. For instance, where producers can easily switch from producing one product to another in response to a price increase, the courts in the US have found those two products to be in the same market. In the case of *State of New York v. Kraft General Foods, Inc.*, 926 F. Supp. 321 Dist. Court, SD New York 1995, the Court defined the relevant market to be "ready-to-eat cereals" instead of "adult cereals" as contended by the Plaintiff. The Court's definition was based on in part on "supply (or production) substitutability", that is the ease with which cereal manufacturers can switch from producing one kind of cereal to another.⁶⁶

Supply-side substitutability in the Competition Regulations is used to determine the extent to which suppliers other than the Licensee in question are able to supply products or services that provide a competitive alternative to consumers.⁶⁷ Supply-side substitutability describes the ability of suppliers to produce substitute products for sale in the relevant geographic market without incurring significant cost of production.⁶⁸ Thus, the focus of inquiry when applying supply-side substitutability in the context of the Competition Regulations would be the ability of other (categories of) Licensees to supply a communications product that is a demand substitute to that offered by the hypothetical monopolist (or Licensee in question).

As at the time of this writing, the Commission is yet to articulate the factors that are relevant in its consideration of supply-side substitutability when defining a relevant communications market. However, it should be borne in mind when considering supply-side substitutability in Nigeria's communications sector, that the regulatory requirement for authorisation of a particular communications service, and to use a particular numbering code and/or frequency spectrum all constitute significant regulatory barriers

⁶³ *Ibid.*, paragraph 45.

⁶⁴ 88/501/EEC: Commission Decision of 26 July 1988 relating to a proceeding under Articles 85 and 86 of the EEC Treaty.

⁶⁵ *Brown Shoe Co. v. United States* (supra); *United States v. Columbia Steel Co.*, 334 U.S. 495, paragraphs 510 - 511.

⁶⁶ See also, *Carter Hawley Hale Stores v. Limited, Inc.*, 587 F. Supp. 246 Dist. Court, CD California 1984, where the Court at paragraph 253 defined the relevant market to include both "high-priced luxury items" and "moderately priced fashion apparel" as the Court was of the view that garment manufacturers can easily switch production at little or no cost from, from "high-priced luxury items" to "moderately priced fashion apparel".

⁶⁷ See Regulation 19 (2) (c).

⁶⁸ Laurent Garzaniti, *supra*, p. 269.

to entry, and thus may impose additional costs for firms other than the Licensee in question in trying to enter a particular communications market, in response to a price increase by the incumbent Licensee.

The geographic market

Black's Law Dictionary (9th Edition) defines the relevant geographical market as "*the part of a relevant market that identifies the regions in which a firm might compete*".⁶⁹ The geographic component of the relevant market examines the extent by which a firm can increase the price of its product sold in a particular area without large numbers of its customers immediately switching to another alternative product outside the area, or where producers outside the area move into the area to sell their own substitute products.⁷⁰

In the EU, the ECJ in *United Brands Company and United Brands Continental BV v. Commission of the European Communities* (supra) defined the relevant geographic area as "*a clearly defined geographic area in which [the product] is marketed...*".⁷¹ In the communications sector, geographic market definition will normally depend on the area covered by a particular network. For instance, the EC in granting approval for the acquisition of Enel by Wind in Case No COMP/M.1536 – *Wind/Enel STC* stated at paragraph 10 that;

"The scope of the geographical market in telecommunications is determined:

- a) by the extent and coverage of the network and the customers that can economically be reached and whose demands may be met; and*
- b) the legal and regulatory system and the right to provide a service".*

In the US, the Court of Appeal, 5th Circuit in *Hornsby Oil Co., Inc. v. Champion Spark Plug Co.*, 714 F. 2d 1384 Court of Appeals, 5th Circuit 1983, stated that the relevant geographic market encompasses "*the area of effective competition in which the particular product or its reasonably interchangeable substitutes are traded*".⁷² That is, the geographic movement of consumer demand is the primary means by which a market's geographic scope is defined in the US.⁷³ In other words, where do consumers look to when considering the purchase of a product or service.⁷⁴ The question here is, if there were a non-trivial and non-transitory increase in price, would consumers turn to suppliers in another geographic area in search of this product.⁷⁵ In the context of the geographic market for a communications service, the US Court of Appeal 7th Circuit, stated that the question as to whether the relevant geographic market was nationwide

⁶⁹ Page 1056.

⁷⁰ Herbert Hovenkamp, *Antitrust* (West Publishing Co., 2011), p. 142.

⁷¹ At paragraph 11.

⁷² At paragraph 1393.

⁷³ Lawrence Sullivan, Warren Grimes, *The Law of Antitrust: An Integrated Handbook (Hornbook)* (West Academic Publishing; 2nd edition, February 9, 2006), p. 67.

⁷⁴ *Ibid.*

⁷⁵ *See, Telecor Communications v. Southwestern Bell* (supra).

was dependent on “*whether the business of providing the [communications] services was operated or sought to be operated on a nationwide level ...*”.⁷⁶ The DoJ is of the view that the geographical scope of a market should be defined in reference to the geographical area in which the consumer is unwilling to leave in search of substitute goods.⁷⁷ This market may be based on the location of suppliers where their goods are sold⁷⁸ or in other cases based on the location of customers, where the suppliers deliver their goods to or services to the customer's location.⁷⁹ In determining the geographic market under the Antitrust laws of the US, the relevant question is whether the goods are readily available to consumers in the particular geographic area under review.⁸⁰ Thus, the relevant geographic market may be local,⁸¹ regional,⁸² national⁸³ or international⁸⁴ in scope.

In Nigeria's communications sector, it is conceivable that the geographic scope of a communications market would be limited to the particular area served by a network (or the Licensee), and the geographical scope of the license issued by the Commission, which is normally limited to geographic areas within the territorial borders of the Federal Republic of Nigeria.

Product markets in Nigeria's communications sector

Market definition in the communications sector presents several challenges due to the constant technological evolution.⁸⁵ As noted by the EC:

*“given the pace of technological change in [the communications] sector, any attempt to define particular product markets [...] would run the risk of rapidly becoming inaccurate or irrelevant. The definition of particular product markets [...] is best done in the light of a detailed examination of an individual case”.*⁸⁶

According to the Commission, the relevant communications markets will be determined in specific proceedings and based on specific circumstances, as it is only in the context of a specific circumstance that a relevant market can be determined.⁸⁷ Product market definition precedents in the communications market indicates that communications markets are normally defined broadly to comprise of the retail market (communications services provided directly to end users), wholesale market (provision of access to facilities needed to provide retail services) and equipment market.

⁷⁶ *MCI Communications Corporation & MCI Telecommunications Corporation v. American Telephone & Telegraph Company*, 708 F. 2d 1081 (7th Cir., 1983), paragraph 500.

⁷⁷ U.S Department of Justice and the Federal Trade Commission, *supra*, paragraph 4.2.

⁷⁸ *Ibid.*, paragraph 4.2.1.

⁷⁹ *Ibid.*, paragraph 4.2.2.

⁸⁰ ABA Section of Antitrust Law, *supra*, p. 60.

⁸¹ *United States v. Rockord Memorial Corp.* 898 F.2d 1278 (7th Cir. 1990).

⁸² *Tasty Baking Co. v. Ralston Purina Inc.* 653 F. Supp. 1250, 1260-62 (E.D.Pa 1987).

⁸³ *United States v. Continental Co.*, 378 U.S 441, 447 (1964).

⁸⁴ *Consolidated Gold Fields Plc v. Minorco, S.A.*, 871 F.2d 252 (2d Cir.)

⁸⁵ Laurent Garzaniti, *supra*, p. 270.

⁸⁶ *Notice on the application of the competition rules to access agreements in the telecommunications sector* (98/C 265/02), paragraph 47.

⁸⁷ *Report of the Public Inquiry on Competition Practices Regulations, supra.*

In the 2010 Dominance Determination the Commission identified the following product markets;

1. **Mobile telephone services:** According to the Commission, this market includes the retail supply of wireless mobile telephony and related features by licensed operators who have been granted specific radio frequency authorisations subject to licence conditions unique to this market.⁸⁸ The Commission is of the view that fixed telephone service is not a good substitute to mobile telephone services because of the lack of mobility in fixed telephone services and price differentials.⁸⁹
2. **International Internet Connectivity:** The Commission defined this market as consisting of the connection of leased high-speed data circuits, including, predominantly, circuits connected to the Internet backbone, which are essential for the provision of wholesale and retail Internet access in Nigeria.⁹⁰ According to the Commission, there is no effective means for users of this service to obtain a comparable substitute, nor is there any way in which the service of global data connectivity can realistically be obtained, other than through such international leased data lines (by either cable or satellite technology), provided by operators licensed to serve that market in Nigeria.⁹¹

In April 2013, the Commission issued the 2013 Dominance Determination wherein the following broad based product markets subject to *ex-ante* competition regulation were identified. These markets are set out in the tables below;

Market Segment	Sub-segment
Voice	<ul style="list-style-type: none"> ➤ Mobile telephony (including messaging); and ➤ Fixed line telephony
Data	<ul style="list-style-type: none"> ➤ Fixed Data, Retail Data Transmission Services and Leased lines; and ➤ Mobile Data (e.g. Dongles/Data Cards/ Tablets, Internet through mobile phone connections e.g. 3G / GPRS / Edge)
Upstream segments	<ul style="list-style-type: none"> ➤ Spectrum; ➤ Tower Sites; ➤ Network Equipment; ➤ Wholesale Broadband/ Internet Access; and ➤ Wholesale Leased Lines and Transmission Capacity
Downstream segments	<ul style="list-style-type: none"> ➤ Handsets / Devices (includes the Device Operating System); and ➤ Applications / Content (includes M-commerce)

⁸⁸ Nigerian Communications Commission (NCC) (2010), *supra*, p. 4.

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

The identified markets were further divided into wholesale and retail sub-segment as follows;

	Upstream segment	Voice segment	Data segment	Downstream segment
Services provided as wholesale by an operator to other operators	Wholesale broadband access	Wholesale voice termination on voice network		
	Wholesale leased lines and transmission capacity	Wholesale voice termination on fixed network		
Service provided as retail by each individual operator to its consumers		Retail voice access on mobile networks	Retail broadband/internet access on mobile devices	Supply of applications, content and devices
		Retail access on fixed networks	Retail broadband/internet access on mobile devices at fixed location	
Service provided as retail by each individual operator to its consumers			Retail leased Lines	

For the 2013 Dominance Determination, the Commission defined the several broad based markets, which are; Voice, Data, Upstream and Downstream markets. The Commission thereafter sub-divided the defined markets into Retail and Wholesale segments. As shown in the table above, the Upstream Segment was sub-divided into wholesale broadband access and wholesale leased lines and transmission capacity, which according to the Commission are services provided as wholesale, by an operator to other operators. The Voice market was sub-divided into the segments of wholesale voice termination on mobile networks and wholesale voice termination on a fixed network, which the Commission regards as services provided as wholesale by an operator. On the retail side of the Voice market, the Commission further identified retail voice access on mobile networks and retail voice access on fixed network.

The Data Segment was sub-divided into retail broadband/internet access on mobile devices, retail broadband/internet access on mobile devices at fixed locations, and retail leased lines which the Commission considers as services provided as retail by each individual operator to its consumers. Lastly, the Downstream Segment was sub-divided into the supply of applications, content and devices, which the Commission considers as services provided as retail, by each individual operator to its consumers.

The Commission identified the distinct segments in the Nigerian telecoms industry and clearly defined the constituent elements and boundaries of each of the segments for the Determination.⁹² In defining Communications market, the Commission considered variables such;

- I. Technology/medium e.g. copper, fibre, microwave, satellite, GSM, CDMA etc;⁹³
- II. Product/service e.g. voice, data, fixed (including FWA), mobile data, fixed data etc;⁹⁴
- III. Geographical e.g. national/regional/state/city, urban/semi-urban/rural etc;⁹⁵ and
- IV. Customer/User profile e.g. socio-economic class, customer behaviour/usage patterns, purpose of use etc.⁹⁶

The Commission also considered the demand and supply substitutability of the markets resulting from the use of these variables.⁹⁷ Finally, the Commission (as stated above) concluded that the results of the evaluation favoured the use of “*product/service definitions*” as the basis to define the Nigerian Telecommunication Industry.

Mobile call and SMS termination are separate product markets

It is important to note that the Commission considers mobile call and SMS termination on an individual communications network as separate product markets in which the owner (called network/texted network) has a monopoly.⁹⁸ It then follows that the called/texted network will have the incentive to exercise market power by charging the calling/texting network a higher price for terminating calls on its network/sending text to its network.⁹⁹ This incentive to increase price is due to the unavailability of a substitute network or technological means which would make it possible for a network

⁹² Nigerian Communications Commission (NCC) (2013), *supra*, p. 10.

⁹³ *Ibid.*

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*, p. 3.

⁹⁸ See Nigerian Communications Commission (NCC), *Determination of Voice Interconnection Rates* (March 20 2013), p. 7; and Nigerian Communications Commission (NCC), *Determination of Voice and SMS Interconnection Rates* (December 21 2009), p. 20; See generally, Peggy Valcke, Robert Queck, Eva Lievens, *EU Communications Law Significant Market Power in the Mobile Sector* (Cheltenham: Edward Elgar, 2005), pp. 18 – 20.

⁹⁹ Nigerian Communications Commission (NCC), *Determination of Voice Interconnection Rates*, *supra*.

other than the called/texted network to provide termination on its own network.¹⁰⁰ In these circumstances, it may be accurate to conclude that the called/texted network is a separate product market,¹⁰¹ and the called/texted network occupies a position of dominance on its own network.¹⁰² Therefore, mobile call and SMS termination on an individual mobile network constitutes a relevant product market.¹⁰³

Product market for different customer groups

Lastly, in defining products market in the communications sector, the question as to the degree to which services provided to residential and business customers are substitutable may arise.¹⁰⁴ The answer may depend on the ability of the operator to differentiate the products and the prices between the different customer groups.¹⁰⁵

EC recommendation of relevant product and service markets within the electronic communications sector

The EC recommended the following markets in the table below in its first recommendation of relevant product and service markets within the electronic communications sector;¹⁰⁶

	Retail Market ¹⁰⁷	Wholesale Market
1	Access to the public telephone network at a fixed location for residential customers	Call origination on the public telephone network provided at a fixed location ¹⁰⁸

¹⁰⁰ Laurent Garzaniti & Matthew O’ Regan, *supra*, pp. 415 – 416; Nigerian Communications Commission (NCC), *Determination of Voice and SMS Interconnection Rates, supra*.

¹⁰¹ Laurent Garzaniti & Matthew O’ Regan, *supra*.

¹⁰² See also the Norwegian Post and Telecommunications Authority (NPT) analysis of 27 September 2010, in which the NPT found that NetCom, Network Norway, TDC, Tele2, Telenor and Ventelo all have significant market power in the markets for voice call termination on their respective mobile networks; Ofcom case Case: CW/00805/12/04 *Floe Telecom Limited (in administration) v. Vodafone Limited* (Re-investigation of a complaint from Floe Telecom Limited against Vodafone Limited), at paragraph 426 where Ofcom found Vodafone dominant in the market for the provision of call termination on its own network because there is “*currently no technological means which would make it possible for anyone other than Vodafone to provide call termination on Vodafone’s network*”.

¹⁰³ M.3530, *TeliaSonera/Orange DK*, paragraphs 8 – 9; M.3776, *Vodafone/Oskar Mobile*, paragraph 8; M. 4034, *Telenor/Vodafone Sverige*, paragraphs 14 – 15.

¹⁰⁴ See generally, Telecommunications and Radiocommunications Regulator (TRR), Government of the Republic of Vanuatu, *Competition Guidelines* 31 August, 2011, paragraph 2.25.

¹⁰⁵ See, *Ibid.*; Mira Burri Nenova, *EC Electronic Communications and Competition Law* (London: Cameron May Ltd, 2007), p. 146.

¹⁰⁶ Commission Recommendation of 11 February 2003 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with *Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communication networks and services (2003/31/EC)*. This recommendation is superseded by both its second edition in 2007 and third edition in 2014.

¹⁰⁷ Together, retail markets 1 through 6 correspond to “the provision of connection to and use of the public telephone network at fixed locations”.

¹⁰⁸ For the purposes of this Recommendation, call origination is taken to include local call conveyance and delineated in such a way as to be consistent with the delineated boundaries for the markets for call transit and for call termination on the public telephone network provided at a fixed location.

MARKET DEFINITION IN NIGERIA'S COMMUNICATIONS SECTOR

2	Access to the public telephone network at a fixed location for non-residential customers	Call termination on individual public telephone networks provided at a fixed location
3	Publicly available local and/or national telephone services provided at a fixed location for residential customers	Transit services in the fixed public telephone network ¹⁰⁹
4	Publicly available international telephone services provided at a fixed location for residential customers	Wholesale unbundled access (including shared access) to metallic loops and sub-loops for the purpose of providing broadband and voice services ¹¹⁰
5	Publicly available local and/or national telephone services provided at a fixed location for non-residential customers	Wholesale broadband access ¹¹¹
6	Publicly available international telephone services provided at a fixed location for non-residential customers	Wholesale terminating segments of leased lines
7		Wholesale trunk segments of leased lines ¹¹²
8		Access and call origination on public mobile telephone networks
9		Voice call termination on individual mobile networks ¹¹³

¹⁰⁹ This market corresponds to transit services in the fixed public telephone network.

¹¹⁰ This market corresponds to access to the fixed public telephone network, including unbundled access to the local loop.

¹¹¹ This market covers "bit-stream" access that permit the transmission of broadband data in both directions and other wholesale access provided over other infrastructures, if and when they offer facilities equivalent to bit-stream access. It includes network access and special network access.

¹¹² Wholesale markets 5 and 6 correspond to leased line interconnection and wholesale provision of leased line capacity to other suppliers of electronic communications networks or services.

¹¹³ This market corresponds to call termination on public mobile telephone networks.

CHAPTER 4

THE SUBSTANTIAL LESSENING OF COMPETITION TEST

Introduction

This chapter discusses the substantive test for evaluating anti-competitiveness in Nigeria's communications sector, and the methodology set out under the Competition Regulations for assessing whether a particular conduct has substantially lessened competition in an aspect of the communications market.

Except for the *Report of the Public Inquiry on Competition Practices Regulations* (December, 2006), and the definition of relevant markets in the Dominance Determinations undertaken by the Commission in 2010 and 2013 respectively, the Commission as at the time of this writing has not issued any guidance on how exactly the substantial lessening of competition test should be applied in the circumstance of the particular conduct investigated. In addition, the Commission's application of the definition of the relevant communications market limb of this test, has not been consistent as shown in its 2010 and 2013 Dominance Determinations discussed in the preceding chapter.

Most of the discussions in this chapter, including discussions on the considerations used to determine whether a conduct constitutes a substantial lessening of competition are illustrated with case laws from either the CJEU and/or US Courts, decisional practices of the EC and/or DoJ Guidelines, and/or leading legal scholarship in this area which at best are persuasive authorities in the context of Nigerian legal jurisprudence.

Lastly, this chapter will discuss the various conducts, which the Commission deems to result in a substantial lessening of competition.

The substantive standard for assessing anti-competitiveness

The substantive standard for assessing anti-competitiveness in Nigeria's communications sector is the "substantial lessening of competition" test.¹ The legal basis for this test is Section 91 (1) of the Act. As a general rule, Section 91 (1) prohibits a Licensee from engaging in "...*any conduct which has the purpose or effect of substantially lessening competition in any aspect of the Nigerian communications market*". Section 91 (2) of the Act further provides that the Commission may from time to time publish guidelines or regulations which clarify the meaning of "substantial

¹ However, it is important to note that in accordance with the Competition Regulations, mergers in addition to being assessed on the basis of whether they may result in a substantial lessening of competition, are also assessed on the basis of whether the post merger firm may occupy a dominant position in the relevant communications market, see Chapter 7 on Mergers, Acquisitions and Takeovers.

lessening of competition”² in the Nigerian communications market 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;
- 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 Commission is satisfied are relevant.

In this regard, the foregoing sets out the Commission's interpretation of the substantial lessening of competition test and the factors that may be considered by the Commission when challenging a conduct in breach of Section 91 (1). However, it should be borne in mind that Section 91 (2) does not provide an exhaustive list of all the factors that the Commission is required to consider when investigating a conduct with the purpose or effect of a substantial lessening of competition.

The requirement that the prohibited conduct have either a “purpose” or “effect” of substantially lessening of competition is not a cumulative requirement but rather should be read disjunctively,³ thus the prohibited conduct could have either a purpose or the effect of a substantial lessening of competition. Black's Law Dictionary (9th Edition) defines “purpose” as the objective goal or end of an action,⁴ and “effect” as the cause, outcome or consequence of an action.⁵ Thus, it would be reasonable to conclude that a conduct having the “purpose” of a substantial lessening of competition is the *anti-competitive end* sought to be accomplished by that conduct while a conduct having the “effect” of a substantial lessening of competition is the *anti-competitive outcome* or consequence of the conduct.⁶ As some commentators have argued, the use of the word

² See also Regulation 4 of the Competition Regulations.

³ See *Izedonmwun v. U.B.N. Plc* (2012) 6 N.W.L.R (Pt. 1295) 1 C.A, p. 10 on how the word “or” is construed. According to the court in *Abia State University v. Anyaibe* (1996) 3 N.W.L.R (Pt. 439) page 646, per Adekeye JCA;

“The use of this word ‘or’ in a statute, connotes disjunctive participle used to express an alternative or to give a choice of one among two or more things. The word always bears a disjunctive meaning in an enactment. It separates the provision preceding it from the provision coming after it. Its role is to show that the provisions in which it is appearing are distinct and separates one from the other”.

⁴ Page 1356.

⁵ Page 592.

⁶ See also the Australian case of *News Ltd v. South Sydney District Rugby League Football Club Ltd* [2003] HCA 45 on whether the agreement between News Limited (News) and Australian

“purpose” clearly expresses the intention of the Licensee to engage in a conduct that substantially lessens competition as opposed to the word “effect”, which does not show an intention but rather the “effect” of the conduct under review.⁷ In this regard, it is however noted that neither the Act nor the Commission, have identified particular conducts, which have either a purpose or effect of substantially lessening of competition, or made clear whether the Commission’s approach in assessing a Licensee’s conduct will differ depending on whether the conduct is having a purpose or effect of substantially lessening of competition.⁸ However, it is pertinent to state that courts and competition authorities in other competition jurisdictions are more likely than not, to conclude that where a conduct has the purpose (or object) of a substantial lessening of competition, it will be not be necessary to demonstrate the anti-competitive effects of such conduct.⁹

In addition, the plain language of Section 91 (1) of the Act indicates that “*any conduct*” as used in this provision, in its broadest sense covers every practices in which a Licensee could possibly engage in when doing business in the relevant communications market. This includes, but is not limited to conducts specified in Section 91 (3)¹⁰ and (4)¹¹ of the Act, and Regulation 8¹² and Regulation 13¹³ of the Competition Regulation. Consequently, Section 91 (1) may still reach conducts not expressly prohibited (or mentioned) in the Act, Regulations, Guidelines or in any License to the extent that the

Rugby Football League Limited (ARL) contained an exclusionary provision in breach of the Trade Practices Act 1974 (now the Competition and Consumer Act 2010). In finding the conduct not to be exclusionary, the High Court per Gleeson CJ held that the “purpose” of conduct is the “*end sought to be accomplished by the conduct*” (at paragraph 18). And further that it is also important to distinguish purpose from effect, however, the “*manifest effect of a provision in an agreement, in a given case, may be the clearest indication of its purpose*” (at paragraph 18).

⁷ Nazura Abdul Manap, Mahmud Zuhdi Mohd Nor, Safinaz Mohd Hussein, ‘Regulating Competition in the Malaysian Communications Industry’, *International Journal of Business and Society*, 13,2 (2012) pp. 163 -182, p. 173, in analysing a similar provision in Sections 133 and 139 of the Malaysian Communications and Multimedia Act 1998.

⁸ Or the standard of proof required to establish a “purpose” or “effect” conduct. For instance, the Malaysian Communications and Multimedia Commission (MCMC) in assessing the “purpose” of a licensee’s conduct, will consider direct evidence of purpose or it may infer a purpose from a range of factors, including: the nature of the conduct; the circumstances of the conduct, including the decision making process that led up to the conduct and its commercial context; and the actual or likely effect of the conduct. According to MCMC, it is possible for a conduct to have more than one purpose. The MCMC will also consider a licensee to have engaged in conduct with a particular purpose if that purpose is or was a substantial purpose of the conduct. The “effect” of conduct according to the MCMC is the result or outcome of that conduct. In assessing the ‘effect’ of a licensee’s conduct, the MCMC will examine the results of the conduct or the likely results of the conduct (See, Malaysian Communications and Multimedia Commission. (2014, July 11). ‘Assessment of Dominance in Communications Markets’ [WWW document] URL <http://www.skmm.gov.my/skmmgovmy/media/General/pdf/Assessment-of-Dominance-in-Communications-Markets-Public-Inquiry-110714.pdf> (visited 2015, September 9), pp. 24 – 25).

⁹ See Richard Whish, David Bailey, *Competition Law* (New York: Oxford University Press, 2012), p. 118. This standard is similar to the restriction by object standard applied in EU competition law, or *per se* standard applied in US Antitrust law, see Chapter 5 for further discussion.

¹⁰ This provision prohibits cartel type conducts, see Chapter 5 for further discussion.

¹¹ This provision prohibits a tying arrangement, see Chapter 5 for further discussion.

¹² This Regulation provides several conducts, which the Commission will deem to result in a substantial lessening of competition. See below for further discussion on this.

¹³ This provision specifies the type of agreement and practice subject to review by the Commission.

conduct is determined to lessen competition substantially in an aspect of the communications market.

In accordance with the provision of Section 91(2) of the Act, which identifies market circumstances and other matters that might be included by the Commission in any guidelines or regulations with regard to the meaning of “substantial lessening of competition”, the Commission shall consider the following in its assessment of whether any conduct constitutes a substantial lessening of competition;¹⁴

- a) Definition of the relevant market or markets;¹⁵
- b) Impact of the conduct on existing competitors in the identified markets;¹⁶
- c) Impact of the conduct on further market entry;¹⁷
- d) Impact of the conduct on consumers, including the availability and pricing of products and services;¹⁸
- e) Degree of interference with competition that results in identifiable injury to competitors or consumers.¹⁹

Accordingly, only conducts which “substantially” lessens competition in a communications market will be condemned by the Commission.²⁰ The use of the word “shall” in this provision, as a general rule, connotes a command that it is imperative, mandatory and admits no discretion.²¹ Thus, the failure of the Commission (or any person) to apply the substantial lessening of competition test (as set out above) when making an assessment as to whether or not a particular conduct constitutes a substantial lessening of competition, will render invalid any conclusion resulting from such assessment. This is because, it is the law that where a statute has prescribed the mode of performing an act, that mode of performing the act must be strictly complied with,²² and any departure from such procedure will be an exercise in futility.²³ Consequently, the Commission (or any person) engaged in the assessment of whether any conduct

¹⁴ Regulation 6 of the Competition Regulations.

¹⁵ Regulation 6 (a) Competition Regulations. The methodology applied by the Commission in defining a communications market is discussed in Chapter 3 and will not be discussed again under this head .

¹⁶ Regulation 6 (b) Competition Regulations

¹⁷ Regulation 6 (c) Competition Regulations

¹⁸ Regulation 6 (d) Competition Regulations

¹⁹ Regulation 6 (e) Competition Regulations

²⁰ The MCMC is of the view that a lessening of competition will be “substantial” if the reduction in competitive constraints in the communications market (or the resulting increase in market power) is considerable or big (see, Malaysian Communications and Multimedia Commission, *supra*, p. 25).

²¹ See, *Bamaiyi v. A.G. of the Federation (2001)* 12 N.W.L.R. (Pt. 727) 468 at 497; *Ogidee v. The State (2005)* 5 N.W.L.R. (Pt. 918) 286 at 327.

²² See, *Unity Bank Plc v. Kayode Olanunji Esq.* (2014) LPELR-24027 (CA).

²³ See, *S.A.P (Nig.) Ltd v. C.B.N* (2004) 15 N.W.L.R. Pt. 897) C.A 665.

constitutes a substantial lessening of competition is statutorily required to apply the substantial lessening of competition test as set out above.

It is however noted that pursuant to Section 93 (1) of the Act, a Licensee may apply to the Commission prior to engaging in any conduct which may be construed to have the purpose or effect of substantially lessening competition in any aspect of the Nigerian communications industry, for authorisation for the conduct, and the Commission may authorise such conduct if it is satisfied that the authorisation is in national interest.²⁴ Although, the phrase “national interest” is not defined by the Act or by the Commission, but it is arguable that national interest authorisation on this basis will be dependent on the circumstance of each case, and consistent with the broad aims of the Act, which among other things are to promote the provision of modern, universal, efficient, reliable, affordable and easily accessible communications services and the widest range thereof throughout Nigeria,²⁵ and to 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.²⁶ Consequently, the Commission in authorising a conduct deemed capable of a substantial lessening of competition will satisfy itself that the national interest in the conduct outweighs any negative effect the conduct may have on competition. In addition, pursuant to Regulation 8 of the Competition Regulations, the Commission may authorise a particular conduct construed to have the purpose or effect of substantially lessening competition, where the Licensee in applying for authorisation demonstrates otherwise.

Lastly, it should be borne in mind that the Commission as at the time of this writing has not elaborated further on the various limbs of the substantial of lessening of competition test, thus the examples used below to illustrate the various limbs of this test are by no means exhaustive.

Impact of the conduct on existing competitors in the identified markets²⁷

I. Foreclosure

Foreclosure is used to describe a situation where effective access of actual or potential competitors to consumers, supplies or markets is hampered or eliminated as a result of the exclusionary conduct²⁸ of a dominant undertaking whereby the dominant undertaking is likely to be in a position to profitably increase prices to the detriment of

²⁴ Section 93 (2).

²⁵ Section 1 (c) of the Act.

²⁶ Section 1 (e) of the Act.

²⁷ Regulation 6 (b) of the Competition Regulations.

²⁸ An exclusionary conduct consists of acts that are reasonably capable of creating, enlarging or prolonging monopoly power by impairing the opportunities for rivals; and that either do not benefit consumers at all, or are unnecessary for the particular consumer benefits that acts produce, or produce harms disproportionate to the resulting benefits (Herbert Hovenkamp, *Federal Antitrust Policy: The Law of Competition and its Practices* (Thompson/West, 2005), p. 277).

consumers.²⁹ Stated differently, foreclosure is the conduct of a dominant firm to exclude competitors from the relevant market.³⁰

Foreclosure in this sense refers to “anti-competitive foreclosure”, which is different from “mere foreclosure”, which occurs where as a result of the superior efficiency of the dominant firm, businesses are won on the merits.³¹ The exclusionary conduct of a dominant Licensee has the effect of limiting the market presence of competing Licensees, or reducing their incentive to compete favourably in a particular communications market. In other words, the impact of the conduct on existing competitors is “foreclosure”, whereby the affected Licensee is foreclosed from the relevant communications market.³² Rey and Tirole define foreclosure as;

*“a dominant firm’s denial of proper access to an essential good it produces, with the intent of extending monopoly power from that segment of the market (the bottleneck segment) to an adjacent segment (the potentially competitive segment). Foreclosure can arise when the bottleneck good is used as an input (e.g., an infrastructure) by a potentially competitive downstream industry, or when it is sold directly to customers, who use the good in conjunction with other, perhaps complementary goods (e.g., system goods or aftersale services). In the former case, the firms in the competitive segment that are denied access to the essential input are said to be “squeezed” or to be suffering a secondary line injury. In the latter case, a tie may similarly distort or even eliminate effective competition from the rivals in the complementary segment”.*³³

Conducts arising from the abuse of a dominant position could be either exclusionary or exploitative in nature.³⁴ A successfully exclusionary conduct isolates a competitor from its customers and/or suppliers.³⁵ If competitors (or consumers) are excluded or foreclosed from a substantial part of the relevant market, the practice is deemed illegal

²⁹ See also, DG Competition (2005, December). ‘Discussion paper on the application of Article 82 of the Treaty to exclusionary abuses’ [WWW document] URL <http://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf> (visited 2012, January 24), paragraph 58.

³⁰ ERG (2006, May). ‘Revised ERG Common Position on the approach of Appropriate remedies in the ECNS regulatory framework’ [WWW document] URL https://pfs.is/upload/files/erg_06_33_remedies_common_position_june_06.pdf (visited, 2016, February 12), p. 38.

³¹ Richard Whish, David Bailey, *supra*, p. 208.

³² See, *Communication from the Commission - Guidance on the Commission’s Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings* OJ 2009, C-45/7, paragraph 19.

³³ Rey, Patrick and Tirole, J. (2006, January 30). ‘A primer on Foreclosure’ [WWW document] URL <http://idei.fr/doc/by/tirole/primer.pdf> (visited 2015, February 15), p. 1.

³⁴ See Commission Staff Working Document (2013, June 11) ‘Practical Guide on Quantifying Harm in Actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union’ [WWW document] URL http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_guide_en.pdf (visited 2015, February 17), paragraph 180.

³⁵ Hanno F. Kaiser, (2009, November) ‘A Primer in Antitrust Law and Policy’ [WWW document] URL http://www.hannokaiser.com/other/2009_at_intro.pdf (visited 2015, February 18), p. 14.

under competition law.³⁶ Foreclosure has three different meanings depending on whether it occurs in a vertical, horizontal or customer context. In the vertical context, foreclosure occurs where firms with market power in the upstream market refuse to supply (or increases the price of) an essential input to its rival downstream competitors, restricting competition downstream.³⁷

A practical example of vertical foreclosure in the communications sector is where an incumbent wholesale access provider refuses to provision access to a retail access provider, thereby leveraging its market power in the wholesale access market to lessen competition in the retail access market.³⁸ In Case COMP/38.784 – *Wanadoo España v. Telefónica*, where Telefónica the dominant operator in the national and regional wholesale broadband access market, had imposed unfair prices, in the form of margin squeeze between its wholesale broadband access tariffs and its own retail prices. The EC in analysing the effect of Telefónica’s exclusionary conduct concluded at paragraph 564 that the; “margin squeeze has had concrete foreclosure effects in the retail market, in particular that due to the margin squeeze, sustainable entry and growth in the retail market has not been possible...” and further at paragraph 586 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. In the case at hand, there is foreclosure because the margin squeeze has affected Telefónica's competitors' ability to enter the relevant market and exert a competitive constraint on Telefónica”.

Horizontal foreclosure occurs in tying arrangements, exclusive dealing arrangements, rebates and predatory pricing.³⁹ In a typical tying arrangement, a firm with market power in a product (the tying product), conditions the purchase of the tying product on the simultaneous purchase of another product (the tied product).⁴⁰ By tying the sales of these products, the dominant firm is restricting competition in the market for the tied product, thus foreclosing competitors who deal in the tied product.⁴¹

In Case T-201/04 *Microsoft Corporation v. Commission of the European Communities*, Microsoft contested the decision of the EC before the CFI on the ground that the EC applied a new, speculative, argument with no basis in law, in order to establish the existence of a foreclosure effect, in finding it liable for infringing Article 82 of the ECT

³⁶ See generally *Standard Oil Co. of Cal. v. United States*, 337 U.S. 293 (1949), paragraph 298 for the “quantitative substantiality” rule.

³⁷ ABA Section of Antitrust Law, *Telecoms Antitrust Handbook* (first edition, ABA Publishing, 2005) p. 20.

³⁸ See generally, Jonathan B. Baker, ‘Exclusion as a Core Competition Concern’, *Articles in Law Reviews & Other Academic Journals* Paper 279 (2013), pp. 539 - 540.

³⁹ Richard Whish, David Bailey, *supra*, p. 205.

⁴⁰ 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.

⁴¹ ABA Section of Antitrust Law, *supra*, p. 258.

(now Article 102 of the TFEU) for making the availability of their Windows Client PC operating system (OS) conditional on the simultaneous acquisition of Windows Media Player (WMP). The CFI in upholding the decision of the EC finding Microsoft to have foreclosed competition in the market for streaming media players held at paragraph 1090 that; “*It follows from all of the foregoing considerations that Microsoft has put forward no argument capable of vitiating the merits of the findings made by the Commission in the contested decision concerning the condition relating to the foreclosure of competition*”. Consequent on the foregoing, horizontal foreclosure occurs where the dominant firm excludes its competitors from access to the relevant market.⁴²

In a customer foreclosure,⁴³ a downstream firm buys key inputs from only one upstream firm, refusing to buy from other competing upstream firms, thus restricting competition in the market in which the upstream firm operates.⁴⁴ Such an arrangement is akin to an exclusive dealing arrangement.

As stated above, the Commission has neither elaborated on the substantial lessening of competition test, nor on the anti-competitive foreclosure effect of a conduct, that substantially lessens competition. On the other hand, the EC has identified several factors that it will consider in order to determine whether a particular conduct is likely to lead to an anti-competitive foreclosure effect. These factors are;⁴⁵

- *the position of the dominant undertaking*: in general, the stronger the dominant position, the higher the likelihood that conduct protecting that position leads to anti-competitive foreclosure;
- *the conditions on the relevant market*: this includes the conditions of entry and expansion, such as the existence of economies of scale and/or scope and network effects. Economies of scale mean that competitors are less likely to enter or stay in the market if the dominant undertaking forecloses a significant part of the relevant market. Similarly, the conduct may allow the dominant undertaking to ‘tip’ a market characterised by network effects in its favour or to further entrench its position on such a market. Likewise, if entry barriers in the upstream and/or downstream market are significant, this means that it may be costly for competitors to overcome possible foreclosure through vertical integration;
- *the position of the dominant undertaking’s competitors*: this includes the importance of competitors for the maintenance of effective competition. A specific competitor may play a significant competitive role even if it only holds a small market share compared to other competitors. It may, for example, be the closest competitor to the

⁴² DG Competition (2005, December), *supra*, paragraph 70.

⁴³ Sometimes customer foreclosure is synonymous with horizontal foreclosure (See Richard Whish, David Bailey, *supra*, p. 204, footnote 236).

⁴⁴ See generally Rey, Patrick and Tirole, J, *supra*, part 4.

⁴⁵ *Communication from the Commission - Guidance on the Commission’s Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings* OJ 2009, C-45/7, paragraph 20.

dominant undertaking, be a particularly innovative competitor, or have the reputation of systematically cutting prices. In its assessment, the EC may also consider in appropriate cases, on the basis of information available, whether there are realistic, effective and timely counterstrategies that competitors would be likely to deploy;

- *the position of the customers or input suppliers*: this may include consideration of the possible selectivity of the conduct in question. The dominant undertaking may apply the practice only to selected customers or input suppliers who may be of particular importance for the entry or expansion of competitors, thereby enhancing the likelihood of anti-competitive foreclosure.⁴⁶ In the case of customers, they may, for example, be the ones most likely to respond to offers from alternative suppliers, they may represent a particular means of distributing the product that would be suitable for a new entrant, they may be situated in a geographic area well suited to new entry or they may be likely to influence the behaviour of other customers. In the case of input suppliers, those with whom the dominant undertaking has concluded exclusive supply arrangements may be the ones most likely to respond to requests by customers who are competitors of the dominant undertaking in a downstream market, or may produce a grade of the product – or produce at a location – particularly suitable for a new entrant. Any strategies at the disposal of the customers or input suppliers which could help to counter the conduct of the dominant undertaking will also be considered;
- *the extent of the allegedly abusive conduct*: in general, the higher the percentage of total sales in the relevant market affected by the conduct, the longer its duration, and the more regularly it has been applied, the greater is the likely foreclosure effect;
- *possible evidence of actual foreclosure*: if the conduct has been in place for a sufficient period of time, the market performance of the dominant undertaking and its competitors may provide direct evidence of anti-competitive foreclosure. For reasons attributable to the allegedly abusive conduct, the market share of the dominant undertaking may have risen or a decline in market share may have been slowed. For similar reasons, actual competitors may have been marginalised or may have exited, or potential competitors may have tried to enter and failed;
- *direct evidence of any exclusionary strategy*: this includes internal documents which contain direct evidence of a strategy to exclude competitors, such as a detailed plan to engage in certain conduct in order to exclude a competitor, to prevent entry or to pre-empt the emergence of a market, or evidence of concrete threats of exclusionary action. Such direct evidence may be helpful in interpreting the dominant undertaking's conduct.

⁴⁶ Case T-228/97 *Irish Sugar v. Commission* [1999] ECR II-2969, paragraph 188.

These factors are analysed in conjunction with other specific factors that the EC also considers as relevant, in its determination of the anti-competitive foreclosure effect of a particular conduct.⁴⁷

II. Raising rivals' cost

Related to the foreclosure effect is the raising rivals' cost effect recognised in the EU and US. Raising rivals' cost generally refers to any practice, which negatively influences a competitor's (and a potential competitor's) cost function.⁴⁸ The seminal legal scholarship on this is Krattenmaker and Salop⁴⁹ where they argued that the exclusionary conduct of a firm will result in raising rivals' cost where such conduct "unavoidably and significantly" increases the costs of its competitors and, enables the firm to raise prices above the competitive level.⁵⁰ For example, a firm by entering into exclusive dealing arrangements with suppliers of inputs would invariably lead its competitors to look elsewhere for these inputs, indirectly raising their cost of doing business.⁵¹

Professor Hovenkamp⁵² also lists a number of strategies for raising rivals' cost that are usually hard to detect. These strategies are where; the dominant firm files litigation against a non-dominant competitor; the dominant firm or group of firms petitions the government or a regulatory agency for a procedure or fee that will cost both dominant and non-dominant firms the same absolute amount to implement; a trade association that engages in self-regulation or self-evaluation of products and is dominated by a few large firms adopts a product standard compliance with which is subject to substantial economies of scale; the dominant firm engages in a form of advertising that must be met by the smaller firms; and a dominant firm researching a new product and knowing that it will be the first entrant, intentionally selects a technology in which economies of scale are substantial, knowing that the fringe firms will have to follow along.⁵³

In addition, vertical mergers in the US telecommunications sector are primarily analysed under the raising rivals' cost standard.⁵⁴ In this analysis, the focus of the inquiry would be whether as a result of the merger, it is probable that the upstream firm will have both the incentive and ability to exclude its downstream competitors from the downstream market to a degree that it could raise prices without decreasing its profit, or in other words, whether it could exercise market power in the downstream market.⁵⁵ In *United States v. AT & T Corp. and McCaw Cellular Communications Inc*, 59 Fed. Reg. 44, 158 (August 26, 1994), where AT&T sought to acquire McCaw in 1993. In that case, AT&T

⁴⁷ Richard Whish, David Bailey, *supra*, p. 209.

⁴⁸ ERG (2006, May), *supra*.

⁴⁹ Thomas G. Krattenmaker, and Steven C. Salop, 'Anticompetitive Exclusion: Raising Rivals' Costs To Achieve Power over Price' *The Yale Law Journal*, Volume 96, Number 2 (December 1986), pp. 209 – 293.

⁵⁰ *Ibid*, p. 214.

⁵¹ *Ibid*, p. 234.

⁵² Herbert Hovenkamp, 'Antitrust Policy After Chicago', 84 *Michigan Law Review* 213, (November 1985).

⁵³ *Ibid*.

⁵⁴ ABA Section of Antitrust Law, *supra*, p. 150.

⁵⁵ Michael H. Riordan, Steven C. Salop, 'Evaluating Vertical Mergers; A Post-Chicago Approach', 63 *Antitrust L.J.* 513, (1995), p. 518.

was the dominant supplier of interexchange telecommunications service in the United States, providing interexchange service to wireline and cellular telephone customers while McCaw was the largest provider of cellular service in the United States, with ownership interests in cellular systems serving approximately 22% of all of the cellular subscribers in the United States. The DoJ concerned that the post-merger AT&T would have the incentive to raise the costs of McCaw's competitors dependent on it for cellular infrastructure equipment by increasing the prices of its equipment and software, or by withholding or delaying the development or delivery of necessary equipment, software, services or other upgrades, imposed various non-discrimination obligations on AT&T.

III. Restriction of competitors' sales

Restriction of competitors' sales results from the conduct of a dominant firm, which negatively affects the demand function of its competitors.⁵⁶ For example, exclusive dealing contracts whereby a dominant operator on the wholesale market has an exclusive contract with a retail service provider, stating that the retail service provider is only allowed to buy upstream inputs from the dominant operator, can make it more difficult for existing competitors at the wholesale level to expand their sales.⁵⁷ Consequently, exclusive dealing in this form can lead to a restriction of competitors' sales.⁵⁸

Impact of the conduct on further market entry⁵⁹

The foregoing discussions will also discourage further market entry and/or expansion of existing market players including potential competitors prevented from entering the market. An example of such an effect would be where a firm committed to entering a particular market is unable to do so, because the dominant firm in that market has entered into exclusive dealing arrangements with its customers in order to prevent the new firm from entering the market and having access to customers.⁶⁰

Predatory pricing, which is setting selling prices below production cost by a dominant will also heighten barriers to entry in the relevant market, as competitors will be driven out of the market because they cannot match the predatory price, and new entrants will be discouraged from entering the market.⁶¹

Impact of the conduct on consumers, including the availability and pricing of products and services⁶²

An anti-competitive conduct could also directly impact consumer welfare, rather than competition in the market.⁶³ In assessing the impact of the prohibited conduct on

⁵⁶ ERG (2006, May), *supra*, p. 38.

⁵⁷ *Ibid.*, p. 33.

⁵⁸ *Ibid.*

⁵⁹ Regulation 6 (c) of the Competition Regulations.

⁶⁰ *See, Interface Group, Inc. v. Massachusetts Port Authority*, 816 F. 2d 9 Court of Appeals, 1st Circuit 1987, paragraph 11.

⁶¹ Richard A. Posner, 'Exclusionary Practices and the Antitrust Laws', *41 University of Chicago Law Review*, (1974), pp. 506 – 535, p.517.

⁶² Regulation 6 (d) of the Competition Regulations.

⁶³ *See generally 1998 Football World Cup OJ [2000] L5/55, paragraphs 99 – 100.*

consumers, the Commission has indicated its preference for conducts that have already occurred, rather than conducts, which are likely or yet to occur.⁶⁴ The impact an anti-competitive conduct has on consumers includes;

I. Overcharges

An exploitative pricing practice of a monopolist will result in monopoly prices charged to consumers.⁶⁵ Consumers are harmed when they pay an overcharge for goods and services. Monopolists by charging an excessive price deprive consumers of the welfare gains normally associated with the provision of goods or services.⁶⁶ As stated in Chapter 2, the resulting injury arising from where the dominant firm exercises its market power by charging excessive price is the “wealth transfer gain”.

Overcharges would also result in existing customers purchasing fewer units of the product and/or a refusal to purchase at the monopoly price. The reduction in the units purchased, triggered by these higher prices, harms would-be-purchasers since they would have been willing to purchase at the normal market price. In addition, the customers who use the product for commercial purpose may be faced with a reduction of profit because of the higher price they will have to pay for the product.

II. Constrained choice

Consumer choice – that is the ability of consumers to choose between a range of products/services is one of the key goals of competition law.⁶⁷ Where consumer choice is severely impeded as a result of an anti-competitive conduct, it results in a significant harm to consumer welfare.⁶⁸ This concern for consumer choice was expressed in *Full Draw Productions v. Easton Sports Inc.*, 182 F.3d 745 (10th Cir. 1999) where the US Court of Appeals stated at paragraph 755 that “[t]he effect of defendants’ alleged [anti-competitive conduct] was not to increase competition between the two trade shows, but rather to distort and ultimately reduce competition by destroying one source of output ... and thereby limiting consumer choice to the other source of output ...”.

Consumer choice is constrained when a firm operating in the relevant market has been eliminated from that market either as a result of the foreclosing practice of a dominant firm, or as a result of a horizontal merger (or acquisition), thereby constraining consumer choice to the firms remaining in the market. For instance, an anti-competitive tying arrangement significantly restricts the choice of consumers to the tied product. Similarly, an anti-competitive horizontal merger that directly eliminates a horizontal competitor significantly diminishes consumer choice with respect to price, product

⁶⁴ *Report of the Public Inquiry on Competition Practices Regulations* (Nigerian Communications Commission, 2006), the Commission’s response to the 22nd comment.

⁶⁵ Richard Whish, David Bailey, *supra*, pp. 718 – 721.

⁶⁶ Michel Kerf, Damien Geradin, ‘Controlling Market Power in Telecommunications: Antitrust vs. Sector Specific Regulation – An Assessment of the United States, New Zealand and Australian Experiences’ *Berkeley Technology Law Journal*, Volume 14 Issue 3 Article 4, (September 1999), p. 7.

⁶⁷ See generally, Robert H. Lande, ‘Consumer Choice as the Ultimate Goal of Antitrust’, 62 *University of Pittsburgh Law Review*, 503, (2001), pp. 503 – 525.

⁶⁸ *Ibid.*

quality, or product variety.⁶⁹ Where competitors are eliminated from a market, the remaining firm has the incentive and is able to profitably raise price because it is not constrained by competition.

III. Retarded innovation

An innovative service offering is recognised as the hallmark of a competitive market.⁷⁰ Firms innovate by either improving the quality of their goods or by producing a better product.⁷¹ Competition scholars are uniform in the view that there exists a relationship between competition and innovation especially in the high tech industry, which is driven, by product innovation. In particular, Salop and Craig have argued that exclusionary conducts in high-networked industries such as the telecommunications industry may retard innovation if not subjected to proper regulatory scrutiny by competition authorities.⁷² Moreover, economic research indicates that consumer welfare declines as innovation becomes retarded.⁷³

In the US case of *United States v. Continental Can Co.*, 378 U.S. 441 (1964), the Supreme Court condemned a merger between a large metal container manufacturer and a large glass container producer in part because it would lessen incentives for product innovation. Also, a monopolist's exclusionary conduct in foreclosing consumers from accessing a new technology indirectly harms innovation. This harm to innovation appears to be the primary motivation for the US District Judge Jackson's finding of fact in *United States of American v. Microsoft Corporation*, *United States District Court for District of Columbia*, Civil Action No. 98-1232 (TPJ) that Microsoft's anti-competitive conduct caused consumer harm in the form of reduced innovation.

Where a showing is made that an anti-competitive conduct retards innovation in a particular market, the resultant effect is normally suffered by the consumers to whom these innovative services in the form of new, better and/or cheaper products which should have been made available to absent the anti-competitive conduct.

IV. Output restriction

In some circumstances, firms can collude to restrict the volume of production and/or the sales of their products. Such coordinated restriction of output is harmful to consumers in

⁶⁹ Neil W. Averitt, Robert H. Lande, 'Consumer Choice: The Practical Reason for Both Antitrust and Consumer Protection Law' *Loyola Consumer Law Review*, Vol. 10, Issue 1 (1998), pp. 44 – 63, p. 47.

⁷⁰ Reinhard Angelmar. (no date). 'Product Innovation: A Tool for Competitive Advantage' [WWW document] URL https://flora.insead.edu/fichiersti_wp/Inseadwp1989/89-14.pdf (visited 2014, September 8), p. 1.

⁷¹ Jonathan B. Baker, 'Beyond Schumpeter vs. Arrow: How Antitrust Fosters Innovation', *Antitrust Law Journal*, Vol. 74, No. 3 (2007), pp. 575 -602, p. 579.

⁷² Steven C. Salop, R. Craig 'Romaine, Preserving Monopoly: Economic Analysis, Legal Standards, and Microsoft', 7 *Geo. Mason L. Rev.* (1999), 617 654-55, 663-64.

⁷³ See generally, Robert M. Solow, 'A Contribution to the Theory of Economic Growth', *The Quarterly Journal of Economics*, Vol. 70, No. 1 (Feb., 1956), pp. 65-94.

that it creates artificial scarcity of the product in question, which may in turn induce a subsequent price increase.⁷⁴

Degree of interference with competition that results in identifiable injury to competitors or consumers⁷⁵

For competition to be substantially lessened in a communications market there must be some “identifiable injury” to competitors and/or consumers.⁷⁶ An identifiable injury exists where there is evidence that competitors and/or consumers have suffered some harm as a result of the anti-competitive conduct. In other words, there must be a causal link between this identifiable injury and the challenged conduct.⁷⁷ The identifiable injury will include the various ways in which the challenged conduct impacts; existing competitors in the identified markets; and/or on further market entry; and/or on consumers as discussed above.

For a particular conduct to result in an “identifiable injury” the particular circumstance, and the relevant proceeding under the Competition Regulations will be taken into consideration by the Commission.⁷⁸ In assessing whether a particular conduct results in “identifiable injury” to consumers, the Competition Regulations requires the Commission to apply the following further considerations;

- i. A trivial or *de minimis* degree of lessening of competition will not be acted on by the Commission;⁷⁹
- ii. The degree of market power of the Licensee;⁸⁰ and
- iii. A smaller degree of interference or injury resulting from the conduct of a Licensee with a large degree of market power (including Licensees found to be in a dominant position) which may be found to constitute substantial lessening of competition.⁸¹

These considerations are further clarified below.

i. A trivial or *de minimis* degree of lessening of competition will not be acted on by the Commission

⁷⁴ See generally, Francesco Russo, *et al.*, *European Commission Decisions on Competition: Economic Perspectives on Landmark Antitrust and Merger Case* (8 July 2010, Cambridge University Press), pp. 43 - 44.

⁷⁵ Regulation 6 (e) of the Competition Regulations.

⁷⁶ *Report of the Public Inquiry on Competition Practices Regulations, supra*, the Commission's response to 10th comment.

⁷⁷ See generally, Joined Cases C-295/04 to C-298/04, *Manfredi & others* [2006] ECR I-6619, paragraphs 61-63, *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 475 n.11 (1982).

⁷⁸ *Report of the Public Inquiry on Competition Practices Regulations, supra*.

⁷⁹ Regulation 7 (a).

⁸⁰ Regulation 7 (b).

⁸¹ Regulation 7 (c).

As explained above, only conducts, which “substantially” lessens competition are prohibited under the Act, accordingly, a conduct that has a trivial or non-material effect on the competitive process is unlikely to be challenged by the Commission. In this regard, *de minimis* is a latin expression that literally translates to *about minimal things*, it also finds meaning in the latin maxim *de minimis non curat lex* which literally means that “*The law does not concern itself with trifles*”. In EU competition law, the *de minimis* doctrine is derived from the CJEU case of *Völk v. Vervaecke* Case 5/69 [1969] ECR 295 where Völk, a German manufacturer of washing machines granted an exclusive dealership⁸² in the form of exclusive distributorship, to Vervaecke in Belgium and Luxembourg. The ECJ in finding that Völk’s market share in the relevant market was negligible (about 0.2% and 0.5% in 1963 and 1965 respectively) held that an agreement will fall outside a prohibited agreement “*where it has only an insignificant effect on the market, taking into account the weak position which the persons concerned have on the product in question*”.⁸³

For example in the EU, the EC adopted the Notice on Agreements of Minor Importance OJ [2001] C 368/13 (the *De Minimis* Notice) in guiding its approach towards *de minimis* for the purpose of determining whether a conduct will have an appreciable effect on competition.⁸⁴ The *De Minimis* Notice sets out the market threshold for determining when a particular conduct will have an appreciable effect on competition. These threshold standards are;

- a) If the aggregate market share held by the parties to the agreement does not exceed 10% on any of the relevant market affected by the agreement, where it is made between firms that are actual or potential competitors on any of these markets (horizontal agreements);⁸⁵ or
- b) If the market share held by each of the parties to the agreement does not exceed 15% on any of the relevant market affected by the agreement, where the agreement is made between firms that are not actual or potential competitors on any of these markets (vertical agreements).⁸⁶

Thus in accordance with EU competition law practice, there is a presumption that horizontal and vertical agreements are unlikely to raise any competition concern where the market share held by each of the parties to the agreement does not exceed 10% and 15% on the relevant market, respectively. In addition, paragraph 11 of the *De Minimis* Notice lists certain types of agreements considered as having as its “object”⁸⁷ the restriction of competition, which will not benefit from these market share threshold. The agreements are; price fixing, the limitation of output or sales and market allocation.

⁸² Exclusive dealing agreements are agreements in which one party promises to deal exclusively with another party. Exclusive dealing agreements are prohibited under Article 102 of the TFEU.

⁸³ Paragraph 5/7.

⁸⁴ The *De Minimis* Notice by virtue of paragraphs 4 and 6 has no binding effect on the courts in the EU, and is subject to interpretation of the CJEU.

⁸⁵ Paragraph 7 (a).

⁸⁶ Paragraph 7 (b).

⁸⁷ See Chapter 5 for a discussion of a “restriction by object” standard under EU competition law.

Accordingly, should the Commission be persuaded to apply a similar threshold, a horizontal agreement where the collective market share of the parties does not exceed 10% in the relevant market, and/or a vertical agreement where the market share of each of the parties does not exceed 15% in the relevant market would invariably fall outside the scope of the Act, and by extension the Competition Regulations.⁸⁸ However, the Commission has explained that further clarification of the *de minimis* rule will be undertaken in the circumstance of a particular complaint or proceeding.⁸⁹ As at the time of writing, no such clarification has occurred.

ii. The degree of market power of the Licensee (using the market definition and assessment of market power methodologies described in Part IV of the Competition Regulations)

Chapter 6 discusses the various market methodologies for evaluating the market power of a Licensee pursuant to the provisions of Part IV of the Competition Regulations.

iii. A smaller degree of interference or injury resulting from the conduct of a Licensee with a large degree of market power (including Licensees found to be in a dominant position) which may be found to constitute substantial lessening of competition

Accordingly, a smaller degree of harm resulting from the conduct of a Licensee with market power may be found by the Commission to constitute a substantial lessening of competition. However, it is unclear whether the Commission may require a greater degree of harm to find a substantial lessening of competition in a conduct engaged in by a Licensee with a very small degree of market power.

Conducts deemed to result in a substantial lessening of competition in the communications sector

Regulation 8 of the Competition Regulations gives a description of several conducts that the Commission will deem to result in a substantial lessening of competition. However, Regulation 8 is non-exhaustive in the light of the provision of Section 91 (1) of the Act, which prohibits a Licensee from engaging in “*any conduct*” which has the purpose or effect of substantially lessening competition in any aspect of the Nigerian communications market. As stated above, it is still possible for the Commission (or Nigerian Courts) to make a finding that a conduct not mentioned or described by the Act or in any Regulations (and/or Guidelines), has substantially lessened competition to the extent that the substantial lessening of competition standard is applied.

⁸⁸ It should be noted that by virtue of the provision of Regulation 12 (2) of the Competition Regulations, certain types of agreements are prohibited out rightly without a consideration of their practical effects pursuant to Regulation 6. See discussion on Anti-competitive Agreements and Practices at Chapter 5 for these types of Agreements.

⁸⁹ *Report of the Public Inquiry on Competition Practices Regulations, supra*, the Commission’s response to 11th comment.

The Commission has explained that the range of conducts identified in Regulation 8 constitutes an abuse of a dominant position⁹⁰ by a Licensee,⁹¹ or result from the unilateral action of a dominant Licensee acting in an abusive manner, rather than from cartel (or agreement) type conducts of Licensees involving multiple participants. In addition, some of the conducts described in Regulation 8, may also be in breach of one or more conditions contained in some licenses issued by the Commission,⁹² however unlike Regulation 8 conducts which requires that the offending Licensee possess market power, the conducts prohibited by these licenses can be challenged without a finding of dominance in the holder of the license. It is also pertinent to note that Regulation 8 conducts with the exception of conducts described in Regulations 8 (f) and 8 (j) are specifically committed against competing Licensees, and not at consumers of communications services.

Although the conducts under Regulation 8 (a) – (j) are presumed to result in a substantial lessening of competition, this presumption can be overcome after an assessment done pursuant to Regulation 6, to determine whether the conduct under review actually does constitute a substantial lessening of competition, or where the Licensee demonstrates otherwise by showing credible efficiency gains beneficial to communications consumers that results from the particular conduct under review.⁹³

The conducts described in Regulation 8 are;

- a) *Failing to supply interconnection or other essential facilities to a competing Licensee,⁹⁴ in accordance with any interconnection agreement between the parties or any direction, rule or order issued by the Commission, pursuant to the Act or the Interconnection Regulations, except under the circumstance that are objectively justified on supply conditions, such as failure, based on shortage of available facilities***

Interconnection is defined under the Act as “*the physical and logical linking and connection of communications systems used or operated by the same or different licensees in order to convey messages to and from the respective systems for the provision of services*”.⁹⁵ Basically, interconnection in this regard refers to the physical

⁹⁰ Abuse of a dominant position is discussed in Chapter 6.

⁹¹ Nigerian Communications Commission (NCC), *Consultation Paper on Dominance in Selected Communications Markets* (October 27 2009), p. 30.

⁹² See also Regulation 3 of the Competition Regulations which provides that “*These Regulations apply to all Licensees and any other providers of communications services in Nigeria and Licensees shall remain subject to any conditions regarding anti-competitive conduct set out in their licenses*”.

⁹³ This is by virtue of the introductory statement of Regulation 8.

⁹⁴ Stakeholders during the *Public Inquiry on the Competition Practice Regulations* raised the question of who is a “competing Licensee” for the purpose of the Regulations, the Commission’s response appear to indicate that a competing Licensee is one who competes in the same relevant market (See *Report of the Public Inquiry on Competition Practices Regulations, supra*, 16th comment and response).

⁹⁵ Section 157.

linking of two communications systems for the mutual exchange of traffic. Absent mandatory interconnection, the competition necessary for sustaining a liberalised communications sector would be severely undermined.⁹⁶ Interconnection also lowers entry barriers for new entrants by encouraging the rapid deployment of communications services through mandating incumbent operators to refrain from refusing to interconnect with competitors.⁹⁷ Without interconnection, it will not be commercially possible for any telecommunications operator in Nigeria to provide the full bouquet of voice telephony services.⁹⁸

A statutory obligation for a network service provider⁹⁹ or network facilities provider¹⁰⁰ to provision interconnection at "technically feasible" locations is created in Section 96 of the Act.¹⁰¹ Condition 16 of both the Digital Mobile License (DML) and Universal Access Service License (UASL), and Condition 15 of the Wholesale Wireless Access Service License (WWASL) among other licenses, also impose similar interconnection obligation on the holders of these licenses.¹⁰² In addition, Regulations 10 - 12 of the Telecommunications Networks Interconnection Regulations 2007 (the Interconnection Regulations) impose additional obligations secondary to the statutory obligation to interconnect, on a telecommunications operator determined by the Commission to be dominant.¹⁰³ This statutory obligation to interconnect under both the Act and the DML was reaffirmed by the Commission in its decision in the matter of *Interconnect Clearinghouse Nigeria Limited v. MTN Nigeria Communications Limited*, Proceedings at the Hearing held at the Nigerian Communications Commission Conference Room on 12th April, 2006, where the Commission held that a proper Licensee "is owed an

⁹⁶ Nigerian Communications Commission (NCC), *Determination of Voice and SMS Interconnection Rates* (December 21 2009), p. 1; Engr. Ernest C. A. Ndukwe, OFR (2009, November 30). 'Presentation of the Draft Final Reports on Interconnection Rates Review for Voice Services and Determination of Data & Multimedia Services' [WWW document] URL http://ncc.gov.ng/archive/evcspeches/2009_opening_remarks_interconnection_rates.pdf (visited 2012, April 6), p. 1.

⁹⁷ Dr. Ernest Ndukwe. (2011, December 2). 'The Telecommunication Revolution in Nigeria' [WWW document] URL <https://www.google.com.ng/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&cad=rja&uact=8&ved=0CDMQFjAD&url=http%3A%2F%2Fwww.iuokada.edu.ng%2FFiles%2FConvocation%2FThe%2520Telecommunications%2520Revolution%2520In%2520Nigeria.doc&ei=yIBVdHaIIW6UcmthMgM&usg=AFQjCNFz6OCr3QeAh4igI1eUmG-JSYISDA> (visited 2015, January, 21), p. 6. See also ABA Section of Antitrust Law, *supra*, p. 11.

⁹⁸ See also, *EC Notice on the application of the competition rule to access agreements in the telecommunications sector (98/C 265/02)* (Access Notice), paragraph 44.

⁹⁹ The Act defines network service provider as person who provides network services.

¹⁰⁰ The Act defines a network facilities provider to mean a person who is an owner of any network facilities.

¹⁰¹ It is noted that the obligation to provision access is pursuant to Sections 101 (1) and 137 (1) - (2) of the Act.

¹⁰² These license conditions will apply irrespective of whether the holder of the license occupies a dominant position in the relevant market or not.

¹⁰³ The Interconnection Regulation defines a "Dominant operator" as a licensed telecommunications operator determined by the Commission under the Act and the Competition Practices Regulations to have a dominant position in one or more communications markets relating to interconnection. Dominance for the purpose of applying this provision will be determined pursuant to the provisions of the Competition Regulations, see *Report of the Public Inquiry on Interconnection Regulations* (Nigerian Communications Commission, 2006), the Commission's response to 13th comment.

obligation to be interconnected by network services and facilities providers". In addition, pursuant to paragraph 25.4 of the Technical Standards for Interconnectivity of Networks, the Commission has stated that it regards interconnection as a right of every licensed operator and shall treat any denial of interconnection to any provider as an anti-competitive practice. As explained in Chapter 3, mobile call termination on an individual communications network is a separate product market, thus the failure (and/or refusal) to interconnect for the purpose of terminating a mobile call on that network, constitutes an abuse of a dominant position because the offending Licensee occupies a position of dominance on its own network.

A failure to provide interconnection at a "technically feasible" location and/or negotiate an interconnection agreement in "good faith"¹⁰⁴ would also constitute a conduct deemed to lessen competition substantially, or alternatively a "constructive" failure to supply interconnection. It appears that the Commission will take space or site concerns into consideration when analysing the technical feasibility of a proposed interconnection point.¹⁰⁵ In determining the technical feasibility of a point of interconnection, it is unclear whether the term "technically feasible" in Section 96 of the Act refers to only technical concerns in reference to the point of interconnection, or it also includes economic concerns¹⁰⁶ as contemplated by Regulation 7 (2) of the Interconnection Regulations.¹⁰⁷

Some of the points on a communications network determined by the Commission as technically feasible for the purposes of interconnection are; the trunk interconnection points of local and national tandem exchanges;¹⁰⁸ the national or international circuit interconnection points of international gateway exchanges;¹⁰⁹ the trunk side of local exchanges;¹¹⁰ the line side of local exchanges (e.g. at the main distribution frame (MDF) or Digital Distribution Frame (DDF));¹¹¹ cross-connect points of any exchange;¹¹² "meet points" at which operators agree to interconnect;¹¹³ signalling transfer points (STF) and other points outside of the communications channel or band, where interconnection is required for CCS7 or other signalling to exchange traffic efficiently and to access call-related databases (e.g. a Local Number Portability (LNP) database);¹¹⁴ access points for

¹⁰⁴ A duty to negotiate an interconnection and, infrastructure sharing agreement in good faith is created by Section 96 of the Act and Paragraph 6 (2) of the Guidelines on Collocation and Infrastructure Sharing respectively. However, the Commission is yet to explain the minimum requirement of the duty to negotiate in good faith.

¹⁰⁵ *Report of the Public Inquiry on Technical Standards For Interconnectivity of Networks* (Nigerian Communications Commission, 2009), the Commission's response to 9th comment.

¹⁰⁶ Economic concerns take into consideration the cost implications of interconnecting at a particular technically feasible point, especially in instances where the cost of such interconnection is very expensive.

¹⁰⁷ In this regard, it does appear that there is a conflict between Section 96 of the Act and Regulation 7 (2) of the Interconnection Regulations.

¹⁰⁸ Paragraph 9.3 Technical Standards for Interconnectivity of Networks.

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

¹¹² *Ibid.*

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*

unbundled network components;¹¹⁵ and transit exchanges provided by licensed clearing houses.¹¹⁶

Also, the failure to supply interconnection in accordance with an interconnection agreement as used in this provision appear to contemplate an existing interconnection relationship that renders the termination of such interconnection as a conduct capable of a substantial lessening of competition.¹¹⁷ With regard to the location of the points of interconnection (PoI), Regulation 1 (2) of the Interconnection Regulations requires a licensed telecommunications operator¹¹⁸ to designate a minimum of one PoI located in the geographic location for each number area for which it has been allocated numbers by the Commission within the range ascribed for fixed services in the national numbering plan. Paragraph 10 of the Technical Standards for Interconnectivity of Networks further sets out the various PoIs between the different types of telecommunications services providers (peer-to-peer interconnection).

While the obligation to interconnect pursuant to Section 96 of the Act has traditionally been interpreted as relating to a telecommunications network, however it is unlikely that the interconnection (or peering¹¹⁹) of internet networks would come inside the statutory meaning of interconnection, in order to impose a Section 96 obligation on licensed ISPs operating in Nigeria.¹²⁰ To justify a refusal to provide interconnection at a point requested by another competing Licensee because of network failure, based on shortage of available facilities in accordance with this provision, the requested Licensee would be expected to make a clear showing to the Commission that specific and significant adverse impacts on the network would result from the requested interconnection, and the requesting Licensee would have to demonstrate otherwise.¹²¹

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*

¹¹⁷ A unilateral withdrawal of interconnection without recourse to the Commission also constitutes a breach of Section 100 of the Act.

¹¹⁸ The Interconnection Regulations in Regulation 19 defines a "Licensed telecommunications operator" to mean a network services provider or network facilities provider licensed under the provision of the Act and includes interconnect exchange operators.

¹¹⁹ Peering is "*an interconnection business relationship whereby ISPs provide connectivity to each others' transit customers*" (See W. B. Norton, *The Art of Peering – The Peering Playbook v1.2*, p. 1).

¹²⁰ This conclusion is based on the fact that interconnection within the meaning of the Act enables the customers of the interconnecting parties to exchange voice calls and short message service (or sms), while peering (or interconnection) of internet networks only enables the exchange of traffic between the peering parties. Without peering, customers of the various ISPs are still able to communicate amongst themselves. Contrast with "*The technical aspects of Interconnection*" under Paragraph 1.2 of the Technical Standards for Interconnectivity of Networks, which relates to the provision of physical facilities to enable two networks to communicate with each other and transfer intelligence seamlessly across their boundaries.

¹²¹ Paragraph 19.3 Technical Standards for Interconnectivity of Networks. See also, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 CC Docket No. 96-98 ("Implementation proceedings") at paragraph 203, where the US Federal Communications Commission (FCC) adopted a similar standard to justify a refusal of an interconnection request by an incumbent local exchange carrier (LEC).

Although, the Commission is yet to make a specific determination (or declaration) to the effect that provisioning access to (unbundled) network elements, collocation¹²² and/or infrastructure sharing¹²³ constitutes a supply to an essential facility, which would be obligatory under this provision, or neither has the Commission clarified what constitutes an essential facility within the meaning of this provision.¹²⁴ However, it does appear that the Commission considers access to towers and backbone network transmission as access to an essential facility.¹²⁵

The essential facilities doctrine imposes a duty to deal, on firms controlling bottleneck resources by requiring them to share those resources with their competitors on just and reasonable terms.¹²⁶ In the US, a failure to share a properly defined “essential facility” is a breach of Section 2 of the Sherman Act.¹²⁷ The term “essential facilities” traces its origin to the US case of *United States v. Terminal Railroad Association of St. Louis* 224 US 383 Supreme Court 1912 where the US Supreme Court in handing down its decision implied that an essential facility is a resource under the control of a monopolist, which is required by competitors to engage in effective competition,¹²⁸ although the clearest articulation of the essential facilities doctrine in the context of communications services is set out in *MCI Communications v. American Tel. & Tel. Co.*, 708 F. 2d 1081 Court of Appeals, 7th Circuit 1983, where the Court of Appeal for the 7th Circuit applied the

¹²² Paragraph 18 of the Guidelines on Collocation and Infrastructure Sharing define collocation to mean “the placement of transmission equipment owned by the interconnection demanding operator in the premises of the interconnection providing operator for interconnection to that operator’s network”.

¹²³ Paragraph 18 of the Guidelines on Collocation and Infrastructure Sharing define infrastructure sharing to mean “the joint use of network facilities by two or more operators subject to agreement specifying relevant technical and commercial conditions”. Under the Guidelines, the term “infrastructure sharing” is more general than the term “collocation” and unless explicitly stated otherwise, infrastructure sharing refers for the purposes of these Guidelines to the sharing of facilities that are not feasible for collocation.

¹²⁴ It bears emphasis that in the US for example, access to unbundled network elements is not based on the essential facility doctrine but rather on the “necessary and impair” standard of Section 251(d)(2) of the Telecommunications Act of 1996 (P.L. 104-104) which requires the FCC when determining what network elements should be made available on an unbundled basis, to consider, at a minimum, whether (a) access to such network elements as are proprietary in nature is “necessary”; and (b) the failure to provide access to such network elements would “impair” the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer. Contrast with Recital 19 of 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) which consider unbundled network elements and parts of a telecommunications network as “essential facilities” essential for the supply of competing communications services.

¹²⁵ See, Nigerian Communications Commission (NCC), *Determination of Dominance in Selected Communications Market in Nigeria* (March 26 2010), p. 8.

¹²⁶ Daniel F. Spulber, Christopher S. Yoo, ‘Mandating Access to Telecom and the Internet: The hidden side of *Trinko*’ *Columbia Law Review*, Vol. 107:1822 (2007), pp. 1822 – 1907, pp. 1828 – 1829.

¹²⁷ Herbert Hovenkamp, (2005), *supra*, p. 309.

¹²⁸ However, Spulber and Yoo argue that the factual circumstance of this case is inapplicable for dealing with a monopolist’s unilateral refusal to deal because the bottle neck resource in that case was controlled by a consortium of fourteen railroad terminating traffic in St. Louis and not by a single individual monopolist, see Daniel F. Spulber, Christopher S. Yoo, *supra.*, p. 1829. This position also accords with the earlier decision of the US Supreme Court in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP* 540 U.S. 398 (2004).

doctrine to require AT&T to provide access to its local service network to competitors in long-distance services. In that case, MCI had alleged that AT&T refused to grant interconnection with its local network, thereby preventing MCI from offering any service other than long-distance leased lines. The Court expounded the law as follows:

“A monopolist’s refusal to deal under these circumstances is governed by the so called essential facilities doctrine. Such a refusal may be unlawful because a monopolist’s control of an essential facility (sometimes called a “bottleneck”) can extend monopoly power from one stage of production to another, and from one market to another. Thus, the anti-trust laws have imposed on firms controlling an essential facility the obligation to make the facility available on non-discriminatory terms.....

....The case law sets forth four elements necessary to establish liability under the essential facilities doctrine: (1) control of the essential facility by the monopolist; (2) a competitor’s inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility”.¹²⁹

From the EU perspective, the essential facilities doctrine is illustrated by Case C-7/97 *Oscar Bronner GmbH and Co KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG* [1998] ECR I-7791 where the publisher of an Austrian daily newspaper, Bronner sought access to the dominant competitor’s home – delivery system, the Court formulated a three step test necessary for invoking the essential facilities doctrine as follows; (i) the facility must be indispensable for carrying on the entrant’s business, in that there are no actual or potential substitutes; (ii) there must be technical, legal or economic obstacles which make it impossible or unreasonably difficult to replicate the facility; and (iii) the refusal must not be objectively justified.¹³⁰

Another important question that remains open for the Commission’s determination is whether the failure (or refusal) by a dominant Licensee to supply interconnection or other essential facilities to a competing Licensee, done in exercise of an intellectual property right (IPR), constitutes a conduct that substantially lessens competition within the meaning of Regulation 8 (a). The resolution of this question is important in the light of the fact that IPRs protected under the relevant Nigerian statute¹³¹ grant to the holders, the right to exclude others from the use of the subject matter protected. While, it is arguable that this question will be resolved in favour of IPRs since they are protected under Acts enacted by the National Assembly of the Federal Republic of Nigeria as against, a conduct prohibited under Regulation 8 (a), a subordinate legislation made by the Commission pursuant to its rule making power under the Act. Moreover, it is a trite principle of law that a subsidiary (or subordinate) legislation cannot contradict or over-

¹²⁹ At paragraphs 1132 – 1133.

¹³⁰ It is important to note that France’s national competition regulator (Autorité de la concurrence) in Decision n°05-D-59, *Neuf Telecom v. French Telecom* relied on a similar doctrine in imposing a fine of € 80 million on France Télécom for refusing competitors access to its local loop.

¹³¹ Such as the Nigerian Patent and Designs Act (PDA), Nigerian Copyright Act and Nigerian Trademark Act.

ride the law.¹³² However, where a request for access to network facilities or services made pursuant to Section 101 (1) of the Act, is refused on the basis of for example, a patent right granted under the PDA, it is likely that the Act being a latter statute will prevail over the PDA.¹³³

For the purpose of enforcing this provision, the Commission will not view a failure to supply interconnection within thirty (30) days period as violatory, if the parties are reasonable in trying to conclude an interconnection agreement or other provisioning terms.¹³⁴ However, it should be noted that the Commission is authorised by Regulation 2 (2) (a) of the Interconnection Regulations to intervene on its own initiative, in negotiations on agreements for interconnection where no agreement is concluded between the negotiating parties within six (6) weeks of the commencement of the negotiations. The Commission is of the view that 6 weeks is adequate and reasonable for parties to hold fair negotiations and agree on the terms for interconnection, failure upon which the Commission will then intervene.¹³⁵ The Commission will consider fifty-six (56) days as the maximum threshold period within which licensed operators are required to have completed all negotiations regarding interconnection and get interconnected.¹³⁶

Similar to the competition offence of a refusal to deal, the competition concern of a refusal to supply interconnection or essential facilities is the likelihood that the competing Licensee will be foreclosed from the relevant market thus eliminating effective competition in an aspect of the communications market.¹³⁷

b) 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

Discrimination at its most fundamental is to treat differently or apply dissimilar conditions to equivalent transactions with different parties. Non-discrimination in the provision of communications services seeks to ensure that a Licensee will apply equivalent conditions in equivalent circumstances to other third parties providing

¹³² See, *Akanni v. Odejide* (2004) All FWLR pt. 218 pg. 827 at 853; *Kennedy v. INEC* (2009) 1 N.W.L.R (Pt. 1123).

¹³³ This is based on the principle of statutory interpretation which states that when two statutes, though both are expressed in affirmative language, are contrary in manner, the latter abrogates the former (*leges posteiiores prioues contrarias abrogant*), see *F.R.N v. Osahon & Ors.* (2006) 5 N.W.L.R (Pt. 973) 361.

¹³⁴ *Report of the Public Inquiry on Competition Practices Regulations, supra*, the Commission's response to 5th comment.

¹³⁵ *Report of the Public Inquiry the on Interconnection Regulations, supra*, the Commission's response to 5th comment.

¹³⁶ *Report of the Public Inquiry on Technical Standards For Interconnectivity of Networks, supra*, the Commission's response to comment on S.12.2.

¹³⁷ See generally, ICN Unilateral Conduct Working Group. (2010, April). 'Report on the Analysis of Refusal to Deal with a Rival Under Unilateral Conduct Laws' [WWW document] URL <http://www.internationalcompetitionnetwork.org/uploads/library/doc616.pdf> (visited, 2015, February 25), p. 4.

equivalent services, and to provide services and information to other third parties under the same conditions and of the same quality as it provides for its own services or those of its associates.¹³⁸ The equivalence of transactions would among other things be dependent on physical characteristics of the products supplied therein, their functional use, physical appearance and the extent to which they are interchangeable.¹³⁹ Condition 7.2 (vi) of the DML, Condition 7.2 (vii) of the UASL and Condition 6.2 (vii) of the WWASL among other licenses, also prohibit the holder of the license from discriminating when providing the licensed service.¹⁴⁰ It is interesting to note that these licenses' condition prohibiting the Licensee from discriminating is nearly identical to Article 102 (2) (c) of the TFEU, which constitutes an abuse of a dominant position by a dominant firm. Discrimination in terms of interconnection or a communications service is likely to occur where the requested Licensee offers the same service or similar retail service as the party requesting interconnection or the communications service.¹⁴¹ Discrimination in the context of this provision will include both price discrimination and non-price discrimination.

Generally speaking, a price discrimination occurs where the same product is sold to different customers at different prices that do not reflect the cost of the services.¹⁴² Richard Posner defines price discrimination as "...the practice of selling the same product to different customers at different prices even though the cost of sale is the same to each of them".¹⁴³

The reference to the "*provision of interconnection or other communications services or facilities to competing Licensees*" in this provision appears to contemplate a "primary line" injury, and excludes a "secondary line" injury. A primary line injury (- the injury is done directly to a competitor of the company that differentiates its prices) occurs where the infringer charges different prices directly to its own customers whom it competes with.¹⁴⁴ An example of primary line injury in the context of this provision would be where an MNO charges different rates for interconnecting with (or terminating a call on) its network, to different MNOs it competes with in the market for mobile telecommunications services,¹⁴⁵ thus distorting competition in this market.¹⁴⁶ Primary

¹³⁸ See also, Access Directive, Article 10 (2).

¹³⁹ Robert O'Donoghue, A. Jorge Padilla, *The Law and Economics of Article 82 EC* (Hart Publishing, 2006), p. 563.

¹⁴⁰ The difference between discrimination under Regulation 8 (b) and discrimination in the various license conditions is that in the former, the discrimination is targeted at competing Licensees of the offending Licensee, while in the latter the target of the discrimination also includes customers of the alleged offending Licensee. It is however noted that in some cases a competing Licensee may also be a customer of the offending Licensee.

¹⁴¹ See, Access Notice, paragraph 85.

¹⁴² Armstrong, Mark. (2006, October). 'Price Discrimination' [WWW document] URL <http://else.econ.ucl.ac.uk/papers/uploaded/222.pdf> (visited 2012, April 17), p.1.

¹⁴³ Richard Posner, *Antitrust Law*, Second Edition, (University of Chicago Press, Chicago and London, 2001), pp. 79 - 80.

¹⁴⁴ Damien Geradin, Nicolas Petit 'Price Discrimination under EC Competition Law: The Need for a case-by-case Approach', *GCLC Working Paper 07/05* (2005), p. 9.

¹⁴⁵ This particular conduct is unlikely to occur in view of the fact that interconnection rates are normally set by the Commission.

line injury is a form of predatory pricing.¹⁴⁷ In a secondary line injury (- injury done to competing buyers), competing buyers pay different price for the same goods.¹⁴⁸ Thus, the resulting anti-competitive harm is occasioned to the *disfavoured* competing buyer(s) who will pay the higher price as against the *favoured* competing buyer(s) who pays a lower price.¹⁴⁹ An analysis of price discrimination in this regard will take into consideration, the (downstream) market in which these buyers compete.¹⁵⁰ For example a secondary line injury occurs where the holder of a WWASL that is vertically integrated with a retail service provider (RSP), without justification charges a lower bandwidth connectivity fee to its own vertically integrated RSP, than that charged to other RSPs. By impairing the ability of other RSPs to compete in this market, the requisite injury has been committed.

From a competition law perspective, the analysis of price discrimination is quite complex as it may also constitute other anti-competitive practices such as discounts and rebates, tying, selective price cuts, discriminatory input prices set by vertically-integrated operators, etc which all have different effects on competition.¹⁵¹ The competition concern with price discrimination is that it can be exploited by a dominant firm with significant market power to foreclose competitors or reduce their incentive to compete effectively.¹⁵² In the context of a secondary line injury, price discrimination can be used by a vertically integrated Licensee with market power on the wholesale communications market to raise a downstream rival's cost by charging a higher price in comparison to its own downstream subsidiary (or affiliate).¹⁵³ In its analysis of price discrimination under Article 102 (2) (c) of the TFEU, the ECJ in *British Airways v. Commission*, [2007] E.C.R. I-2331, at paragraph 139 held that applying different commission rates to travel agents according to whether or not they had achieved their individual sales targets by comparison with the reference period, was discriminatory, because the bonus schemes at issue involved the application of different rates of commission to agents who had sold the same number of tickets.

In its *Determination of Dominance in Selected Communications Market in Nigeria, 2013* (the 2013 Dominance Determination), the Commission determined MTN to be dominant in the mobile voice market and directed that it refrain from its on-net/off-net differential pricing practice,¹⁵⁴ that is price discriminating between calls within its

¹⁴⁶ See generally, Pinar Akman 'To Abuse, or not to Abuse: Discrimination between Consumers', *CCP Working Paper 06-18* (November 2006), paragraph C, citing A Jones, B Sufrin, *EC Competition Law* (2nd Edition Oxford University Press New York 2004), pp. 411 – 412.

¹⁴⁷ Herbert Hovenkamp, *Antitrust* (West Publishing Co., 2011), p. 324.

¹⁴⁸ Amy A. Marasco, 'Tracing an Antitrust Injury in Secondary Line Price Discrimination Cases', *50 Fordham Law Review* 909 (1982), p. 925.

¹⁴⁹ Herbert Hovenkamp, (2011), *supra*, pp. 324 - 325.

¹⁵⁰ Damien Geradin, Nicolas Petit, *supra*.

¹⁵¹ *Ibid.*, p. 2.

¹⁵² Armstrong, Mark, *supra*, p. 2.

¹⁵³ ERG (2006, May), *supra*, p. 31.

¹⁵⁴ On-net/off-net differential pricing refers to the practice of an MNO charging subscribers higher prices for making off-net calls (i.e., voice calls originating on its network and terminating on a competitor's network) than on-net calls (i.e., voice calls originating and terminating on its own network).

network (on-net calls) and calls to other mobile networks (off-net calls).¹⁵⁵ Although, the Commission stated that the Direction became necessary in order to promote fair competition, prevent failure in the mobile telecommunications market and improve quality of mobile telecommunications service,¹⁵⁶ nevertheless, the Commission's decision in this regard is consistent with economic opinion in the literature, which have severally concluded¹⁵⁷ that on-net/off-net price differentials have foreclosure effects on smaller operators, as the dominant operator has a commercial incentive to set lower prices for on-net calls than for off-net calls in order to induce a customer churn away from competing networks, further entrenching its dominance.

In October 2014, the Commission reviewed its Direction requiring MTN to collapse its on-net and off-net retail tariff, by approving a 30% differential for MTN's on-net and off-net call retail tariff.¹⁵⁸ This review was the subject matter in *Emerging Markets Telecommunications Services Limited (EMTS) v. Nigerian Communications Commission & MTN* Suit No. FHC/L/CS/1075/15 (unreported), where EMTS contested the Commission's decision in reviewing its Direction to MTN, to collapse its on-net and off-net retail tariff in the 2013 Determination. In that case, EMTS mainly argued that the Commission failed to comply with certain procedural requirements under the Act and Competition Regulations in reviewing its Direction to MTN. One unusual procedural aspect of this case, is that EMTS in seeking to overturn the Commission's decision, did not formulate for the court's determination, the issue of whether MTN's 30% differential for its on-net and off-net retail tariff is indeed anti-competitive, and thus substantially lessens competition, despite alleging¹⁵⁹ that MTN's differentiated on-net and off-net voice tariff is "a misuse of dominant position" in the mobile voice market, and seeking to perpetually injunct MTN on this basis.¹⁶⁰ However, during the pendency of this case, the Commission wrote a letter to MTN directing that it "maintain the status quo of the dominance obligation that is to maintain parity between on-net and off-net tariff charges with immediate effect", which subsequently resulted in the case being dismissed by the trial court on account of MTN's contention that EMTS' claim has become "academic".¹⁶¹

¹⁵⁵ Nigerian Communications Commission (NCC), *Determination of Dominance in Selected Communications Market in Nigeria* (April 25 2013), p. 13.

¹⁵⁶ Nigerian Communications Commission *Summary of the Commission's Compliance Monitoring and Enforcement Activities for Quarter two (2), 2014* (undated), p. 1.

¹⁵⁷ For a discussion on the foreclosure effects of on-net/off-net price differentials see Hoernig, Steffen, 'On-Net and Off-Net Pricing on Asymmetric Telecommunications Networks' *Information Economics and Policy* 19 (2007), 171-188, Calzada, J. & Valletti, T., 'Competition and Entry Deterrence', *The Economic Journal* 118 (2008), 1223-1244, Stennek, J. & Tangerås, T., 'Intense Network Competition', NET Institute Working Paper # 08-36 (2008), Lopez, A. & Rey, P., 'Foreclosing Competition Through Access Charges and Price Discrimination', IDEI Working Paper No. 570 (2009), and Harbord, D. & Pagnozzi, M. 'Network Based Price Discrimination and 'Bill-and-Keep' vs. 'Cost-Based' Regulation of Mobile Termination Rates', *Review of Network Economics* 9 (1) (2010), Article 1.

¹⁵⁸ Festus Akanbi and Emma Okonji, 'Understanding the Spat over MTN's Dominance in GSM Market' *Thisday*, Sunday August 16, 2015, p. 27.

¹⁵⁹ At paragraph 19 of its amended statement in support of its Motion.

¹⁶⁰ Chukwuyere Ebere Izuogu, 'The Anti-competitive Dimension of On-Net/Off-Net Price Differentials', *Businessday*, 14 January, 2016.

¹⁶¹ *Ibid.*

In *Decision n°12-D-24*,¹⁶² following a complaint filed by Bouygues Télécom, the Autorité de la concurrence (France’s national competition regulator) fined Orange France and SFR a total of €183.1 million for implementing excessive rate differentiation practices between on-net calls and off-net calls. In that case, the Autorité established that Orange France and SFR abused the dominant position each of them held in their respective call termination markets (i.e. in the interconnection service they offered other operators by “terminating” calls on their networks). The Autorité described the foreclosure effects of on-net/off-net differential pricing as follows:

“These offerings first of all artificially accentuated the “club” effect, that is, the propensity for close relatives to regroup under the same operator, by encouraging consumers to switch operators and join that of their relatives. These offerings played a great role as this factor was, above price, the main incentive for subscriptions (70% of a subscriber’s consumption is used towards its three favourite interlocutors).

Once the clubs were formed, these offerings “locked” consumers in durably with their operator by significantly raising the exit costs incurred by the subscribers of on net unlimited offerings as well as by their relatives who wish to subscribe to a new offering with a competing operator.

The rate differentiation between “on net” and “off net” calls puts off any operator switch because the subscriber or its relatives would consequently no longer be able to make or receive “unlimited” calls.

This differentiation between “on net” and “off net” calls therefore consequently damaged the fluidity of the retail market by hampering customers’ migration towards another existing operator”.

According to the Autorité, this differentiation between “on-net” and “off-net” calls therefore consequently damaged the fluidity of the retail market by hampering customers’ migration towards another competing operator. Prior to the decision of the Autorité, the European Regulators Group (ERG, now BEREC) had in 2008, concluded in a study that under certain circumstances, on-net/off-net retail price differential would strengthen the market position of larger networks by creating a “calling club” resulting in customer lock-in and foreclosure of smaller MNOs unable to match the on/off-net price differential.¹⁶³

Non-price discrimination is any form of discrimination other than price/tariff discrimination and will include the provision of insufficient network capacity as

¹⁶² Visit http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=418&id_article=2014 for a summary of this case in English.

¹⁶³ ERG (2008, February 28). ‘ERG’s Common Position on symmetry of fixed call termination rates and symmetry of mobile call termination rates’ [WWW document] URL http://ec.europa.eu/danmark/documents/alle_emner/videnskabelig/090507_termineringstaks_ter_holdning_en.pdf (visited, 2015, August 21), p. 97.

compared to the incumbent's own services, discriminatory rationing of network access and transport facilities¹⁶⁴ and the selective carriage of traffic.¹⁶⁵ Also, the restrictions or delays in making network connections, the provision of maintenance or repair services or information about network programming, signaling protocols, technical standards or other facilities necessary for proper interconnection and interoperability, numbering and routing constitutes incidences of non-price discrimination.¹⁶⁶ Non-price discrimination may also relate to the technical configuration of the network and access in relation to the degree of technical sophistication, and number and/or location of connection points.¹⁶⁷

According to the ERG (/BEREC), discrimination on non-price parameters, by a vertically integrated operator can occur as follows;

- *Discriminatory use or withholding of information*, which refers to a discriminatory practice where an operator dominant in the wholesale market, provides its retail division with information it does not provide to other downstream firms, or refuses to supply other information which is necessary to take up the wholesale offer and/or to supply the retail service.¹⁶⁸
- *Delaying tactics*, which is a behaviour where the dominant operator supplies an upstream input at a later point in time, compared its downstream affiliate.¹⁶⁹
- *Bundling/Tying*: In the context of two vertically related markets, an operator dominant in the wholesale market can condition the sale of a necessary upstream input on the sale of other, not necessary products or services and in this way can raise the costs of its downstream rivals.¹⁷⁰
- *Undue requirements*, which are any contractual terms, which require a particular behaviour of the downstream competitor, which is unnecessary for the provision of the upstream product but raises rivals' costs or restricts rivals' sales.¹⁷¹
- *Quality discrimination* by which the dominant firm can either raise rivals' costs or restrict its rivals' sales by degrading the quality of service of the wholesale service supplied to its downstream competitor.¹⁷²
- *Strategic design of product characteristics* which embraces all types of product characteristics like design, compatibility, norms and standards, etc. and can either

¹⁶⁴ Paragraph 3.7 Technical Standards for Interconnectivity of Networks.

¹⁶⁵ Paragraph 4.3 Technical Standards for Interconnectivity of Networks.

¹⁶⁶ Laurent Garzaniti & Matthew O' Regan, editors, *Telecommunications, Broadcasting and the Internet EU Competition Law & Regulation* (London: Thomson Reuters (Legal) Limited, 2010), p. 482.

¹⁶⁷ *Ibid.*

¹⁶⁸ ERG (2006, May), *supra*, p. 30.

¹⁶⁹ *Ibid.*

¹⁷⁰ *Ibid.*

¹⁷¹ *Ibid.*, p. 31.

¹⁷² *Ibid.*

raise rivals' costs or restrict competitors' sales.¹⁷³ The dominant operator may, for example, use standards, which are easy to meet for their own downstream arm, but not for alternative operators, which may have to make additional investments to ensure compatibility or make access/ interconnection technically possible.¹⁷⁴

- *Undue use of information* about competitors may arise when a dominant operator in the wholesale market provides access to a competitor on the retail market and obtains certain information about the customers of the retail undertaking, which it then uses to target its downstream competitors' customers with tailor-made offers.¹⁷⁵

Non-discrimination in granting interconnection is recognised by the Commission as an important regulatory tool¹⁷⁶ mandated by the provision of Section 97 (1) of the Act, which provides that all interconnection agreements between Licensees shall among other things comply with the principles of non-discrimination. In addition, Section 101 (2) of the Act enacts the obligation of network facilities providers and network service providers not to discriminate against other Licensees when providing access to its network, 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”.

By virtue of the foregoing statutory provision, the “first provider” is required to provide access to “another provider”, at a level of technical standard and quality that is at a minimum, indistinguishable from that which the first provider, provides itself. Section 137 (1) of the Act further requires a Licensee to provide another Licensee with a non-discriminatory access to any post, network facilities or right-of-way it owns or controls. Pursuant to Regulation 10 (1) (b) of the Interconnection Regulations, a Licensee determined to be dominant in one or more communications market relating to interconnection is also required to adhere to the principle of non-discrimination with regard to interconnection offered to other licensed telecommunications operators, in particular, it shall apply similar conditions in similar circumstances to interconnected licensed telecommunications operators providing similar services and provide interconnection facilities and information to other licensed telecommunications operators under the same conditions and of the same quality as it provides for its own services or those of the group of companies or partners. In addition, paragraph 4.2 of the

¹⁷³ *Ibid.*

¹⁷⁴ *Ibid.*

¹⁷⁵ *Ibid.*

¹⁷⁶ Engr E.C.A. Ndukwe. (undated). ‘Regulatory measures to promote the growth of mobile subscribers in Africa’ [WWW document] URL https://www.google.com.ng/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CBwQFjAA&url=http%3A%2F%2Fwww.ncc.gov.ng%2Farchive%2Fspeeches_presentation%2FEVC%2527s%2520Presentation%2FEVC%2527S%2520SPEECH%2520to%2520gsm%2520africa%5B1%5D.pdf&ei=3bIBVZ_5CorWUeeihJAC&usq=AFQjCNF92AwYf8OHldzdGFp8qpp7k8CloQ&bv=bv.87920726,d.d24 (visited 2013, July 18), p. 5.

Technical Standards for Interconnectivity of Networks requires that interconnection be set up in such a manner that the terms do not discriminate unduly between operators or between any operators' own networks and services and those of other interconnecting parties. In the context of access to network infrastructure, the obligation not to discriminate prevents vertically integrated firms in the upstream market from unfairly discriminating against their competitors to the advantage of their own downstream operations, thus distorting competition in the downstream market.¹⁷⁷

Unlike the prohibition of discrimination in the various Licenses' conditions where the standard for finding liability is the proof that another party has been placed at a "competitive disadvantage", liability under this provision will be in accordance with the substantial lessening of competition test provided in Regulation 6 of the Competition Regulations, which among other things, will require evidence of the impact of the conduct on competitors,¹⁷⁸ and/or on further market entry.¹⁷⁹ The general concern with price discrimination is that it could possibly result in the foreclosure of the *disfavoured* customer from the market, where the discrimination persists.¹⁸⁰

Under this provision, it is a defence to discrimination if there is an objective justification for the difference in treatment such as discrimination based on differences in the costs of supply, for instance where the infringing Licensee alleges that the costs of the products or services or the customers to which a certain price is charged are not subject to an equivalent transaction.¹⁸¹ The justification of discrimination on the basis of cost of supply was recognised in the case of *United Brands Co and United Brands v. Commission*, [1978] E.C.R. 207, where the ECJ at paragraph 228 stated that the differences in transport costs, taxation, customs duties, the wages of labor force, the conditions of marketing, the differences in the parity of currencies, or even the density of competition could justify price differences.

c) Bundling of communications services, whereby the Licensee in question requires, as a condition of supplying a service to a competing Licensee, that the competing Licensee acquire another service that it does not require

Bundling is a form of tying.¹⁸² In a tying arrangement, the purchaser is required by the seller to simultaneously purchase another product it does not require.¹⁸³ Tying is also

¹⁷⁷ See Chukwuyere Ebere Izuogu, 'Vertical integration, non-price discrimination and NCC proposed broadband open access', *Businessday*, 11 September 2014.

¹⁷⁸ Regulation 6 (b).

¹⁷⁹ Regulation 6 (c).

¹⁸⁰ Armstrong, Mark, *supra*.

¹⁸¹ See *AKZO Chemie BV v. Commission*, [1991] ECR I-3359, at paragraph 120.

¹⁸² Richard Whish, David Bailey, *supra*, p. 689.

¹⁸³ U.S. Department of Justice. (2008). 'Competition and Monopoly: Single-Firm Conduct under Section 2 of the Sherman Act' (Withdrawn) [WWW document] URL <http://www.justice.gov/atr/public/reports/236681.pdf> (visited 2012, September 9), p. 77.

prohibited by Section 91 (4) of the Act,¹⁸⁴ Condition 7.3 (iii) of both the DML and UASL, and Condition 6.3 (iii) of the WWASL,¹⁸⁵ among other licenses. Tying through bundling occurs when a firm sells two or more products together and does not sell one of the products comprised in the bundle as an individual unit.¹⁸⁶ To satisfy the element of this conduct, the competing Licensee must be required by the dominant Licensee to simultaneously purchase another service that it does not require (the bundled service) while purchasing a service from the dominant Licensee (the bundling service).

Under CJEU case law, the analysis of a tying (or a bundling) practice involves a five-stage analysis.¹⁸⁷ The first stage involves ascertaining whether the seller engaging in a tying practice is dominant in the market for the tying product, since it is only a dominant seller that can successfully engage in a tying practice without fear of losing customers who purchase the tying product.¹⁸⁸ In Case COMP/C-3/37.792 *Microsoft*, C(2004) 900, where Microsoft was found guilty of making the availability of their Windows Client PC OS conditional on the simultaneous acquisition of WMP, the EC identified the Windows PC OS in which Microsoft had a market share of around 95% as the dominant tying product.¹⁸⁹ The second stage analysis is a question of whether there exists a second market – the tied market. According to the Court in Case T-86/95 *Compagnie Generale Maritime* [2002] ECR II-1011, at paragraph 159, in order to establish that a tying practice constitutes an abusive conduct, there must be a clear showing that the products or services being tied together are independent from one another – there must be a distinct demand for both of them. The third stage analysis is whether there is a conduct forcing customers to purchase the tied product together with the tying product.¹⁹⁰ The coercion could be contractual,¹⁹¹ factual,¹⁹² through pricing incentive,¹⁹³ or through a combination of those.¹⁹⁴ The fourth stage is a question of whether the tying indeed does

¹⁸⁴ See generally, Chukwuyere Ebere Izuogu, 'Legal assessment of tying practices in Nigeria's telecommunications market', *Businessday*, 11 September 2012, p. 39. The scope of a tying arrangement prohibited in this section is much wider than that prohibited in Regulation 8 (c) of the Competition Regulations, as its target will also include consumers at the retail end of the market in addition to competing licensees. In addition, the illegality of the conduct under Section 91 (4) of the Act cannot be overcome by the substantial lessening of competition test, as the conduct is presumed to be illegal without the requirement to conduct any further test, see Regulation 12 (2) of the Competition Regulations.

¹⁸⁵ In this regard, these license conditions appear to conflict with Regulation 12 (2).

¹⁸⁶ Tirole, Jean. (2004, December 9). 'The Analysis of Tying Cases: A Primer' [WWW document] URL <http://idei.fr/doc/by/tirole/analysis.pdf> (visited 2015, February 27), p. 6.

¹⁸⁷ See also, Maurits Dolmans and Thomas Graf, 'Analysis of Tying under Article 82 EC: The European Commission's *Microsoft* Decision in Perspective' *World Competition*, Vol. 27, No 2 (2004), pp. 225 – 244, at p. 234.

¹⁸⁸ Mira Burri Nenova, *EC Electronic Communications and Competition Law* (London: Cameron May Ltd, 2007), p. 175.

¹⁸⁹ At paragraph 431.

¹⁹⁰ Miguel Rato, Nicolas Petit, 'Abuse of Dominance in Technology-Enabled Markets: Established Standards Reconsidered' *European Competition Journal* (ECJ) Vol. 9 No. 1 (April 2013), pp. 46 – 47.

¹⁹¹ Case T-83/91 *Tetra Pak v. Commission (Tetra Pak II)* [1994] ECR II-755, [1997] 4 CMLR 726.

¹⁹² *Hilti AG v. Commission* (Case T-30/89) [1991] ECR II-1439.

¹⁹³ *Ibid.*

¹⁹⁴ Mira Burri Nenova, *supra*, p. 176.

distorts competition¹⁹⁵ in the tied market. Translated into the context of the Competition Regulations, is a question of whether the tying practice substantially lessens competition. The focus of inquiry here is to what extent the tying practice harms consumers and/or competitors. The fifth and final stage is whether there is an objective and proportionate justification for the coercion.¹⁹⁶ As the Court held in *Case C-333/94 P Tetra Pak International SA v. Commission* [1996] ECR I-5951, at paragraph 37, that “...even where tied sales of two products are in accordance with commercial usage, or there is a natural tie between the two products in question, such sales may still constitute abuse [...] unless they are objectively justified”. Efficiency justification or improvement of quality and safety are some of the reasons given for engaging in a tying practice.¹⁹⁷

In Nigeria's communications market, the Interconnection Regulations requires that interconnection charges set by operators, with special focus on the dominant operators providing interconnection to their telecommunications network, shall be sufficiently unbundled to ensure that an operator requesting interconnection is not required to pay for network elements or facilities not strictly required for the service to be provided.¹⁹⁸ The Interconnection Regulations also requires a “Dominant operator” to submit to the Commission for approval and publish a Reference Interconnection Offer, sufficiently unbundled, giving description of the interconnection offerings broken down into components according to market needs and the associated terms and conditions including tariffs.¹⁹⁹ In addition, a local exchange operator²⁰⁰ is required to provide unbundled network elements (UNEs) and services to an interconnected party if so demanded.²⁰¹ These UNEs shall include; network access lines (local loops and related functions);²⁰² local and tandem switches (including all vertical switching features provided by such switches);²⁰³ inter-exchange transmission facilities;²⁰⁴ network interface devices;²⁰⁵ access to signalling links and signal transfer points;²⁰⁶ signalling and call-related database facilities;²⁰⁷ operations support systems functions;²⁰⁸ operator and directory assistance facilities;²⁰⁹ access to rights of way;²¹⁰ co-location of

¹⁹⁵ *Ibid.*

¹⁹⁶ *Ibid.*, p. 177.

¹⁹⁷ *Ibid.*

¹⁹⁸ Regulation 6 (1) (b).

¹⁹⁹ Regulation 10 (1) (d).

²⁰⁰ A local exchange operator is a service provider licensed to provide telecommunications services within a defined geographical area through a switch or a group of switches, see paragraph 10.1 of the Technical Standards for Interconnectivity of Networks.

²⁰¹ Paragraph 27.2 Technical Standards for Interconnectivity of Networks.

²⁰² *Ibid.*

²⁰³ *Ibid.*

²⁰⁴ *Ibid.*

²⁰⁵ *Ibid.*

²⁰⁶ *Ibid.*

²⁰⁷ *Ibid.*

²⁰⁸ *Ibid.*

²⁰⁹ *Ibid.*

²¹⁰ *Ibid.*

equipment;²¹¹ local number portability;²¹² operator and directory assistance services;²¹³ and operations support systems (OSS) functions.²¹⁴

In the context of telecommunications regulation, mandated unbundled access requires network operators to provision access to selected elements of their networks, to competitors.²¹⁵ The FCC interprets “access” to unbundled element as referring to the means by which requesting operators obtain an element’s functionality in order to provide a telecommunications service,²¹⁶ and “unbundled” in the access, as meaning that incumbent LECs must provide the facility or functionality of a particular element to requesting carriers, separate from the facility or functionality of other elements, for a separate fee.²¹⁷ Mandating unbundled access is a regulatory tool used to prevent an incumbent from bundling the sale of its network elements.²¹⁸ The policy rationale why communications regulators mandate unbundled network access, is to ensure that the competitive portion of a telecommunications network is deregulated, in order to encourage the development of a range of diverse communications services, to be driven by competition.²¹⁹ In Nigeria for example, the Technical Standards for Interconnectivity of Networks mandates access to UNEs to enable the deployment of “enhanced services”²²⁰ such as mobile value-added-services (mVAS).²²¹

An example of a conduct constituting bundling within the meaning of this provision would be where a licensed local exchange operator makes the purchase of a UNE by a competing Licensee conditional on the purchase of a another UNE. The competition concern with tying/bundling arrangements is the possible horizontal foreclosure of competitors from the tied/bundled market whereby the dominant firm is able extract a monopoly profit by attracting more customers in the tied/bundled market.²²² Also, bundling of communications services may increase a downstream rival’s cost, where a

²¹¹ *Ibid.*

²¹² *Ibid.*

²¹³ *Ibid.*

²¹⁴ *Ibid.*

²¹⁵ Christopher S. Yoo and Daniel F. Spulber, *Networks in Telecommunications: Economics and Law*, (New York: Cambridge University Press, 2009) p. 158.

²¹⁶ Implementation proceedings, paragraph 269.

²¹⁷ *Ibid.*, paragraph 268.

²¹⁸ Scott Hempling, *Regulating Public Utility Performance: The Law of Market Structure, Pricing and Jurisdiction* (Chicago, Illinois: ABA Publishing, 2013), p. 201.

²¹⁹ Jerry A. Hausman, Gregory Sidak, ‘Did Mandatory Unbundling Achieve Its Purpose? Empirical Evidence From Five Countries’ *Journal of Competition Law and Economics* 1(1), (2005), pp. 173 – 245, p. 176; Christopher S. Yoo and Daniel F. Spulber, *supra*. See also, the policy argument and summary for *Regulation (EC) No 2887/2000 of the European Parliament and of the Council of 18 December 2000 on unbundled access to the local loop*.

²²⁰ The glossary of the Technical Standards for Interconnectivity defines an “enhanced service” as; “A service offered over common carrier transmission facilities employing computer processing applications to handle the format, content, code, protocol, or similar aspects of the customer’s transmitted information; provide the customer with additional, different, or restructured information; or involve customer interaction with stored information”.

²²¹ See, paragraph 6.2.

²²² DG Competition (2005, December), *supra*, paragraphs 180-181 and 188.

Licensee dominant in an upstream market conditions the sale of an upstream input on the sale of another input sold, to a downstream rival.²²³

So far, it is not clear for the purpose of applying this particular provision, whether the bundled service is a service that the competing Licensee does not require for the provision of its service, or a just service that the competing Licensee does not require from the dominant Licensee. The implication is that in the former scenario, the dominant Licensee's conduct in bundling two separate communications services would not be deemed to result in a substantial lessening of competition within the meaning of the Regulation 8 (c) of the Competition Regulations, if the competing Licensee in the provision of its services requires such bundled services. However, competition authorities from other jurisdictions are more likely to interpret this provision to be consistent with the latter scenario.

d) Offering a competing Licensee more favourable terms or conditions that are not justified by cost differences, if it acquires another service that it does not require

By this conduct, a dominant Licensee supplies a communications service to a competing Licensee at a more favourable term "not justified by cost difference", on the condition that the competing Licensee purchase another communications services.

The conduct regulated in this provision is the same as bundled discounting arrangements prohibited by the competition law of both the EU and US. Bundled discounts are generally discounts that the purchaser receives for buying another product.²²⁴ Condition 7.4 of both the DML and UASL, and Condition 6.4 of the WWASL among other licenses, also prohibit the holder of the license from engaging in bundled discounting arrangements when providing the licensed service.²²⁵ A bundled discounting arrangement differs from a tying arrangement in that the purchaser can still acquire the bundled products separately though at a higher unit price that would have been in the case of a bundled sale.²²⁶ Bundling discounting arrangements involve some element of predatory pricing to the extent the offending firm's pricing falls below some measure of

²²³ ERG (2006, May), *supra*, p. 30.

²²⁴ Herbert Hovenkamp (2011), *supra*, p. 149.

²²⁵ However note should be taken that the subsequent provision to these license conditions allows the Licensee in situations where it supplies as part of the same transaction or interconnected series of transactions two or more items of telecommunications equipment to offer quantity discounts or more favourable terms and conditions in respect of quantity in relation to such equipment, whether those items or equipment are of the same or different descriptions. In this regard, it would seem that this exemption would apply irrespective of whether the substantial lessening of competition test pursuant to Regulation 6 of the Competition Regulations and Condition 7.1 of both the DML and UASL and 6.1 of the WWASL has been applied or not.

²²⁶ ICN Unilateral Conduct Working Group. (no date). 'Questionnaire on Tying and Bundled Discounting' [WWW document] URL <http://www.internationalcompetitionnetwork.org/uploads/questionnaires/uc%20tying/belgium%20old.pdf> (visited, 2015, February 25), p. 1.

its cost or the approved regulatory threshold.²²⁷ The main competition concern with bundled discounting is that under certain condition, an efficient competitor offering the products comprised in the bundle, may be foreclosed because of its inability to match the low prices offered by the offender without incurring a loss.²²⁸ For the competing Licensee, it would be reasonable to conclude that a tying/bundling arrangement would have the effect of raising its cost of doing business.²²⁹

Case laws from the CJEU and US courts show different standards applied when analysing bundling discounting arrangements. While the requirement for a cost based standard is not strictly applied in the EU²³⁰ as exemplified by Case 85/76 *Hoffmann La-Roche & Co. AG v. Commission of the European Communities* where the Court conclusively determined a dominant company to have abused its position of dominance by simply making rebates conditional on purchasing a range of different products.²³¹ Similarly, in the 2014 case of Case T-286/09 *Intel v. European Commission*, the EC found Intel to have abused its dominant position on the market for x86 central processing units (CPUs) by granting to four major computer manufacturers (Dell, Lenovo, HP and NEC), exclusivity rebates on the condition that they purchased from Intel all or almost all of their x86 CPUs. On appeal to the GC, the decision of the EC was upheld, in particular, the GC in relying on *Hoffmann La-Roche & Co. AG v. Commission of the European Communities* (supra) stated at paragraphs 72 - 73 that:

“According to settled caselaw, an undertaking which is in a dominant position on a market and ties purchasers – even if it does so at their request – by an obligation or promise on their part to obtain all or most of their requirements exclusively from that undertaking abuses its dominant position within the meaning of Article [102 TFEU], whether the obligation in question is stipulated without further qualification or whether it is undertaken in consideration of the grant of a rebate.

The same applies where that undertaking, without tying the purchasers by a formal obligation, applies, either under the terms of agreements concluded with these purchasers or unilaterally, a system of loyalty rebates, that is to say, discounts conditional on the customer’s obtaining – whether the quantity of its purchases is large or small – all or most of its requirements from the undertaking in a dominant position”.

²²⁷ Herbert Hovenkamp, Erik Hovenkamp, ‘Complex Bundled Discounts and Antitrust Policy’ *Buffalo Law Review*, Vol. 57, 1227 – 1266 at p. 1229. For further discussion on predatory pricing practices, see below.

²²⁸ Patrick Greenlee, David Reitman, and David S. Sibley, ‘An Antitrust Analysis of Bundled Loyalty Discounts’, *EAG 04-13* (October 2004), p. 5, DG Competition, *supra*, paragraph 189. See Case T-203/01 *Michelin v. Commission* [2003] ECR II-4071, paragraph 100, Case T-57/01 *Solvay v. Commission* [2009] ECR II-4621.

²²⁹ Tying/bundling practices as discussed in the preceding head would also have a similar effect on a competing Licensee if it were the target.

²³⁰ However, the EC is of the view that bundling discounts is unlikely to foreclose competition unless it is predatory (See Laurent Garzaniti & Matthew O’ Regan, *supra*, p. 477).

²³¹ At paragraph 89.

The US courts unlike the CJEU have not adopted a uniform cost based standard in determining whether a bundling discounting arrangement is prohibited under Section 2 of the Sherman Act.²³² In *Ortho Diagnostic Systems, Inc. v. Abbott Laboratories, Inc.* 920 F. Supp. 455, 458 (S.D.N.Y. 1996), where the Defendant Abbott's conduct of bundling discounts for five different blood screening tests was challenged. The Court in analysing Abbott's conduct explained that a Plaintiff in order to succeed in a Section 2 (of the Sherman Act) claim "*must allege and prove either that (a) the monopolist has priced below its average variable cost or (b) the plaintiff is at least as efficient a producer of the competitive product as the defendant, but that the defendant's pricing makes it unprofitable for the plaintiff to continue to produce*" the product.²³³

The standard applied by this court is different from the standard applied by the court in *LePage's Inc. v. 3M* 324 F.3d 141 (3d Cir. 2003). In LePage's case, 3M was sued by LePage's on the basis that 3M's bundled rebates and other discount and incentive programs harmed competition in the market for the sale of transparent tape. The jury in finding 3M's conduct unlawful under Section 2 of the Sherman Act dispensed with the need for LePage's to prove either it or another efficient competition could not meet the discount offered by 3M, without pricing below cost.²³⁴ The Court finally concluded that 3M's conduct "*has made it very difficult or impossible for competitors to engage in fair competition*".²³⁵

Based on the use of the phrase "not justified by cost difference" in this provision, it is more likely than not, that the Commission will apply a cost-based standard to conclusively determine that a Licensee's conduct of bundling discounting is unlawful.

e) *Pre-emptively acquiring or securing scarce facilities or resources, including rights of way, required by another Licensee for the operation of its business, with the effect of denying the use of the facilities or resources to the other service provider*

According to the Commission, the acquisition of scarce resources that are necessary for the Licensee's operations will not infringe this provision, rather it is the element of the pre-emption that is objectionable and is thus an anti-competitive conduct.²³⁶

The pre-emptive acquisition of scarce resources occurred in Case AT.39727 – CEZ Commission Decision of 10/04/2013, where the EC conducted investigation into whether CEZ's alleged conduct of making pre-emptive reservation in the electricity transmission network was an abuse of its dominant position in the market for generation and wholesale supply of electricity in the Czech Republic. In assessing CEZ's conduct, the EC was of the view that CEZ's strategy for pre-emptive reservation of capacities in the Czech electricity transmission network exhausted all the available capacity which

²³² U.S. Department of Justice. (2008), *supra*, p. 92.

²³³ At paragraphs 469 – 470.

²³⁴ U.S. Department of Justice. (2008), *supra*, p. 94.

²³⁵ Paragraph 168.

²³⁶ *Report of the Public Inquiry on Competition Practices Regulations, supra*, the Commission's response to 12th comment.

could have been utilised by CEZ's competitors,²³⁷ thus denying access of an essential input to new entrants in this market, as the sole transmission system operator refused to connect them as a result of this insufficient capacity.²³⁸ In finding CEZ's conduct to have distorted competition in the relevant market, the EC concluded at paragraph 33 that:

“CEZ prevented, or at the very least considerably delayed, the entry of a new competitor into the market by making a potentially pre-emptive reservation in the electricity transmission network with the aim of depriving other undertakings of the means of competing and, ultimately, of preventing them from entering the market”.

In this regard, the pre-emptive acquisition of scarce resources in the communications sector, including but not limited to frequency spectrum, numbers and electronic addresses²³⁹ will likely discourage potential competitors from entering a market or raise their cost of doing business in that market.

f) Supplying communications services, at prices below long run average incremental costs or such other cost standard, as is adopted by the Commission

This provision regulates predatory pricing practices.²⁴⁰ Condition 7.2 (iii) of the UASL and Condition 6.2 (iii) of the WWASL among other licenses, also prohibit predatory pricing. Predatory pricing occurs where a firm sells its products below its cost of production over a sustained period, in order to make it unprofitable for competitors to remain in the market or reduce their incentive to compete effectively in that market.²⁴¹ In assessing whether a dominant Licensee has engaged (or is engaging) in a predatory pricing practice, the Commission will consider the pricing of a communications service below long run average incremental costs (LRAIC) as presumptively predatory.²⁴² Thus, a pricing in Nigeria's communications sector is deemed predatory and will be challenged by the Commission, if it is below the LRAIC.²⁴³ The LRAIC costing methodology is a

²³⁷ At paragraph 26.

²³⁸ At paragraph 31.

²³⁹ See Section 1 (i) of the Act for the types of scarce resources mentioned therein.

²⁴⁰ *Report of the Public Inquiry on Competition Practices Regulations, supra*, the Commission's response to 13th comment.

²⁴¹ DG Competition (2005, December), *supra*, paragraph 93; Scott Hempling, *supra*, p.197.

²⁴² *Report of the Public Inquiry on Competition Practices Regulations, supra*.

²⁴³ However, there is the general concern that LRAIC may not properly identify predatory pricing practices in industries such as telecommunications with relatively high sunk costs (See, The Unilateral Conduct Working Group. (2012, April) 'Unilateral Conduct Workbook Chapter 4: Predatory Pricing Analysis' [WWW document] URL <http://www.internationalcompetitionnetwork.org/uploads/library/doc828.pdf> (visited 2013, January 18), pp. 26 – 27; Richard Whish, David Bailey, *supra*, 747). In such cases, the pricing practice would be consistent with legitimate economic behaviour, and may require the Commission to prove the intention of the alleged offender to eliminate competition in order to conclude that the pricing is predatory (see also, the Unilateral Conduct Working Group, *supra*, and OECD Report on Predatory Pricing (1989) at <http://www.oecd.org/competition/abuse/2375661.pdf>, p. 7)

forward-looking long run with increment as the total service.²⁴⁴ The LRAIC includes all the costs a company incurs in the production of a product or the fixed costs specific to the service concerned: "service specific fixed costs".²⁴⁵ The EC also adopts the LRAIC costing methodology when setting interconnection charges.²⁴⁶

The Commission has indicated that it may consult with stakeholders, prior to adopting any cost model for assessing predatory pricing.²⁴⁷ As at the time of this writing, no such specific consultation has held.²⁴⁸ However, the Commission in exercising its power to publish clear and appropriate studies and standards for any cost analysis required to support the development of equitable interconnection charges under the National Telecommunications Policy 2000, after extensive consultation with stakeholders in its 2013 Voice Interconnection Rates determined that:²⁴⁹

- a) The Termination Rates for voice services provided by new entrants²⁵⁰ and small operators²⁵¹ in Nigeria irrespective of the originating network shall be:
 - i. N6.40 (Six Naira Forty Kobo) from 1st April, 2013;
 - ii. N5.20 (Five Naira Twenty Kobo) from 1st April, 2014; and
 - iii. N3.90 (Three Naira Ninety Kobo) from 1st April, 2015.

- b) The Termination Rates for voice services provided by other operators in Nigeria irrespective of the originating network shall be:
 - i. N4.90 (Four Naira Ninety Kobo) from 1st April, 2013;
 - ii. N4.40 (Four Naira Forty Kobo) from 1st April, 2014; and
 - iii. N3.90 (Three Naira Ninety Kobo) from 1st April, 2015.

In arriving at this determination, the Commission used a hybrid-costing model whereby the modelled network is based on a scorched node approach and takes the actual and planned coverage of a typical operator and the specific factors of Nigeria into account.²⁵² The Determination took effect from 1st April 2013 and remains valid and binding on Licensees for three years or until further reviewed by the Commission. However, the

²⁴⁴ Intven, Hank, editor, *Telecommunications Regulation Handbook* (Washington, The World Bank, 2000), p. 3.26.

²⁴⁵ *Ibid.*

²⁴⁶ *Ibid.*

²⁴⁷ *Report of the Public Inquiry on Competition Practices Regulations, supra.*

²⁴⁸ However, in March 2016, the Commission in preventing price related abuses in the wholesale leased line and transmission capacity market in the telecommunications sector, issued a policy on the determination of cost based pricing of fixed transmission services for operators in Nigeria.

²⁴⁹ At p. 12.

²⁵⁰ New entrant is defined as newly licensed operator entering an existing or new market within 0 to 3 years.

²⁵¹ Small operator is defined, for the purpose of this Determination, as an existing operator with a market share of 0 – 7.5% in terms of subscriber base.

²⁵² Page 5.

Commission on August 11, 2015 approved the removal of retail floor price for voice and data services for small operators.²⁵³

In condemning predatory pricing practices, the Commission had, in November 2012 issued a press release directing that all promotions and lotteries operated by certain telecommunications operators be stopped forthwith because among other things, the on-net calls offered by some of these operators were at tariffs below the prevailing interconnect rates thereby introducing anti-competitive practices and behaviour.²⁵⁴ The operators affected by this direction were Globacom, MTN, Intercellular Nigeria Plc, Visafone Communications, Etisalat, Airtel Networks and Multilinks.²⁵⁵

Also, in 2014, the Commission carried out an investigation and found MTN to have abused its position of dominance in the mobile voice market by charging subscribers on its Ipulse plan, a tariff below the approved mobile termination rate (MTR) of N4.40.²⁵⁶ As a result of which, the Commission commenced enforcement proceedings against MTN pursuant to its powers under the Act and the Nigerian Communications (Enforcement Processes, Etc.) Regulations 2005,²⁵⁷ and subsequently fined MTN in the sum of N5, 000,000:00 (five million Naira) for non-compliance with the MTR regarding its I Pulse tariff plan.²⁵⁸ In this circumstance, it is reasonable to assume that any pricing of voice termination rate below the Commission approved rate would in addition to being a clear breach of the Commission's Direction, may also be deemed predatory by the Commission as the offending Licensee occupies a dominant position in the market for terminating a voice call on its mobile network.

In regulating predatory pricing practices, it is not clear whether the Commission will consider as proof of a predatory pricing conduct, the fact the Licensee alleged to be engaged in predatory pricing has an objectively reasonable expectation of recouping its losses arising from its predatory pricing practice.

²⁵³ Nigerian Communications Commission, *Public Notice: Waiver for Small Operators and Non-Profit Organisations*, p. 1.

²⁵⁴ See Nigerian Communications Commission (NCC) press release at http://www.ncc.gov.ng/index.php?option=com_content&view=article&id=1105:ban-of-all-promotions-and-lotteries-by-telecommunications-operators&catid=73:cat-web-publicnotices&Itemid=92 (visited 2012, November 27). It is noted that each of these operators have market power in the market for terminating a mobile call on their network, and were thus abusing their (individual) market power in this market by engaging in predatory pricing practices. However, the Commission did not state how it arrived at the conclusion that these tariffs were anti-competitive or substantially lessened competition.

²⁵⁵ NCC press release, *supra*.

²⁵⁶ Nigerian Communications Commission (2014). 'Summary of the Commission's Compliance Monitoring and Enforcement Activities for Quarter Four (4), 2014' [WWW document] URL http://www.ncc.gov.ng/index.php?option=com_docman&task=doc_download&gid=554&Itemid= (visited 2015, June 26), p. 2.

²⁵⁷ *Ibid.*

²⁵⁸ Nigerian Communications Commission (2014). 'Summary of the Commission's Compliance Monitoring and Enforcement Activities for Quarter 2 (2), 2015' [WWW document] URL http://www.ncc.gov.ng/index.php?option=com_content&view=category&id=66&Itemid=80 (visited 2015, October 6), p. 2.

For instance, in C-202/07 P- *France Télécom v. Commission*, the ECJ at paragraph 113 upheld the CFI's decision that “*demonstrating that it is possible to recoup losses is not a necessary precondition for a finding of predatory pricing*”. This case is contrasted with the Privy Council case of *Carlet Holt Harvey Building Products Group Ltd v. The Commerce Commission* [2004] UKPC 37, where the Privy Council at paragraph 67 held that: “*It is the ability to recoup losses because its price-cutting has removed competition and allows it to charge supra-competitive prices that harms competition*”, and also *Brooke Group Limited v. Brown & Williamson Tobacco Co.* 509 US 209, 113 S.Ct. 2578 (1993), where the US Supreme Court held at paragraph 26 that a Plaintiff seeking to establish injury resulting from an unlawful predatory pricing must in addition to proving that the prices complained of are below an appropriate measure of its rival's costs, must also demonstrate “*that the [Defendant] competitor had a reasonable prospect, or, under [Section] 2 of the Sherman Act, a dangerous probability, of recouping its investment in below cost prices*”.

The competition concern of predatory pricing practices is their potential to harm consumers when the predator charges supra-competitive prices in order to recover losses arising from its predatory pricing practice and/or their potential to exclude rivals who cannot competitively match the predator's price, from the relevant market.²⁵⁹

g) Using revenues or the allocation of costs from one communications service to cross-subsidize another communications service, except where such cross subsidy is specifically approved by the Commission including, approval of tariffs or charges for the relevant communications services

In accordance with this provision, cross-subsidisation occurs when a Licensee uses the revenues it earns (or allocates cost) from one activity to cover losses made in another activity.²⁶⁰ Cross-subsidisation is also prohibited by Condition 6 of both the DML and UASL, and Condition 5 of the WWASL²⁶¹ among other licenses. The intent of this provision is to bar a Licensee from subsidising competitive activities through non-competitive sources, unless the Commission approves such cross- subsidisation. Where a dominant Licensee cross-subsidises the activity it faces competition, with revenue from activities in which it faces little or no competition, it would be in a position to offer cheaper prices (or better terms and conditions) than its competitors in the competitive market, thereby foreclosing existing competitors, or discouraging new entrants from entering this market, as a result of its unfair use monopoly revenue earned in one market.²⁶²

²⁵⁹ The Unilateral Conduct Working Group, *supra*, pp. 3 and 14.

²⁶⁰ For a detailed analysis of the concept of cross-subsidisation, see Leigh Hancker and José Lius Buendia Sierra, ‘Cross-subsidisation and EC Law’, 35 *C.M.L.Rev.* 901, (1998), and G. Abbamonte, ‘Cross-subsidization and Community Competition Rules: Efficient Pricing Versus Equity’, *E.L.Rev.* 414, (1998).

²⁶¹ These license conditions apply irrespective of whether the holder of the license occupies a dominant position in the relevant market or not.

²⁶² Laurent Garzaniti & Matthew O’ Regan, *supra*, pp. 473 – 474.

For instance, pursuant to Condition 6.1 of the DML, the Licensee shall ensure that his business under this License is not unfairly cross-subsidised from any other source, except in cases where the Licensee is under an obligation to provide service at a place in an area in which the demand or the prospective demand for the service is not sufficient, having regard to the revenue likely to be earned from the provision of the service in the area, to meet all the costs reasonably to be incurred by the Licensee in providing the service there, including;

- i. the cost of equipment necessary for the provision of the service there;
- ii. the cost of installing, maintaining and operating such equipment for the purpose of providing service there, and
- iii. the cost of the trained manpower necessary to provide the service there; in which case prior approval shall be obtained from the Commission.

Where it appears that the Licensee's business is unfairly cross-subsidised from any other source whatsoever, the Commission is authorised to take such steps as it deems necessary to remedy the situation.²⁶³ For the purposes of determining cross-subsidy, the Licensee shall record at full cost in its accounting records any material transfer between it and any other member of the Licensee's Group or any other source whatsoever.²⁶⁴

Cross-subsidisation could take various forms other than cash grant or direct funding.²⁶⁵ In Case C39/94 *Syndicat français de l'Express international (SFEI) and others v. La Poste and others* European Court reports 1996 Page I03547, the Court concluded that various forms of commercial intervention to mitigate the charges of a firm such as the provision of logistical and commercial assistance, the supply of goods or services on preferential terms or at a cost substantially lower than the market price constitutes subsidies in so far as the recipient firm receives an economic advantage which would not have been obtained under normal market conditions.²⁶⁶

Cross-subsidisation under this provision is illegal unless approved by the Commission. The competition concern of cross-subsidisation is that the dominant firm is able to restrain competition in the market in which it subsidises through a strategy of either predatory pricing or margin squeeze.²⁶⁷ To prevent cross-subsidisation, competition authorities will normally impose a price floor, and/or mandate accounting separation of the costs of the firm's competitive and non-competitive products.²⁶⁸

²⁶³ Condition 6.2 DML.

²⁶⁴ Condition 6.3 DML.

²⁶⁵ See also Condition 6.3 (a) DML.

²⁶⁶ See generally paragraphs 58 – 62.

²⁶⁷ Laurent Garzaniti & Matthew O' Regan, *supra*, pp. 474 – 475.

²⁶⁸ infoDev, ITU (undated) 'ICT Regulation Toolkit' [WWW document] URL <http://www.ictregulationtoolkit.org/2> (visited 2015, February 27), 2. Competition and Price, p. 30.

h) Failing to comply with interconnection or facilities access obligations, including the Telecommunications Networks Interconnection Regulations 2007, any other interconnection or access terms specified or approved by the Commission, or any interconnection or access related decisions, directions or guidelines of the Commission

See the discussion in (a) above. In addition, the Commission has indicated that complaints relating to access to tower sites/base stations can be quickly remedied under the Communications Act, the Interconnection regulations and the Guidelines on Collocation and Infrastructure Sharing, in the event that market force is unable to resolve these complaints.²⁶⁹

i) Performing any of the following actions, where such actions have the effect of impeding or preventing a competing Licensee's entry into, or expansion in, a communications market

- i. deliberately reducing the margin of profit available to a competing Licensee that requires wholesale communications services from the Licensee in question, by increasing the prices for the wholesale communications services required by that competing Licensee or decreasing the prices of communications services in retail markets where they compete, or both.**

The conduct regulated under this provision is a margin squeeze²⁷⁰ whereby a vertically integrated upstream Licensee, supplies wholesale communications services to its customers, with whom it competes with on the retail market.²⁷¹ In a margin squeeze, a Licensee with market power in a wholesale communications market can "squeeze" customers with whom it competes with in the retail communications market, by charging an excessive price for the wholesale communications service, or a predatory price for its own retail communications service, or a combination of both.²⁷² A price is excessive when it is set significantly above the competitive level.²⁷³ While the Commission is yet to set out the particular standard for assessing whether or not a price is excessive in Nigeria's communications market, neither is the author aware of any decision from a Nigerian court that has formulated the particular legal test for excessive pricing, it is however pertinent to note that in the context of EU competition law, a price is "excessive" if it bears no reasonable relationship to the economic value of the goods or

²⁶⁹ Nigerian Communications Commission (NCC) (2010), *supra*, pp. 32 - 33.

²⁷⁰ Referred to as price squeeze in the US. For a list of relevant cases in the US, see in particular *AT&T v. Iowa Utilities Board*, 525 U.S. 366 (1999); *Cavad Communications v. Bell Atlantic Corp.*, 398 F.3d 666 (D.C. Cir 2005).

²⁷¹ See, Kathryn McMahon, 'The Regulation of a Margin Squeeze in the European Union and the Intersection of Competition Law and Sector-Specific Regulation', *The Competition Law Review*, Volume 10 Issue 2, (December 2014), pp 167-204, pp. 167 - 168; Charlotte A. Eijberts, 'The Margin Squeeze in the EU Telecommunications Sector, No Changes Thus Far', *International Journal of Communications Law and Policy*, Issue: 14 (2012), p. 3.

²⁷² See, *Ibid.*

²⁷³ Organisation for Economic Co-operation and Development, *Glossary of Industrial Organisation Economics and Competition Law*, paragraph 80.

services provided.²⁷⁴ As explained above, a price is predatory if set below the LRAIC or some other cost standard that is adopted by the Commission. The anti-competitive effect or the harm in a margin squeeze is that the competing Licensee is prevented from entering or expanding in the retail communications market (*foreclosure*).

In the EU, whilst a margin squeeze is not expressly prohibited, however the ECJ in Case C-52/09 *Konkurrensverket v. TeliaSonera Sverige AB* [2011] ECR I – 527 held that a margin squeeze will be caught by Article 102 (a) of the TFEU which expressly prohibits a dominant undertaking from directly or indirectly imposing unfair prices. In explaining the occurrence of a margin squeeze within the meaning of Article 102 (a) of the TFEU, it is pertinent to note that the ECJ in that case made clear that it is not necessary to establish that the wholesale prices and the retail prices “*are in themselves abusive on account of their excessive or predatory nature*”. According to the ECJ, for a conduct to constitute an abusive margin squeeze, there must exist a spread between the price for the wholesale service and the price for the retail service, and the spread is not sufficient to cover the specific cost which the dominant undertaking must incur to gain access to the retail market.²⁷⁵ Thus, a margin squeeze will leverage market power into the downstream market,²⁷⁶ thereby distorting competition in that market.

Although Geradin and O’Donoghue²⁷⁷ had earlier argued that for a finding to be made that a margin squeeze has occurred, the following cumulative conditions must be satisfied. Firstly, a margin squeeze can only be committed where the infringing firm is vertically integrated with a downstream firm.²⁷⁸ Secondly, the input supplied by the upstream firm must be an essential input required from only the upstream supplier for competition downstream.²⁷⁹ Thirdly, the upstream input supplied by the upstream firm must constitute a significant part of the cost borne in the downstream operations.²⁸⁰ Fourthly, an analysis undertaken to determine that the downstream operations of a competitor is uneconomic as a result of the margin squeeze, *i.e.*, either loss making or insufficient to provide a “reasonable profit”.²⁸¹ Fifthly, an assessment to determine

²⁷⁴ See, Case 26/75, *General Motors v. Commission* [1975] E.C.R. 1367; Case 226/84 *British Leyland v. Commission* [1986] E.C.R. 3263.

²⁷⁵ *Konkurrensverket v. TeliaSonera Sverige AB* (*supra*).

²⁷⁶ P. Crocioni, C. Veljanovski, ‘Price Squeeze, Foreclosure and Competition Law, Principles and Guidelines’ *Journal of Network Industries*, Volume 4 (2003) No. 1, p. 39.

²⁷⁷ Damien Geradin, Robert O’Donoghue ‘The Concurrent Application of Competition Law and Regulation: the Case of Margin Squeeze Abuses in the Telecommunications Sector’ *GCLC Working Paper 04/05* (2005), p. 6.

²⁷⁸ *Ibid.*, p. 5 – 6. See also, Laurent Garzaniti & Matthew O’ Regan, *supra*, p. 467.

²⁷⁹ Damien Geradin, Robert O’Donoghue, *supra*, p. 7. Or the upstream supplier enjoys a lower cost of production compared to other producers of the input (*See* ABA Section of Antitrust Law, *supra*, p. 36).

²⁸⁰ Damien Geradin, Robert O’Donoghue, *supra*.

²⁸¹ *Ibid.* This requirement is consistent with the phrase “deliberately reducing the margin of profit available to a competing Licensee” as used in Regulation 8 (i) (i). See also, *Wanadoo España v. Telefónica* (*supra*), where the EC at paragraph 311 stated that:

“A margin squeeze can be demonstrated by showing that the dominant company’s own downstream operations could not trade profitably on the basis of the upstream price charged to its competitors by the upstream operating arm of the dominant company (‘equally efficient competitor’ test). A margin squeeze can also be demonstrated by showing that the margin between the price charged to competitors on the upstream market for access

whether there is any objective justification for the margin squeeze other than to foreclose competitors from the downstream market.²⁸² Sixthly and finally, the requirement that the margin squeeze does distort competition in the downstream market after taking into consideration the length of its occurrence, the harm suffered by downstream competitors that results in consumer harm in the form of higher prices and/or reduced choices.²⁸³

In *Deutsche Telekom* OJ [2003] L 263/9, Deutsche Telekom (DT) held a dominant position in the market for local loop (the portion of a telecommunications network that connects a customer's premises to the local switching point), from which it provided retail services to its own retail customers and sold wholesale capacity to operators also providing retail services. The EC held that DT's conduct of charging of retail prices, which were less than its wholesale prices, constituted an abusive margin squeeze.²⁸⁴ This decision on appeal was upheld by both the GC²⁸⁵ and ECJ.²⁸⁶

Another illustration of margin squeeze is *Wanadoo España v. Telefónica* (supra) where Telefónica was the dominant operator in the national and regional wholesale broadband access market. In that case, the margin between Telefónica's retail prices and the price for wholesale access at regional level, on the one hand, and the margin between the retail prices and the price for wholesale access at national level, on the other hand, was insufficient to cover the costs that an operator as efficient as Telefónica would have to incur to provide retail broadband access.

The EC found Telefónica's behaviour constitutes an abuse of its dominant position by unfair pricing in the form of a margin squeeze on the basis that its retail price were so low that an equally efficient operator would be unable to cover its costs of operations, and were either forced to exit the market or constrained in their ability to expand.²⁸⁷ The EC found the immediate harm to consumers to be significant in that the retail market for broadband services would have been likely to have witnessed more vigorous competition and would have delivered greater benefits to consumers in the form of lower prices, increased choice and innovation.²⁸⁸ The EC also found the margin squeeze to have had concrete foreclosure effects in the retail market and a detrimental impact for end users.²⁸⁹

and the price which the downstream arm of the dominant operator charges in the downstream market is insufficient to allow a reasonably efficient service provider in the downstream market to obtain a normal profit ("hypothetical reasonably efficient competitor test")".

²⁸² Damien Geradin, Robert O'Donoghue, *supra*, p. 8. See also *Wanadoo España v. Telefónica* (supra), paragraphs 641 – 664.

²⁸³ Damien Geradin, Robert O'Donoghue, *supra*. Under the Competition Regulations, the effect of a margin squeeze is by virtue of the introductory part of Regulation 8 (i). As a general rule, the assessment should consider prices and cost of the offending firm on its downstream operations, or the price and costs of its competitors in the downstream market, see *Konkurrensverket v TeliaSonera Sverige AB* (supra) paragraph 77.

²⁸⁴ At paragraphs 152 – 153.

²⁸⁵ Case T-271/03 *Deutsche Telekom AG v. Commission* [2008] ECR II – 47.

²⁸⁶ Case C- 280/08 P *Deutsche Telekom AG v. Commission* [2010] ECR I – 000.

²⁸⁷ At paragraph 615.

²⁸⁸ At paragraphs 556 – 557.

²⁸⁹ At paragraphs 564 – 566.

The Commission in its 2013 Dominance Determination stated that some smaller operators expressed concerns that bigger operators with presence in both the wholesale upstream and retail markets, have the incentive to “squeeze” the margins of their retail competitors who are also their customers,²⁹⁰ as a result of which the Commission imposed *ex ante* regulatory obligations of adhering to a pre-determined price cap for wholesale services and price floor for retail services and accounting separation, on MTN and Glo who collectively occupied a position of dominance on the wholesale-leased line & transmission capacity market.²⁹¹ In addition, in March 2016, the Commission in an effort to forestall abusive pricing practices, including the excessive pricing of wholesale transmission links in the wholesale-leased line and transmission capacity market issued the *Determination of Cost Based pricing of Fixed Transmission Services in Nigeria*, whereby the pricing of wholesale transmission services is subject to specified caps. In the EU, the EC is concerned that as a result of a margin squeeze, an “equally efficient competitor”²⁹² may be eliminated or foreclosed from the market.²⁹³

As with cross-subsidisation, the upstream monopolist will support the loss making operations of its downstream service with monopoly profits earned in its upstream operations.²⁹⁴ In this regard, the same principle for assessing a predatory pricing practice may also be applied in assessing a margin squeeze.²⁹⁵

ii. requiring or inducing a supplier to refrain from selling to a competing Licensee²⁹⁶

A dominant Licensee who requires or induces another supplier to refrain from selling to another competing Licensee would be deemed to have contravened this provision. This conduct suggests that the dominant Licensee exercises market power as a monopsonist,²⁹⁷ in order to be able to compel the supplier, to act in such a manner, or it involves some form of tying (or exclusive dealing) arrangement between a dominant buyer who is a Licensee, and the supplier.²⁹⁸

²⁹⁰ NCC, 2013, p. 8.

²⁹¹ *Ibid.*, pp. 13 - 14.

²⁹² The “*as efficient*” competitor is a hypothetical competitor having the same costs as the dominant company (see DG Competition, *supra*, paragraph 63).

²⁹³ See, Organisation for Economic Co-operation and Development (OECD). (2009, October 29). ‘Working Party No. 2 on Competition and Regulation Margin Squeeze – European Commission DAF/COMP/WP2/WD(2009)32’ [WWW document] URL <http://ec.europa.eu/competition/international/multilateral/marginsqueeze.pdf> (visited 2015, March 10), p. 2.

²⁹⁴ Laurent Garzaniti & Matthew O’ Regan, *supra*, p. 468.

²⁹⁵ ABA Section of Antitrust Law, *supra*, p. 36.

²⁹⁶ A similar provision is provided in the 78 (1) (h) of the Competition Act of Canada (C-34). This provision states “*requiring or inducing a supplier to sell only or primarily to certain customers, or to refrain from selling to a competitor, with the object of preventing a competitor’s entry into, or expansion in, a market*” is an abuse of a dominant position.

²⁹⁷ See, Chapter 6 for an explanation of the concept of monopsony.

²⁹⁸ See for instance the Canadian case of *Canada (Director of Investigation and Research) v. The D&B Companies of Canada Ltd.* (1995), 64 C.P.R. (3d) 216 (Comp. Trib.) brought under Section 78 of C-34, where Nielsen was the exclusive buyer of scanner-based data from retailers. In that case, retailers agreed not to sell scanner-based data to any other buyer other than Nielsen, which, in combination with a number of other factors, foreclosed entrants from participating in

However, it is unclear from this provision whether the supplier required by the dominant Licensee to refrain from supplying to the competing Licensee is also a Licensee within the meaning of the Communications Act. If this provision contemplates a supplier in the literary sense of the word, then it may become necessary for the Commission to clarify the nature of the product or service supplied in order to render its non-supply to a Licensee, upon the request of a dominant Licensee as distorting of competition.

iii. adopting technical specifications for networks or systems to deliberately prevent interconnection or interoperability with a network or system of a competing Licensee

Licensed telecommunications operators are required by the Technical Standards for Interconnectivity of Networks to employ open network provisioning (ONP) or open network architecture (ONA) in their network rollout plan, in order to provide non-discriminatory access to services furnished by the local exchange providers to all interconnected parties.²⁹⁹ Thus, the adoption of technical standards contrary to this requirement would be deemed a breach of this provision. In addition, the intent to “*deliberately prevent interconnection or interoperability with a network*” is likely to achieve the same effect as the case of a straightforward refusal/failure to supply interconnection,³⁰⁰ which has been discussed above.

iv. failing to make available to competing Licensees on a timely basis, technical specifications, information about essential facilities, or other commercially relevant information which is required by such competing Licensees to provide communications services and which is not available from other sources

Delaying in provisioning interconnection can also amount to a (constructive) refusal to interconnect, which in turn will be a breach of this provision.³⁰¹ In addition, an identical provision is contained in the World Trade Organisation (WTO) Telecommunications Reference Paper. The WTO Telecommunications Reference Paper contains additional specific commitments undertaken by several national governments including Nigeria

the scanner-based tracking services market. The Canadian Competition Tribunal held the conduct to have substantially lessened competition in the relevant market.

²⁹⁹ Paragraph 6.2.

³⁰⁰ This is akin to the competition law concept of “constructive refusal to deal” which under certain circumstance will constitute a straightforward refusal to deal, see generally Note by the European Commission (2007, January 4) ‘Roundtable on Refusals to Deal’ [WWW document] URL

http://ec.europa.eu/competition/international/multilateral/2007_oct_refusals_to_deal.pdf (visited 2015, January 12), paragraph 2.4.

³⁰¹ DG Competition (2005, December), *supra*, paragraph 225; See, *Communication from the Commission - Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings* OJ 2009, C-45/7, paragraph 79 which concludes that delaying in dealing with a competitor also constitutes a refusal to deal/supply.

pursuant to Article XVIII of the General Agreement on Trade in Services (GATS).³⁰²

These commitments are regulatory principles designed to apply in the telecommunications sector of the participating governments.³⁰³ The main thrust of the WTO Telecommunications Reference Paper is to provide the statutory protection designed to make the market access and foreign investment commitments effective, and to challenge a failure to abide by these commitments under the WTO dispute resolution system.³⁰⁴

Section 1 of the WTO Telecommunications Reference Paper obligates a WTO Member state to “maintain appropriate measures for the purposes of preventing suppliers who, alone or together, are a major supplier from engaging in or continuing anti-competitive practices”. These anti-competitive practices include among other things “*not making available to other service suppliers on a timely basis technical information about essential facilities and commercially relevant information which are necessary for them to provide services*”.

It is likely that the Commission will consider the timelines indicated in the discussion under Regulation 8 (a) above, in order to conclude that a breach of this provision has occurred. In addition, a breach of this provision may also constitute a “constructive breach” of Regulation 8 (1) (a) of the Interconnection Regulations.³⁰⁵

v. using information obtained from competing Licensees, for purposes related to interconnection or the supply of communications facilities or services by the Licensee in question, to compete with such competing Licensees

The conduct described in this provision is an anti-competitive use of information, an example of which would be where an MNO in the course of considering a proposal for access to its network from an access seeking licensed mVAS provider, acquires information such as the proposed mVAS and its business model, demographic information in respect of the mVAS provider’s target customers, and instead uses the same information to launch a similar mVAS targeting the same subscribers with a superior service offering thus placing this mVAS provider at a severe competitive

³⁰² Article XVIII provides that “*Members may negotiate commitments with respect to measures affecting trade in services not subject to scheduling under Articles XVI or XVII, including those regarding qualifications, standards or licensing matters. Such commitments shall be inscribed in a Member’s Schedule.*”

³⁰³ Bronckers, Marco and Larouche, Pierre. (2008) ‘A Review of the WTO Regime for Telecommunications Services’ [WWW document] URL http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1995658 (visited 2012, September 20), p. 12.

³⁰⁴ *Ibid.*

³⁰⁵ This provision provides that:

“*Interconnected telecommunications networks shall be technically compatible and parties to an interconnection agreement shall ensure that –*

a) they provide to each other sufficient technical information to enable each party to plan its interconnection arrangements, including information on the technical characteristics of its telecommunications network”

disadvantage. Another example is where a vertically integrated Licensee providing wholesale leased line (needed for the provision of retail internet services), in the course of negotiating with an access seeking retail ISP for the provision of access to its leased line, acquires information such as the size and demographic information of the retail ISP's target subscribers, and instead uses this information to target the same subscribers, thus discouraging the access seeking ISP from entering the retail market.

j) Any failure by a Licensee to comply with any decision, rule, direction or guideline issued by the Commission, regarding either prohibited or required competitive practices

By this provision, a dominant Licensee who fails to comply with any decision, rule, direction or guideline issued by the Commission in respect of an anti-competitive practice would be deemed to have engaged in a conduct deemed to substantially lessen competition.

CHAPTER 5

ANTI-COMPETITIVE AGREEMENTS AND PRACTICES

Introduction

The focus of this chapter is on cartel (or collusive) type conducts engaged in by Licensees, *i.e.* horizontal agreements between competing Licensees, and vertical agreements in which a Licensee is a party to, which are both regulated in Section 91 (3) - (4) of the Act, and under Part III of the Competition Regulations. The particular phraseology adopted in Section 91 (3) of the Act, and by the Commission in the treatment of cartel type conducts is “understanding, agreement or arrangement” which is nearly identical to the phraseology adopted in Section 45 (2) (a) of the Australian Competition and Consumer Act 2010 (CCA). In the absence of case laws from Nigeria or decisional practices of the Commission in this regard, reference will be made to the leading Australian case of *Australian Competition & Consumer Commission v. Leahy Petroleum Pty Ltd* [2007] FCA 794, where these words were construed in relation to cartel type conducts, as persuasive authority for interpreting these terms pursuant to Section 91 (3) of the Act.

In addition, the specific types of agreements prohibited by the Act, and which the Commission is authorised to review will be discussed, while bearing in mind that the Commission as at the time of this writing has yet to render any regulatory guidance on these agreements. As with the previous chapters, the different types of agreements that are discussed in this chapter will be illustrated with the relevant foreign authority.

Unless otherwise stated in this chapter, any reference to an *agreement* should generally be construed to include a reference to *understanding* or *arrangement*.

The meaning of understanding, agreement or arrangement

Section 91 (3) of the Act prohibits a Licensee from entering into any understanding, agreement or arrangement, whether legally enforceable or not, which provides for certain cartel type conducts.¹ The words “understanding, agreement or arrangement” were not defined in the Act, neither has the Commission construed them for the purpose of applying Section 91 (3).

However, Black’s Law Dictionary (9th Edition) defines the words understanding and agreement respectively as “*An agreement, esp.[sic] of an implied or tacit nature*”² and “*A mutual understanding between two or more persons about their relative rights and duties regarding past or future performances*”³ while the Oxfords Advanced Learners

¹ See, Robert H. Lande, Howard P. Marvel, ‘The Three Types of Collusion: Fixing Prices, Rivals and Rules’ *Wisconsin Law Review*, (2000), pp. 941 – 999, for an excellent discussion on the three primary types of cartels.

² Page 1665.

³ Page 78.

Dictionary (International Student's Edition) defines an arrangement as "*an agreement that you make with sb [sic] that you can both accept*".⁴

In addition, the Court of Appeal of Nigeria in *Princewill Eyo Asuquo & Ors. v. Mrs. Grace Godfrey Eyo & Anor* (2013) LPELR-20199(CA) defined an agreement as a mutual understanding between two or more persons, oral or documentary, about their relative rights and duties regarding past or future performances. According to the Court of Appeal in that case, an agreement is a manifestation of mutual assent by two or more persons. The case law in Nigeria also indicates that the term "agreement" is synonymous with the word "contract", but much wider and of less technicality.⁵ Thus, every contract is an agreement but not every agreement is a contract.⁶

In Australia unlike Nigeria, the CCA adopts the phraseology "contract, arrangement and understanding". Although these terms are not defined in the CCA, courts in Australia have nevertheless rendered several judgements interpreting them in the context of cartel type conducts or collusive practices.⁷ The leading Australian case in this regard, is *Australian Competition & Consumer Commission v. Leahy Petroleum Pty Ltd* (supra) where several petrol retailers were alleged by the Australian Competition & Consumer Commission (ACCC) to have entered and given effect to a price fixing provision, in contravention of Section 45(2) (a) and (b) of the Trade Practices Act 1974 (now the CCA). The substantive issue before the Court was whether there existed by way of contract, arrangement or understanding a price-fixing scheme.

According to the Court at paragraph 24 "contract", "arrangement" and "understanding" are conducts plainly intended to represent a spectrum of consensual dealings. The Court went ahead to clarify the meaning of these terms for the purpose of enforcing Section 45 (2) (a) of the Trade Practices Act. Contract in the opinion of the Court is "*a consensual dealing with a high degree of formality*". Specifically the Court stated at paragraph 25 that;

"The term 'contract' is well understood by lawyers. A contract is the result of the acceptance by one party of an offer made by another, resulting in the minds of the

⁴ Page 66.

⁵ *Elder Esem Akpan v. Akanabasi Asibong Ubong* LPELR-20418(CA).

⁶ *Ibid.*

⁷ *See, Trade Practices Commission v. Nicholas Enterprises Pty Ltd (No2)* (1979) 26 ALR 609; *Morphett Arms Hotel Pty Ltd v. Trade Practices Commission* (1980) 30 ALR 88; ATPR 40-157; *Trade Practices Commission v. Email Ltd* (1980) 31 ALR 53; *Trade Practices Commission v. TNT Management Pty Ltd* (1985) 6 FCR 1; *Trade Practices Commission v. David Jones (Australia) Pty Ltd* (1986) 13 FCR 446; (1986) 64 ALR 67; (1986) ATPR 40-671; *Trade Practices Commission v. David Jones (Aust) Pty Ltd* (1986) 13 FCR 446; *Trade Practices Commission v. Service Station Association Ltd* (1993) 44 FCR 206; 116 ALR 643; *News Ltd v. Australian Rugby Football League Ltd* (1995) 58 FCR 447 at 527; 135 ALR 33; *Rural Press v. ACCC* [2002] FCAFC 213; *Australian Competition Commission v. Leahy Petroleum* [2004] FCA 1678; and *Ballarat Petrol Case, Apco Service Stations Pty Ltd v. Australian Competition and Consumer Commission* [2005] FCAFC 161.

two parties being at one as to the agreement they have made. It must be supported by good consideration, have sufficient certainty of terms that it be possible to determine what has been agreed, and be accompanied by an intention on the part of the parties that a legally binding relationship should be established by it. In ordinary circumstances, the obligations created by a contract are enforceable in a court, but their enforceability is subject to the possibility of defences arising from the nature of the contract itself, or from external circumstances. One defence arising from the nature of the contract itself results from the illegality of its purpose. In using the word 'contract' in s 45(2)(a) of the Trade Practices Act, Parliament must have intended to refer to a consensual dealing having the fundamental characteristics of a contract, but not necessarily being enforceable in a court of law, because s 45(2)(a) would itself give rise to the defence of illegality, and thereby prevent enforcement. Thus, the word 'contract' for the purposes of s 45(2)(a) describes a consensual dealing with a high degree of formality".

Arrangement in the Court's view is less formal than a contract. However, there must be some express communications between the parties. According to the Court at paragraph 26:

*"The word 'arrangement' is less clearly understood, and more susceptible of elasticity as to its meaning. In general, it appears to connote a consensual dealing lacking some of the essential elements that would otherwise make it a contract. For instance, a dealing that would otherwise be a contract may be described as an 'arrangement' if the parties to it intended not to create a legally binding relationship, but only to give expression to their intentions as to the obligations that each felt morally bound to adhere to in relation to what was to pass between them, or to be carried out by them. Of course, an arrangement might be a broader concept than this, because it is a term the boundaries of which have not been fixed in the traditional understanding of lawyers. The Oxford English Dictionary gives as the apparently appropriate meaning of the word 'arrangement' 'a settlement of mutual relations or claims between parties; an adjustment of disputed or debatable matters; a settlement by agreement', or alternatively, 'disposition of measures for the accomplishment of a purpose; preparations for successful performance.' The ordinary understanding of what amounts to an 'arrangement' makes it difficult to envisage that an arrangement could come about without express negotiations between the parties, although there have been suggestions that an arrangement can be tacit. See *Federal Commissioner of Taxation v Cooper Brookes (Wollongong) Pty Ltd* (1979) 41 FLR 277 at 301 – 302 per Fisher J, with whom Brennan and Deane JJ agreed, referred to by Franki J in *Trade Practices Commission v. TNT Management Pty Ltd* (1985) 6 FCR 1 at 24 in the context of s 45(2) of the Trade Practices Act. At the very least, there must be some express communication between the parties, although what is said may not amount to offer and acceptance for the purposes of the law of contract. The need for express communication is also suggested by the use of the verb 'make' in conjunction with both 'contract' and 'arrangement' in s 45(2)(a) of the Trade Practices Act. It is hard to see how two parties could 'make' an*

'arrangement' without doing so expressly, at least as to the substance of the arrangement, even if the acceptance by one party of what the other has communicated is implicit in some act, rather than expressed in words".

Lastly, understanding was held to be less formal than both a contract and understanding, and will require consensual dealing between the parties.⁸ However according to the Court, an understanding unlike an arrangement can be tacit, in the sense that it can be arrived at by each party, either by words or acts, signifying an intention to act in a particular way in relation to a matter of concern to another party.⁹ The Court held at paragraph 27 that;

"The word 'understanding' is obviously intended to connote a less precise dealing than either a contract or arrangement. This is so because of the meaning of the word 'understanding' itself, and because, in the terms of s 45(2)(a), the parties to it may 'arrive at' it instead of making it. Once again, the Oxford English Dictionary supplies an appropriate definition: 'a mutual arrangement or agreement of an informal but more or less explicit nature.' It is the informal and less explicit nature of an understanding that led Smithers J to describe the concept of an understanding as 'broad and flexible' in L Grollo & Co Pty Ltd v. Nu-Statt Decorating Pty Ltd (1978) 34 FLR 81 at 89".

Accordingly, the universal theme in this Court's interpretation of these terms is that for a conduct to fall inside Section 45(2) (a) and (b) of the Trade Practices Act 1974, there must be some form of commitment (or obligation) whether overt or covert by the parties. To satisfy the element of a commitment, at least a party must be understood by other(s) to be committed to act or refrain from acting in a particular manner.

The prohibited agreements

Section 91 (3) and Section 91 (4) of the Act prohibits a Licensee from engaging in certain cartel type conducts such as rate fixing,¹⁰ market sharing,¹¹ boycott of another

⁸ In arriving at the conclusion that an understanding must involve the "meeting of the minds", the court referred to the English case of *British Basic Slag Ltd v. Registrar of Restrictive Trading Agreements* [1963] 2 All ER 807 which stated at 819:

"by parity of reasoning it would follow that the existence of an arrangement of the kind contemplated in s. 45 is conditional upon a meeting of the minds of the parties to the arrangement in which one of them is understood, by the other or others, and intends to be so understood, as undertaking, in the role of a reasonable and conscientious man, to regard himself as being in some degree under a duty, moral or legal, to conduct himself in some particular way, at any rate so long as the other party or parties conducted themselves in the way contemplated by the arrangement.

It seems to me also that an understanding must involve the meeting of two or more minds. Where the minds of the parties are at one that a proposed transaction between them proceeds on the basis of the maintenance of a particular state of affairs or the adoption of a particular course of conduct, it would seem that there would be an understanding within the meaning of the Act".

⁹ At paragraph 28.

¹⁰ Section 91 (3) (a).

¹¹ Section 91 (3) (b).

competitor,¹² boycott of a supplier of apparatus or equipment,¹³ boycott of any other Licensee¹⁴ and where a Licensee makes it a condition for supplying a product or service 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.¹⁵

In considering whether an agreement is prohibited, it is necessary to first consider the precise purpose and/or nature of the entire agreement in the economic context in which it is to be applied. The prohibited agreements identified in Section 91 (3) and Section 91 (4) must result from all or at least one of the clause of the agreement itself, where, however, an analysis of the said clause(s) does not identify a prohibition, the consequences of the agreement should then be considered in the light of the nature of the prohibited agreements.¹⁶

As a threshold matter, for a conduct to be actionable pursuant to Section 91 (3) or Section 91 (4), *firstly*, it must be shown that the conduct results from an agreement (or at a minimum a commitment to act or not to act).¹⁷ As stated in Section 91 (3), the prohibited agreement does not have to be legally enforceable.

Secondly, it must be shown that the conduct results from an agreement involving multiple participants, at least one of which must be a Licensee within the meaning of the Act. In this regard, the unilateral (or single) conduct of a dominant Licensee abusing its position of dominance is unlikely to come inside the scope of Section 91 (3) and Section 91 (4). However, it is not clear whether a prohibited agreement entered between a Licensee and its wholly owned subsidiary and/or sister company (wholly owned subsidiary of the same parent company) will satisfy the multiple participant requirement necessary for the formation of an agreement.¹⁸ A Licensee is a person who either holds

¹² Section 91 (3) (c).

¹³ Section 91 (3) (d).

¹⁴ Section 91 (3) (e).

¹⁵ Section 91 (4).

¹⁶ See *Société Technique Minière (L.T.M.) v. Maschinenbau Ulm GmbH (M.B.U.)*, Judgment of the Court of 30 June 1966, Case 56-65.

¹⁷ See also, *Australian Competition & Consumer Commission v. Leahy Petroleum Pty Ltd* (supra), and the US case of *Copperweld Corporation v. Independence Tube Corporation* 467 U.S. 752 (1984), where the US Supreme Court held that an agreement in restraint of trade or commerce may be found when “*the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement*”.

¹⁸ See the EU Case IV / 22548 - *Christiani & Nielsen* where the EC held that the contractual relationship between the Christiani & Nielsen parent company and its subsidiary did not fall within the scope of Article 85 prohibiting anti-competitive agreements, and the US case of *Copperweld Corporation v. Independence Tube Corporation* (supra), where the US Supreme Court held that an agreement between a company and its wholly owned subsidiary does not constitute a contract, combination or conspiracy in restraint of trade or commerce. However, according to the CJEU Case 22/71 *Beguelin Import v. GL Import Export* [1971] ECR 949, [1972] CMLR 81, an agreement between a parent and its subsidiary company, or between two companies which are under the control of a third, will not be agreements between undertakings if the subsidiary has no real freedom to determine its course of action on the market and, although having a separate legal personality, enjoys no economic independence.

an individual licence or undertakes activities, which are subject to a class licence granted under this Act.¹⁹ A class Licensee as read in the Act, is not a person who holds a class license, but rather a person whose activities in the communications sector is subject to a class License, thus the holding of a class License is not a necessary requirement in order for such person's conduct to come inside the scope of Section 91 (3) and Section 91 (4).

Also, decisions of trade associations of Licensees (or industry groups of Licensees)²⁰ in Nigeria contained in their constitutions, statutes, bye-laws, rules, resolutions, recommendations and/or codes of conduct satisfy the agreement requirement of Section 91 (3) and Section 91 (4) of the Act to the extent that they influence their members to act (or refrain from acting) in a particular manner. The same also applies to international trade associations active in the communications sector²¹ in so far as members who are Licensees within the meaning of the Act comply with such decisions, and the decision has the *purpose* or *effect* of a substantial lessening of competition in an aspect of Nigeria's communications market.²²

In the Australian case of *ACCC v. The Tasmanian Salmonid Growers Association Ltd* [2003] FCA 788, the ACCC alleged that the Respondent trade association of farmers of Atlantic salmon in Tasmania, contravened Section 45 of the CCA. The alleged contravention resulted from a resolution adopted by the board of the Respondent on 14 February, 2002 which was to the effect that all its members who were farmers of Atlantic salmon should cull at least 10% of the 2001 year class of salmon by 31 July 2002 and, if a further review by 31 May 2002 found it necessary, an additional 5% should be culled.²³ It was also part of the resolution that only Atlantic salmon that would otherwise have reached market would be culled and that the culled salmon would be discarded in a manner that ensured they did not reach market.²⁴ The Court held among other things, that by encouraging and facilitating the making of an arrangement or understanding to limit the supply of Atlantic salmon by culling Atlantic salmon stocks, which arrangement or understanding would be likely to have the effect of controlling or maintaining the price of Atlantic salmon, the Respondent was, knowingly involved in the making of an arrangement or understanding which contravened Section 45(2)(a)(ii) of the CCA.²⁵

¹⁹ Section 157.

²⁰ For example, the Association of Licensed Telecommunications Operators of Nigeria (ALTON), the Association of Telecommunications Companies of Nigeria (ATCON), Internet Service Providers of Nigeria (ISPAN), Wireless Service Providers of Nigeria (WASPAN) and Phone and Allied Products Dealers Association of Nigeria (PAPDAN).

²¹ For example, the GSM Association (GSMA), the Global Mobile Suppliers Association (GSA), the Mobile Ecosystem Forum (MEF), the Alliance for Telecommunications Industry Solutions (ATIS), the Next Generation Mobile Networks (NGMN), the Telecommunications Industry Association (TIA), etc.

²² See, *Hartford Fire Insurance v. California* 509 US 764 (1993) where the U.S Supreme Court, per Justice Souter held that "it is well established by now that the Sherman Act [an Antitrust statute] applies to foreign conduct that was meant to produce and did in fact produce some substantial [anti-competitive] effect in the United States".

²³ At paragraph 12.

²⁴ *Ibid.*

²⁵ At paragraph 37.

It is important to note Regulation 12 (2) of the Competition Regulations, which reads; “*The agreements and practices identified in sections 91 (3) and 91 (4) of the Act are prohibited without the requirement of assessing their practical effects*”. Pursuant to this provision, the agreements prohibited in Section 91 (3) and Section 91 (4) are out rightly illegal and will be condemned absent any proof of their anti-competitive harm. Thus, the substantial lessening of competition test provided for in Regulation 6 for assessing the anti-competitiveness of a conduct, will not be applied in any situation where a Section 91 (3) and Section 91 (4) agreement is found to exist. This presumption of illegality by Regulation 12 (2) is similar to the “restriction by object” standard applied in EU competition law or the *per se* standard applied in Antitrust matters in the US. Under these standards, certain agreements are prohibited outright, such that no evidence of actual anti-competitive effects is required for a finding of illegality.²⁶ This presumption of illegality is founded on the reasoning that this category of anti-competitive agreements are likely to be detrimental to consumer welfare, and so unlikely to be beneficial that it should be condemned without further inquiry into its impact on competition.

In Case C -8/08 *T - Mobile Netherlands* [2009] ECR I – 4529, the ECJ explained that where a “restriction by object” is found, it is not necessary to demonstrate the direct effect of the conduct.²⁷ This is because, it is settled law that where an agreement is held to infringe by object, then there is no need to further establish the effect of this agreement within the common market.²⁸ The test for this is subjective and not objective, after taking into consideration the terms of the license, ‘the legal and economic context in which it is concluded and the conduct of the parties’.²⁹

Accordingly, the CFI held in Case T-160/01 *GlaxoSmithKline Services Unlimited v. Commission of the European Commission* [2006] ECR 0000 that:

“*When examination of the clauses of an agreement, carried out in their legal and economic context, reveals in itself the existence of an alteration of competition, it may be presumed that the agreement has as its object the prevention, restriction or distortion of competition*”.³⁰

The way in which an agreement is actually implemented may reveal a restriction by object even where the formal agreement does not an express provision to that effect.³¹

²⁶ Richard Whish, David Bailey, *Competition Law* (New York: Oxford University Press, 2012), pp. 118 – 119; and Herbert Hovenkamp, *Antitrust* (West Publishing Co., 2011), p. 123.

²⁷ At paragraph 29.

²⁸ See the Joined Cases 56/64 and 58/64 *Consten and Grundig v. Commission* [1966] ECR 299, 342, and case C-219/95 P *Ferriere Nord v. Commission* [1977] ECR I-4411, paragraphs 12 - 14, where the Court held that as the EC had already established that the measures adopted by the applicant had the *object* of partitioning the Italian market, therefore the commission was not required to investigate the actual effect these measures had on competition within the common market.

²⁹ See Joined Cases 96/102, 104, 105, 108, 110/82 *NVIAZ International Belgium and others v. The Commission* [1983] ECR 3369, paragraphs 23 – 25.

³⁰ At paragraph 111.

³¹ *Guidelines on the Application of Art. 81(3) of the Treaty*, [2004] OJ C101/08, paragraph 22.

When the contract terms do not show evidence of an object of restricting trade in the common market, then an examination of the clause becomes necessary in order to establish the effect it has on the common market.³²

Similarly, the US Supreme Court in the case of *Northern Pacific Railway Company & Northwestern Improvement Company v. United States*-356 US (1958), in explaining a *per se* violation, had this to say at paragraph 4; “*there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use*”.³³ Under the *per se* standard, the plaintiff is relieved of the obligation to define the relevant market and prove market power.³⁴ The rationale for *per se* rules in part is to avoid a burdensome inquiry into actual market conditions in situations where the likelihood of anti-competitive conduct is so great as to render unjustified the costs of determining whether the particular case at bar involves anti-competitive conduct.³⁵ Thus, application of the *per se* rule focuses on the probability of anti-competitive consequences.³⁶

Lastly, as was stated in Chapter 4, a Licensee who intends to enter into any of these agreements may apply to the Commission for authorisation under Section 93 (1) of the Act to engage in the agreement, and the Commission may give such authorisation if it is satisfied that the authorisation is in the national interest.

Each of the prohibited agreement is discussed below;

I. Rate fixing

An agreement whether legally enforceable or not in which a Licensee is a party to that provides for rate³⁷ fixing is prohibited by Section 91 (3) (a) of the Act. *Stricto sensu*, rate fixing in the context of the Act is simply an agreement that fixes the rate of providing a

³² *Ibid.*

³³ See also *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 133 (1998) where the court noted that some agreements are *per se* illegal because they;

“*will so often prove so harmful to competition and so rarely prove justified that the antitrust laws do not require proof that an agreement of that kind is, in fact, anticompetitive in the particular circumstances*”; see also *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 486 – 87 (1992) where Scalia, J., dissenting stated that “*Per se* rules of antitrust illegality are reserved for those situations where logic and experience show that the risk of injury to competition from the defendant’s behavior is so pronounced that it is needless and wasteful to conduct the usual judicial inquiry into the balance between the behavior’s procompetitive benefits and its anticompetitive costs”.

³⁴ *In re Insurance Brokerage Antitrust Litigation*, 618 F. 3d 300 Court of Appeals, 3rd Circuit 2010, paragraph 317.

³⁵ *Arizona v. Maricopa County Medical Society* 457 US 332 Supreme Court 1982, paragraphs 350 – 351.

³⁶ *Jefferson Parish Hospital District No. 2, et al v. Edwin G. Hyde* 466 US 2 - Supreme Court 1984, paragraph 14.

³⁷ Black’s Law Dictionary (9th Edition) at page 1375 defines “rate” as “*an amount paid or charged for good or service*”.

particular communications service or product.³⁸ As the broad language indicates, Section 91 (3) (a) is capable of application to both horizontal rate fixing and vertical rate fixing. Also, there is nothing by way of statutory interpretation in the Act, case law jurisprudence from Nigerian courts or the decisional practice of the Commission to suggest that it is only agreements that *directly* fixes rate that is caught by Section 91 (3) (a), and not any form of rate fixing.³⁹

A horizontal rate fixing occurs where competing Licensees agree to fix the rate of a particular communications services (or product) they sell. A hypothetical example of horizontal rate fixing would be where manufacturers/sellers of mobile handsets⁴⁰ in Nigeria agree to sell certain types of handsets, at a particular rate. In the EU, horizontal price fixing is condemned outrightly because the CJEU and the EC consider such agreements as having as its “object”, the restriction of competition.⁴¹ Thus, the need for a finding as to its “effect” on competition is dispensed with.⁴² In Joined cases T-217/03 and T-245/03 *Fédération nationale de la coopération bétail et viande (FNCBV) (T-217/03) and Fédération nationale des syndicats d'exploitants agricoles (FNSEA) and Others (T-245/03) v. Commission of the European Communities*, the CFI upheld the EC’s decision not to conduct an assessment of the actual effects of a price fixing agreement whereby the parties had agreed on a slaughterhouse entry price scale for certain categories of cattle, which provided for a list of prices per kilogram of carcass for certain categories of cows and the method of calculating the price to be applied to other categories, by reference *inter alia* to the price fixed by EU authorities under a special purchase scheme.⁴³

³⁸ See also the US case of *United States v. Trenton Potteries Co.*, 273 U.S. 392, where the Supreme Court stated that prices are fixed if the range within which purchases or sales will be made is agreed upon if the prices paid or charged are to be at a certain level or on ascending or descending scales, if they are to be uniform, or if by various formulae they are related to the market prices. According to this court, they are fixed because they are agreed upon.

³⁹ For instance an agreement that *indirectly* fixes rate (or price) has been held to exist where; producers of virgin aluminium agreed not to sell below their published price, (*See* 75/497/EEC: Commission Decision of 15 July 1975 relating to a proceeding under Article 85 of the EEC Treaty); the parties agreed not to discount off published rates for charges and surcharges, (*See* 2000/627/EC: Commission Decision of 16 May 2000 relating to a proceeding pursuant to Article 81 of the EC Treaty (IV/34.018 - Far East Trade Tariff Charges and Surcharges Agreement (FETTCSA))); and an agreement to observe maximum discounts and to offer same credit terms, (*See* 83/361/EEC: Commission Decision of 13 July 1983 relating to a proceeding under Article 85 of the EEC Treaty (IV/30.174 - Vimpoltu)).

⁴⁰ The sales of terminal equipment such as mobile handsets is subject to a basic license issued by the Commission in the class license category.

⁴¹ Richard Whish, David Bailey, *supra*, p. 523.

⁴² *Ibid.* However, the restriction by object is inapplicable where the parties to a joint purchasing arrangement agree on the purchasing prices the joint purchasing arrangement may pay to its suppliers for the products subject to the supply contract. In such scenario, the effects of agreement will be assessed, see *Communication from the Commission on Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements*, (2011/C 11/01), paragraph 206.

⁴³ At paragraphs 82 – 93.

In the US, a horizontal price-fixing agreement that is *naked*,⁴⁴ is considered a *per se* violation of Section 1 of the Sherman Act.⁴⁵ As stated above, a *per se* illegality under US Antitrust law are conducts which are condemned without an elaborate inquiry into market power or the effect of the conduct in the particular case.⁴⁶ In *United States v. Socony Vacuum Oil Co.*, 310 US 150 Supreme Court 1940 where the Respondents were indicted on a criminal charge for conspiring to artificially raise and fix the tank price of gasoline.⁴⁷ The Circuit Court of Appeals in reversing their conviction by the United States District Court for the Western District of Wisconsin concluded that there was no evidence to show that their conducts constituted an unreasonable restraint of trade.⁴⁸ In so concluding, the Circuit Court of Appeals remanded the case for a new trial so that the effect of their conducts on competition could be determined.⁴⁹ On appeal at the Supreme Court, the *per se* illegality of a price fixing scheme was confirmed when the Court held that “a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*”.⁵⁰ Consequently, the Supreme Court further held that the Circuit Court of Appeals erred in reversing the judgment of the United States District Court for the Western District of Wisconsin, on the ground that the effect(s) of the Respondents’ conduct on competition be examined.⁵¹

Other types of price fixing agreements, that are “ancillary”, will be subject to the rule of reason analysis in the US.⁵² A restraint under US Antitrust jurisprudence is ancillary if it has the potential to facilitate the accomplishment of a joint venture’s legitimate objectives.⁵³ Horizontal price fixing is bad for competition because it eliminates price competition between the parties to the agreement.⁵⁴

⁴⁴ A “naked” price fixing agreement is one that is *not* part of or ancillary to a business arrangement that has a legitimate purpose unrelated to the suppression of competition, (See, Thomas R. Sheran, *Anticompetitive Pricing Practices*, (May 6, 2009), p. 7).

⁴⁵ Herbert Hovenkamp (2011), *supra*, p. 98.

⁴⁶ *Ibid.*, p. 123.

⁴⁷ At paragraph 166

⁴⁸ At paragraph 211.

⁴⁹ At paragraph 212.

⁵⁰ At paragraph 223.

⁵¹ At paragraph 228.

⁵² Miles, Jeff. (2012, November 8). ‘Principles of Antitrust Law’ [WWW document] URL https://www.healthlawyers.org/Events/Programs/Materials/Documents/FHL12/e_miles.pdf (visited 2013, December 25), p. 43.

⁵³ Werden, Gregory J. (2006, March 29 - 31). ‘The Ancillary Restraints Doctrine, in Rule of Reason v. Per Se: Where are the Boundaries Now?’ [WWW document] URL <http://apps.americanbar.org/antitrust/at-committees/at-s1/pdf/spring-materials/2006/werden06.pdf> (visited 2015, March 27), p. 4 (stating that Judge Taft imposed the ancillary restraint doctrine into the Sherman Act jurisprudence in his *Addyston Pipe* opinion). In *Addyston Pipe & Steel Co.* 85 F. 271 (6th Cir. 1898), Judge Taft wrote that no conventional restraint of trade can be enforced unless the covenant embodying it is merely ancillary to the main purpose of a lawful contract, and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party.

⁵⁴ Alicia L. Downey. (2012). ‘Antitrust Constraints on Vertical Price Agreements and Unilateral Pricing Conduct’ *Antitrust Counseling & Compliance 2012* (Practising Law Institute) [WWW document] URL <http://downeylawlc.com/wp->

Rate fixing on a vertical level is also known as resale price maintenance (RPM).⁵⁵ An RPM is where a supplier and dealer agree, that the dealer will resell the supplier's product at a pre-determined rate. In addition to the constituent elements necessary for finding the existence of an agreement, there must be a "resale" in an RPM, thus the dealers must be required to sell at the prices set by the suppliers.⁵⁶ The agreement element of an RPM must be in relation to the "price" or "price levels" agreed between the supplier and a dealer.⁵⁷ This price level could either be in respect to the maximum, minimum or fixed price agreed between the supplier and the dealer.⁵⁸ As a hypothetical, an agreement between a supplier of terminal equipments such as mobile handsets, and dealers to fix the minimum price at which the dealers can resell these mobile handsets to retailers and/or consumers would also be infringing of Section 91 (3) (a) of the Act. Also, any agreement as to the price at which telecommunications services obtained through either roaming⁵⁹ or pre-paid phone cards⁶⁰ will be resold in Nigeria is likely to be caught by Section 91 (3) (a).⁶¹

RPMs under competition law are anti-competitive, because of their potential to eliminate *intra-band* competition,⁶² *i.e.* competition between the distributors/resellers of a particular product brand. In the EU, an RPM is generally regarded as an agreement having as its object the restriction of competition,⁶³ while an RPM in the US would be subject to the rule of reason analysis which requires that both the definition of the relevant market and an assessment of its (anti-) competitive or efficiency effects.⁶⁴

Despite concerns that RPMs are anti-competitive, there is ample evidence in the economic literature to support the efficiency justification for an RPM scheme, especially as a means of keeping retail prices to a minimum, where expenses has already been incurred (or investment made) in pre-sales/after sales services that will be beneficial to

content/uploads/Publications/2012%20Vertical%20Price%20Agreements%20and%20Unilateral%20Pricing%20Conduct%20.pdf (visited 2015, June 12), p. 1.

⁵⁵ ABA Section of Antitrust Law, *Telecoms Antitrust Handbook* (first edition, ABA Publishing, 2005) p. 253.

⁵⁶ *Ibid.*, See also *Simpson v. Union Oil Co. of California*, 377 U.S. 13 (1964).

⁵⁷ ABA Section of Antitrust Law, *supra*. See also *Monsanto Co. v. Spray-Rite Services Corp.* 465 US 752, 761 -764 (1984).

⁵⁸ Andrés Font-Galarza, Frank P. Maier-Rigaud, Pablo Figueroa, 'RPM Under EU Competition Law: Some Considerations From a Business and Economic Perspective' *CPI Antitrust Chronicle*, November 2013 (1), p. 2.

⁵⁹ Holders of a Digital Mobile License and Unified Access Service License are obliged after 12 months from commercial launch date and with the Commission's prior consent to enter into agreement to provide national roaming service on a reciprocal basis to every other MNO requesting such service.

⁶⁰ This service is subject to a basic license issued by the Commission in the class license category.

⁶¹ See, ABA Section of Antitrust Law, *supra*, p. 255.

⁶² *Commission Notice on the Guidelines on Vertical Restraints C* (2010) 2365, paragraph 224, Miles, Jeff, *supra*, p. 50.

⁶³ Richard Whish, David Bailey, *supra*, pp. 124 and 644.

⁶⁴ Herbert Hovenkamp (2011), *supra*, p. 227. See also the US case of *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 127 S.Ct. 2705, 2712 (2007), where the US Supreme Court reversed *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911) which had earlier held that RPM should be treated as a *per se* illegality.

consumers.⁶⁵ In this regard, an RPM could be said to encourage inter-brand competition, *i.e.*; competition between a product brand.⁶⁶ Other arguments such as the facilitation of a new product⁶⁷ and quality signalling⁶⁸ have also been advanced as efficiency justification for an RPM scheme.

II. Market sharing

Section 91 (3) (b) of the Act prohibits a Licensee from entering into a market sharing agreement. This provision is applicable to both horizontal and vertical market sharing agreements. Horizontal market sharing in the communications sector in Nigeria can occur between competing Licensees, at the geographic, customer or product level. In a geographic market sharing, the competing parties will divide the market into geographic area of operations, with each party providing its services only in its assigned geographic area of operation.⁶⁹ In market sharing at the customer level, the participants divide the market based on customer differentiation such as enterprise business customers and individual customers.⁷⁰ Market sharing at the product level occurs where the parties agree on the particular product each will (or will not) produce and/or sell. Market sharing on a horizontal level eliminates total competition between firms in the market that would have been present in the absence of the agreement.⁷¹

Market sharing can also occur at the vertical level where a seller and a buyer agree as to the geographic area in which the buyer can resell the seller's product, the location from which it can resell such product, the types of customers it can resell to, and/or the particular customer the buyer can resell to.⁷² Vertical market sharing restricts *intra-band* competition, and in the US such agreements are analysed under the rule of reason standard.⁷³

In *Tréfileurope Sales SARL v. Commission of the European Communities* European Court reports 1995 Page II-00791 (Case T-141/89), the CFI upheld the EC's finding that an agreement between three parties in which a party agreed not to produce catalogue mesh while the remaining two parties in turn agreed not to produce standard mesh, constitutes a market sharing agreement within the meaning of Article 101 (1) (c) of the TFEU.⁷⁴ The EC has also noted that interconnection agreements may facilitate market

⁶⁵ Kenneth G. Elzinga & David E. Mills, 'The Economics of Resale Price Maintenance', in *3 Issues in Competition Law and Policy 1841* (ABA Section of Antitrust Law 2008), pp. 1842 – 1843.

⁶⁶ Andrés Font-Galarza, Frank P. Maier-Rigaud, Pablo Figueroa, *supra*, p. 4.

⁶⁷ *Ibid.*, pp. 4 – 5.

⁶⁸ See, H.P. Marvel, S. McCafferty, 'Resale Price Maintenance and Quality Certification' *RAND Journal of Economics*, vol. 15, issue 3, (1984) pp. 346-359.

⁶⁹ Herbert Hovenkamp (2011), *supra*, p. 103. This type of market sharing may not be possible to achieve in certain aspects of Nigeria's communications market without also breaching the license condition that obligates the holder to rollout the authorised service on a national basis.

⁷⁰ Herbert Hovenkamp (2011), *supra*.

⁷¹ Richard Whish, David Bailey, *supra*, 47.

⁷² Miles, Jeff, *supra*, p. 52.

⁷³ *Ibid.*

⁷⁴ At paragraph 97.

sharing between the network operators providing access and the network operators seeking access through the exchange of customer and traffic information.⁷⁵

In the US, the US Supreme Court held in *United States v. Topco Associates, Inc.*, 405 US 596 Supreme Court 1972, that an agreement between competitors at the same level of the market structure to allocate territories in order to minimise competition is a *per se* violation of Section 1 of the Sherman Act.⁷⁶ The Court in that case went further to state that such “[h]orizontal territorial limitations . . . are naked restraints of trade with no purpose except stifling of competition”.⁷⁷ The antitrust analysis of a market sharing scheme in the US is dependent on whether the scheme lacks any pro-competitive justification in which case, it is “naked” and thus subject to the *per se* rule,⁷⁸ or it constitutes an “ancillary restraint” in which case it will be subject to the rule of reason analysis *only* to the extent that it is *ancillary* to a legitimate business purpose.⁷⁹

III. Boycott of another competitor, a supplier of apparatus or equipment, or of any other Licensee

Section 91 (3) c – e of the Act respectively prohibits an agreement in which a Licensee is a party to, that provides for the boycott of another competitor, the boycott of a supplier of apparatus or equipment, and the boycott of any other Licensee. As the name suggests, these are agreements in which a Licensee agrees with another party (or parties) not to do business with another competitor, a supplier of apparatus or equipment and/or another Licensee. The most obvious example of this violation in the communications sector would be the collective agreement of incumbent MNOs not to interconnect their networks with a new entrant, or not to provide access to their networks, to a new competitive mVAS provider.⁸⁰

A collective boycott between competitors to exclude (or not to deal with) another competitor is considered an object restriction of competition in the EU.⁸¹ In Case C-68/12 *Protimonopolný úrad Slovenskej republiky v. Slovenská sporiteľňa a.s.*, the Competition Authority of the Slovak Republic found that three major Slovak banks – Slovenská sporiteľňa a.s., Československá obchodná banka a.s. and Všeobecná úverová banka a.s. had infringed EU competition rules and subsequently fined them. The three

⁷⁵ *Notice on the application of the competition rules to access agreements in the telecommunications sector* (98/C 265/02), paragraphs 136 and 139.

⁷⁶ At paragraph 608.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

⁷⁹ *Rozema v. The Marshfield Clinic*, 977 F. Supp. 1362 Dist. Court, WD Wisconsin 1997, where the court noted that “Market allocations that accompany and promote the success of larger endeavors are considered “ancillary” trade restraints and warrant more in-depth analysis under the Rule of Reason”.

⁸⁰ This violation would also constitute a breach of Sections 96, 101 (1) and 137 (1) of the Act.

⁸¹ Commission Staff Working Document (2014, June 25) ‘Guidance on restrictions of competition “by object” for the purpose of defining which agreements may benefit from the De Minimis Notice’ [WWW document] URL http://ec.europa.eu/competition/antitrust/legislation/de_minimis_notice_annex.pdf (visited 2014, December 25), paragraph 2.5.

banks had terminated in a coordinated manner, contracts concerning current accounts that Akcenta CZ a.s. (-a non-bank financial institution, and a competitor to these banks in the market for cashless foreign exchange transactions) had with them. They also decided not to enter into any further contracts with Akcenta.

One of the banks fined, appealed to the Supreme Court of the Slovak Republic arguing that it has not infringed EU competition rules, as Akcenta cannot be regarded as its competitor. According to the bank, since Akcenta did not have the license required under Slovak law for it to carry on its business, it was operating illegally on the Slovak market. The Supreme Court of the Slovak Republic referred to the ECJ, the question of whether EU competition applies to an agreement prohibited under Article 101(1) TFEU which by its nature has the effect of excluding from the market a specific individual competitor (trader) which has subsequently been found to have been carrying out foreign exchange transactions on the cashless foreign-exchange operations market without holding the appropriate license as required under national law,⁸² to which the ECJ responded in the positive and further held that the agreement is restrictive of competition by object.⁸³

Under US Antitrust law, a boycott of this nature is referred to as a "concerted refusal to deal".⁸⁴ In addition, courts in the US are likely to deem a concerted refusal to deal among competitors as a *per se* illegality,⁸⁵ while a concerted refusal arising from a vertical relationship will be analysed under the rule of reason standard.⁸⁶ In *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U. S. 207, the question before the US Supreme Court was whether "a group of powerful businessmen may act in concert to deprive a single merchant, like Klor's, of the goods he needs to compete effectively". The allegation was that manufacturers and distributors of electrical appliances had conspired among themselves and with a major retailer, Broadway-Hale, "either not to sell to Klor's (who at that time was Broadway-Hale's competitor) or to sell to it only at discriminatory prices and highly unfavourable terms". The Supreme Court concluded that the alleged group boycott of even a single trader constituted a *per se* violation as there was no need to investigate the reasonableness of the conduct in the circumstances.⁸⁷

The competition concern with collective boycott is its potential to exclude competitors from the market, thus eliminating price competition.⁸⁸

IV. *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*

⁸² At paragraph 12.

⁸³ At paragraph 19.

⁸⁴ Philip Areeda, Herbert Hovenkamp, *Fundamentals of Antitrust Law* (Aspen Publishers, 2011), p. 19-9.

⁸⁵ Herbert Hovenkamp, *Federal Antitrust Policy: The Law of Competition and its Practices* (Thompson/West, 2005), p. 220.

⁸⁶ Mark A. Lemley, Christopher R. Leslie, 'Categorical Analysis in Antitrust Jurisprudence' *Iowa Law Review*, Vol. 93, (2008), pp. 1223 – 1224.

⁸⁷ At paragraphs 211 – 212.

⁸⁸ See generally, *United States v. General Motors Corp.*, 384 US 127 Supreme Court 1966.

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

This is an agreement between the Licensee and its customer, whereby the Licensee requires as a condition for supplying a product or service that its customer agrees to purchase or not purchase any other product or service either from the Licensee or from another person. An agreement such as this constitutes a tying arrangement as discussed in Chapter 4.⁸⁹ In Case 92/163/EEC: Commission Decision of 24 July 1991 relating to a proceeding pursuant to Article 86 of the EEC Treaty (IV/31043 *Tetra Pak II*), the EC stated that Tetra Pak's conduct of requiring its customers who purchase packaging machines to also purchase cartons from it constituted a tying arrangement (or a tied sales).⁹⁰ Also in the US case of *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 US 451 Supreme Court 1992, the US Supreme Court held that the conduct of Eastman Kodak in selling replacement parts for its photocopiers and micrographic equipment to third parties on the condition that they agreed not to buy after-sales service of Eastman Kodak's equipment from Independent Service Organisations (ISOs) constituted a tied sale.

An example of unlawful tying for the application of this prohibition would be where a seller/manufacture of network switching subsystem⁹¹ requires its MNO customers, to agree to also purchase after sales services,⁹² as a condition for purchasing its network switching subsystem. As earlier stated in Chapter 4, it is possible for tying arrangements to foreclose other competitors from the tied market.⁹³

Tying in the EU is not considered to be a restriction by object in so far as the following factors are considered prior to the commencement of any enforcement action by the EC; whether the offender is dominant in the tying market (or in the bundled markets); whether the tying and tied products are distinct relevant product markets, and whether the tying practice is likely to lead to anti-competitive foreclosure.⁹⁴ In analysing tying arrangements in the US, courts will apply a modified *per se* rule in the sense that proof

⁸⁹ This conduct will also constitute an abuse of a dominant position where the Licensee imposing this condition has market power in the relevant market, *See generally*, Case 85/76 *Hoffmann La Roche & Co. AG v. Commission of the European Communities* European Court reports 1979 Page 00461.

⁹⁰ At paragraphs 115 to 117. This statement was upheld on appeal to the ECJ in Case C-333/94 P *Tetra Pak International SA v. Commission* [1996] ECR I-5951.

⁹¹ The sales and installation of major network & switching equipment is subject to a basic license issued by the Commission in the class license category.

⁹² The repairs and maintenance of telecom facilities is also subject to a basic license issued by the Commission in the class license category.

⁹³ Citing DG Competition (2005, December). 'Discussion paper on the application of Article 82 of the Treaty to exclusionary abuses' [WWW document] URL <http://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf> (visited 2012, January 24), paragraphs 181 and 188.

⁹⁴ *Communication from the Commission - Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings* OJ 2009, C-45/7, *see generally* paragraphs 47 – 62.

of anti-competitive harm is not necessary, once a finding has been made that the offender is dominant in the relevant markets.⁹⁵

Under this provision, the tying arrangement may also have the effect of an exclusive dealing arrangement to the extent that it requires the customer (as a condition for purchasing from the Licensee), *not to purchase any other product or service from another person*, if such product and/or service serves the same purpose as that already purchased from the Licensee. Thus, the customer will invariably be purchasing all its requirement of this particular product or service from the Licensee. An exclusive dealing arrangement is an agreement under which the buyer agrees to concentrate all its purchase of a particular product from a particular seller.⁹⁶ In Case 85/76 *Hoffmann La Roche & Co. AG v. Commission of the European Communities* European Court reports 1979 Page 00461, the Court held that an exclusive dealing arrangement may be found where a firm concludes an agreement on the condition that its customer obtains all or most of its requirement from the firm.⁹⁷ The Court further held such arrangements to be incompatible with EU competition law.⁹⁸ Similarly, the US Supreme Court in *Standard Oil Company of California et al. v. United States*, 337 US 293 upheld an injunction prohibiting Standard Oil from enforcing or entering into exclusive supply contracts requiring gas stations in seven states to purchase only Standard Oil gas, as such contracts infringe both Section 1 of the Sherman Act and Section 3 of the Clayton Act.

Exclusive dealing agreements raise competition concern in so far as they operate to foreclose competition in the relevant market, to competing suppliers during the term of the agreement.⁹⁹ In both the EU and US, the percentage of competing business foreclosed from participating in the market affected by the exclusive dealing agreement is a determinant for liability,¹⁰⁰ the higher the percentage foreclosed, the stronger the foreclosure potential of an exclusive dealing arrangement.¹⁰¹

Part III of the Competition Regulations

Regulation 12 (1) of the Competition Regulations authorises the Commission to review either on its own or on the application by an *interested person*, other forms of agreements and related practices (apart from those listed above), that have the purpose or effect of substantially lessening of competition. An *interested person* is someone who is aggrieved or has suffered a legal grievance.¹⁰² Thus in this circumstance, an *interested person* could either be a Licensee, or a communications consumer who has suffered (or

⁹⁵ *U.S. Healthcare, Inc. v. Healthsource, Inc.*, 986 F.2d 589, 593 n. 2 (1st Cir.1993).

⁹⁶ Herbert Hovenkamp (2011), *supra*, 216.

⁹⁷ At Paragraph 7.

⁹⁸ *Ibid.*

⁹⁹ *Commission Notice on the Guidelines on Vertical Restraints, supra*, paragraph 130, *see Omega Environment, Inc v. Gilbarco, Inc.* 127 F. 3d 1157 - Court of Appeals, 9th Circuit 1997 at paragraph 1162.

¹⁰⁰ *See* Jonathan M. Jacobson, 'Exclusive Dealing, "Foreclosure", and Consumer Harm' 70 *Antitrust L.J.* 311 (2002), p. 311; *See also Standard Oil Company of California et al. v. United States (supra)*, paragraph 314.

¹⁰¹ *DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses*, (December, 2005), paragraph 148.

¹⁰² *See, P.P.A. v. I.N.E.C.* (2012) 9 N.W.L.R (Pt. 1304) 185 S.C, p. 226.

is likely to suffer) an anti-competitive harm (or injury) as a result of the (prohibited) agreement.¹⁰³

In addition, the reference to “substantially lessening of competition” in Regulation 12 (1) indicates that the review undertaken by the Commission in respect of the agreement, will be in accordance with the substantial lessening of competition test set out in Regulations 6 (and 7), and pursuant to the provision of Regulation 15, which requires the Commission to apply the standards and process described in Part II of the Competition Regulations (or as discussed in Chapter 4) which among other things includes defining the relevant market or markets, and assessing the degree of interference with competition that results in identifiable injury to competitors or consumers. Thus, unlike the conducts stated in Section 91 (3) and Section 91 (4) of the Act, which are presumed illegal without a finding of their anti-competitive harm, Regulations 13 and 14 conducts can only be condemned as illegal after an assessment in accordance with the substantial lessening of competition test determines their anti-competitive effect(s).

Regulations 13 and 14 list the following agreements, which the Commission is authorised to review as;

a) Price fixing agreements among competing Licensees

Regulation 13 (a) authorises the Commission to review price fixing among competing Licensees. The agreement referred to in this provision is a horizontal price fixing agreement, which is discussed above. The difference in rate fixing discussed above and price fixing in this provision is that in the former, the price fixing agreement is between parties of which one of them is a Licensee, while in the latter, the price fixing is between competing Licensees. Thus for a finding of liability in this case, the price fixing agreement must have been entered into between *only* competing Licensees. However, it is important to note that horizontal price fixing in the EU is considered as having an object restriction.¹⁰⁴ In the US a horizontal price fixing agreement that is *naked* is condemned as a *per se* illegality, while an ancillary horizontal price fixing is analysed under the rule of reason standard.¹⁰⁵

The reference to the manipulation of consumer prices in this provision seems to suggest that the Commission is also authorised to review a price fixing between competing Licensees that *directly* and *indirectly* fixes price.¹⁰⁶ As stated above, in the case of *United States v. Socony Vacuum Oil Company* (supra) the US Supreme Court defined price fixing as any “... combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity

¹⁰³ See also, *Vinci v. Waste Mgmt., Inc.*, 80 F.3d 1372, 1376 (9th Cir. 1996) where the Court stated that a Plaintiff who is neither a competitor nor a consumer in the relevant market does not suffer antitrust harm, and therefore lacks standing to sue under antitrust laws.

¹⁰⁴ Commission Staff Working Document (2014, June 25), *supra*, p. 4.

¹⁰⁵ See *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 24 (1979), where the US Supreme Court concluded that the rule of reason standard should be applied where blanket licenses of different music composers involving an element of price fixing, which made it possible for the composers to mass market their compositions.

¹⁰⁶ For the caselaws from CJEU on the indirect fixing of price on a horizontal level, see footnote 39.

in interstate or foreign commerce.¹⁰⁷ Under US Antitrust case law jurisprudence, the manipulation of prices includes agreements between competitors as to; minimum prices,¹⁰⁸ maximum prices,¹⁰⁹ discounts or not to offer discounts,¹¹⁰ credit terms or not to grant credit,¹¹¹ and pricing formulae.¹¹²

b) Bid rigging between competing licensees

Under Regulation 13 (b), the Commission is authorised to review a bid rigging agreement between competing Licensees, where they have agreed to manipulate the prices or conditions of a competitive tender process. The reference to a competitive tender process raises the question of whether the process is restricted to only public procurements, or will include all forms of procurement whether public or private occurring in the communications sector. In addition, it is likely that the procurement process will be in respect of a product or services falling within a defined relevant market in an aspect of the communications sector. It is interesting to also note that the Commission includes anti-bid rigging rule in all auctions it conducts for operational and spectrum licenses.

Bid rigging is a particular form of collusive price-fixing behaviour by which firms coordinate their bids on procurement or project contracts.¹¹³ At a minimum, to constitute a bid rigging for the purpose of the Commission's review, the competing Licensees in question will have agreed among themselves as to which will win in response to a bid proposal.¹¹⁴ A bid rigging agreement can take the form of either *bid suppression*: where the conspirators agree not to submit bids, or even withdraw their bid offer, *complementary bidding*: where the co-conspirators intentionally submit inflated bids or bids not in compliance with the bid rules, *bid rotation*: where all co-conspirators submit bids, but by agreement, take turns as the lowest bidder on a series of contracts, and *customer or market allocation*: where the co-conspirators divide up customers or geographic areas in agreement that each will only submit bids in the area assigned to it.¹¹⁵

Bid rigging in the US is condemned on a *per se* basis.¹¹⁶ The EC considers bid rigging as a form of price fixing and/or market allocation and is thus a restriction by object.¹¹⁷

¹⁰⁷ At paragraph 223.

¹⁰⁸ See *Goldfarb v. Va. State Bar*, 421 U.S. 773 (1975).

¹⁰⁹ See *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982).

¹¹⁰ See *Freeman v. San Diego Association of Realtors*, 322 F.3d 1133 (9th Cir. 2003).

¹¹¹ See *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980).

¹¹² See *Food & Grocery Bureau v. United States*, 139 F.2d 973 (9th Cir. 1943).

¹¹³ Organisation for Economic Co-operation and Development, *Glossary of Industrial Organisation Economics and Competition Law*, paragraph 17.

¹¹⁴ Richard Whish, David Bailey, *supra*, p. 536, The Department of Justice. (no date). 'Preventing and Detecting Bid Rigging, Price Fixing, and Market Allocation In Post-Disaster Rebuilding Projects An Antitrust Primer for Agents and Procurement Officials' [WWW document] URL http://www.justice.gov/atr/public/guidelines/disaster_primer.pdf (visited 2015, March 26) p. 2.

¹¹⁵ The Department of Justice, *supra*, pp. 2 – 3.

¹¹⁶ See *United States v. Brighton Building & Maintenance Co.*, 598 F. 2d 1101 Court of Appeals, 7th Circuit 1979, In *re Insurance Brokerage Antitrust Litigation* (*supra*).

¹¹⁷ Commission Staff Working Document, *supra*, paragraph 2.4.

In Case T-21/99 *Dansk Rorindustri v. Commission*, the CFI held that an agreement between four (4) Danish producers of district heating pipes which provided *inter alia* the allocation of individual projects to designated producers and the manipulation of the bidding procedure for such projects in order to ensure that the assigned producer was awarded the contract in question, had infringed the Article 85 (1) of the EC Treaty (now Article 101 (1) of the TFEU), as it had an anti-competitive object. Similarly, in *Addyston Pipe & Steel Company v. United States* 175 US 211 Supreme Court 1899, the US Supreme Court held that the conduct whereby cast-iron pipe manufacturers colluded to choose one of their member to participate in an auction conducted by a public body was violatory of Section 1 of the Sherman Act. A conspiracy to submit collusive, non-competitive, rigged bids is a *per se* illegality in the US.¹¹⁸

c) Market allocation

Regulation 13 (c) authorises the Commission to review market allocation agreements, pursuant to which competing Licensees allocate geographic or product markets among themselves. Market sharing between competing Licensees is referred to as horizontal market sharing, and has been discussed above.

d) Resale price maintenance

Regulation 13 (d) authorises the Commission to review a resale price maintenance agreement pursuant to which a Licensee that supplies a competing service provider with products or services, attempts to impose restrictions on the price charged by that service provider to consumers. As discussed above, an RPM is vertical price fixing, which can also be indirectly achieved by fixing the maximum discounts, linking the granting of rebates to the observance of a price level, etc.¹¹⁹ However unlike the broad nature of the RPM discussed above, Regulation 13 (d) is limited to RPMs in situations where a Licensee that provides a competing service attempts to set the retail price of that service. For instance where a wholesale bandwidth provider with presence in the retail market, sets the retail price for the bandwidth it supplies to ISPs it competes with in that market.

e) Exclusive dealing

The Commission is authorised by Regulation 13 (e) to review exclusive dealing agreements, pursuant to which, a Licensee enters into an agreement with another party, for the supply of products or services on an exclusive basis. Exclusive dealing agreements have been discussed above.

f) Any other agreement or practices between Licensees or between Licensees and third parties

Lastly, Regulation 14 authorises the Commission to review any other agreement or practices between Licensees or between Licensees and third parties, including joint-

¹¹⁸ *United States v. Brighton Building & Maintenance Company & Ors* (supra), paragraph 1106.

¹¹⁹ *Commission Notice on the Guidelines on Vertical Restraints*, supra, paragraph 48.

venture or similar collaboration agreements, to determine whether they have the purpose or effect of substantially lessening of competition. Thus, the Commission's power to review agreements and related practices extend beyond agreements entered between Licensees, to agreements entered between a Licensee and a non-licensee, in so far as the purpose of the Commission's review is to determine whether the agreement has the purpose or effect of substantially lessening of competition in any aspect of Nigeria's communications market.

Any Licensee who contravenes any of the provisions of the Competition Regulations (including the Regulations relating to anti-competitive agreements), is liable to such fines, sanctions or penalties, including any penalties determined under the Nigerian Communications (Enforcement Processes, Etc.) Regulations 2005 or as may be determined by the Commission from time to time.¹²⁰ In addition, where a Licensee enters into a prohibited agreement, the Commission is authorised by Regulation 34 to issue any of the following Directions; requiring one or more persons named in the direction to cease-and-desist from the agreement, subject to such conditions as are prescribed in the direction or make identified changes, as a means of eliminating or reducing the anti-competitive impact; require the Licensee involved in the agreement, and the persons affected, to meet and attempt to determine remedies to prevent, eliminate or compensate for such practice, and to resolve any remaining dispute; require the Licensee, to pay compensation to persons affected by the agreement; require the Licensee to publish an acknowledgment and apology in one or more newspapers of general circulation, in such a form, at such times and otherwise, as the Commission specifies in the direction; and require the Licensee, to provide periodic reports to the Commission, to assist in determining, whether the actions or practices are continuing and to determine their impact on communications markets, competing Licensees and consumers. It should be borne in mind that the exercise of this power is without prejudice to any other action or remedy provided for under the Act or the Nigerian Communications (Enforcement Processes, Etc.) Regulations 2005.

As at the date of writing, there have so far not been, anti-competitive agreement type conducts by any communications Licensee that was challenged by the Commission.¹²¹

Effect of the prohibited agreements

Unless exempted by the Commission in accordance with Section 93 (1) of the Act, the agreements prohibited by Section 91 (3) and Section 91 (4) of the Act are illegal in Nigeria. In *Unitrust Insurance Co. Ltd. v. Ambico Sendirian Nigeria Ltd* (2012) LPELR-15417 (CA), the Court of Appeal in quoting Vol. 8 of Halsburys Laws of England 3rd Edition Page 126, Paragraph 218 explained an illegal contract as thus "A contract is illegal where the subject matter of the promise is illegal or where the consideration or any part of it is illegal". An illegal contract is one, which is expressly prohibited by

¹²⁰ Regulation 34.

¹²¹ See also, the Commission's letter to the author, dated February 3, 2015, whereby the Commission stated that anti-competitive agreements have never proceeded to full enforcement. However, this conclusion in the author's opinion should not be construed as an absence of cartel type conducts in Nigeria's communications sector.

statute, and is coupled with provisions for sanction (such as fine or imprisonment) in the event of its contravention.¹²²

Where an agreement is expressly prohibited by statute, Nigerian courts will be unwilling to enforce it, and neither party can derive any right or benefit from such an agreement.¹²³ In *Alao v. A.C.B Ltd* (1998) 3 N.W.L.R (Pt. 542) 339 SC, the Supreme Court made clear that:

“As a general rule the Courts will neither enforce a contract which is illegal or which is otherwise contrary to public policy, nor permit the recovery of benefits conferred under such contract”.

This position of law is founded on the latin maxim expressed as *Ex turpi causa non oritur actio*, which means an action does not arise from a base cause.¹²⁴ Thus, any agreement that is tainted with illegality in which both parties are involved is beyond the face of the law as no person can claim any right or remedy under such an agreement.¹²⁵ If it is a clause that is found to be illegal, the question becomes whether it is possible to sever such clause from the entire agreement. In *Adesanya v. Otuewu* (1993) 1 N.W.L.R (Pt. 270) 414, the Supreme Court per Nnaemeka-Agu, JSC had this to say concerning the severability of an illegal clause:

“...it is a recognised principle of law that a contract will rarely be totally illegal or void: certain parts may be entirely lawful in themselves, while others are (sic) valid. Where the illegal or void parts can be “severed” from the rest of the contract on the well-known principles of severance such will be done and the rest of the contract enforced without the void part. It is permissible for courts to adopt this course where the objectionable part of the contract involves merely a void step or promise and is not fundamental, and it is possible to simply strike down the offending part without re-writing or remaking the contract for the parties and without altering the scope and intention of the agreement; and lastly, the contract, shorn of the offending parts, retains the characteristics of a valid contract.”¹²⁶

Accordingly, if it is possible to sever an illegal clause from an agreement in order permit the enforcement of what remains, otherwise the entire agreement is illegal and unenforceable if the illegal clause(s) cannot be severed. It then follows that the enforceability of the entire agreement after the severance of an illegal clause is permissible, insofar as there is no fundamental change in the remaining agreement, and its application would not produce a result inconsistent with the provision(s) of an existing statute.

¹²² *Pan Bisbuilder v. First Bank of Nigeria Ltd* (2000) 1 N.W.L.R (Pt. 612) 684.

¹²³ *Unitrust Insurance Co. Ltd. v. Ambico Sendirian Nigeria Ltd.* (supra)).

¹²⁴ *F.A.B.S Ltd v. Ibeyeye* (2008) 14 NWLR (Pt. 1107).

¹²⁵ *Ibid.*

¹²⁶ At 456 – 457

CHAPTER 6

ABUSE OF A DOMINANT POSITION

Introduction

This chapter is concerned with the extent to which the unilateral (or single) conduct of a Licensee with market power can infringe the competition provisions of the Act and by extension the Competition Regulations. This chapter does not focus on cartel type conducts or agreements (as the previous chapter did) but rather on the unilateral conduct of a Licensee holding a dominant position in an aspect of Nigeria's communications market, and the prohibition of this dominant Licensee from exploiting that position. In this regard, it may be helpful to recall that the conducts deemed to result in a substantial lessening of competition in the communications sector discussed in Chapter 4, all result from the unilateral conduct of dominant Licensees abusing their position of dominance.

Lastly, this chapter will discuss the approach adopted by the Commission in regulating Licensees with market power and/or in conducting a dominance determination for the purpose of imposing *ex ante* regulatory obligation(s).

The applicable provision

Section 92 (4) of the Act authorises the Commission to direct a Licensee in a dominant position on a communications market, to cease conduct in that market which has or may have the effect of substantially lessening competition in any communications market and to implement appropriate remedies.¹ In the EU for instance, the relevant provision that prohibits the abuse of a dominant position is Article 102 of the TFEU (formerly Article 82 of the ECT). Article 102 provides that;

“Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market insofar as it may affect trade between Member States...”

Unlike Article 102, Section 92 (4) does not expressly “prohibit the abuse of a dominant position”,² rather what the Act prohibits is “...*any conduct which has the purpose or effect of substantially lessening competition in any aspect of the Nigerian communications market*”.³ However it is important to note that the exercise by the Commission of its Section 92 (4) power will have the same effect as prohibiting the abuse of a dominant position.⁴

¹ This provision is also restated in Regulation 23 of the Competition Regulations.

² However it should be noted that Part V of the Competition Regulations is worded as thus “*Abuse of a dominant position*”.

³ Section 91 (1).

⁴ It follows then that where the Commission fails and/or refuses to exercise its Section 94 (2) power in circumstances where a dominant Licensee engages in a conduct that has the purpose or

Section 92 (4) therefore deals with the abuse of market power, rather than cartel type conducts as Section 91 (3) and (4) of the Act, and Part III of the Competition Regulation does. By authorising the Commission to direct a dominant Licensee to cease an abusive conduct, and thus prohibiting the “abuse of a dominant position”, the objective of Section 92 (4) is to prevent dominant Licensees from using their market power to impede effective competition by engaging in a conduct that has an adverse effect on consumer welfare, or on a communications market.

The application of Section 92 (4) requires *firstly* a finding of a position of dominance, and *secondly* the existence of the abuse of such dominance. In other words, the Commission will not take action to condemn a Licensee who only occupies a dominant position, but rather the Commission is authorised by Section 92 (4) to challenge a dominant Licensee where in addition to holding a dominant position, the Licensee *abuses* such position by engaging in any conduct “*which has or may have the effect of substantially lessening competition in any communications market*”.⁵ Thus, without a finding of dominance, an abusive conduct is unlikely to be challenged by the Commission under its Section 92 (4) power.

Despite its 2010 and 2013 Dominance Determinations, the Commission unlike competition authorities in other jurisdictions, is yet to articulate the particular circumstances that are likely to trigger the application of its Section 92 (4) power,⁶ as at the time of this writing, or stated whether it will focus on those types of conducts that harm communications consumers such as exploitative conducts or conducts resulting in direct consumer harm in the form of negative effect on prices, output, innovation or choice, and/or on exclusionary conducts that harm competing Licensees by foreclosing them from the relevant communications market, in applying its Section 92 (4) power.⁷ Although, as previously noted in Chapter 4, the various conducts deemed by the Commission to result in a substantial lessening of competition under Regulation 8 are specifically committed against competing Licensees and not at consumers of communications services.⁸

Lastly, as stated in Chapter 4, an abusive conduct may be authorised by the Commission pursuant to Section 93 of the Act, on the application of the dominant Licensee.

effect of a substantial lessening of competition, a writ of *mandamus* can be filed at the Federal High Court to compel the Commission to exercise this power.

⁵ See, *Report of the Public Inquiry on Competition Practices Regulations* (Nigerian Communications Commission, 2006), the Commission's response to 15th comment.

⁶ For instance, the EC in its *Non-Horizontal Merger Guidelines*, OJ 2008 C265/6, paragraph 18, makes clear that non-horizontal mergers with exclusionary effects will only be condemned, if the exclusion (or foreclosure) of competitors is likely to result in direct consumer harm.

⁷ However it is important to note that under the substantial lessening of competition test pursuant to Regulation 6 of the Competition Regulations, the Commission in its assessment of whether a conduct constitutes a substantial lessening of competition is required to consider *inter alia*, the impact of the conduct on existing competitors in the identified market, and impact of the conduct on consumers. On exploitative and exclusionary conducts see the concept of abuse below.

⁸ With the exception of conducts described in Regulations 8 (f) and 8 (j).

The concept of dominance

The ECJ in C27/76 *United Brands v. Commission*, [1978] ECR 207, [1978] 1 CMLR 429, at paragraph 65 defined a dominant position as “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”. Thus, the dominant undertaking will normally possess a substantial degree of market power that is in excess of any market power held by any of its competitors. It is interesting to note that the Commission equates significant market power (SMP) with dominance.⁹ Market power is the ability of a seller to charge prices without being restrained by competitive pressure.¹⁰ The US Supreme Court in *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma* 468 U.S. 85, 109 n.38 (1984) defined market power as “the ability to raise prices above those that would be charged in a competitive market”.¹¹ A seller has market power if the seller is able to profitably raise price above the competitive level by a small but significant amount (for example by 5% or 10%) for a significant period of time.¹² From an economic standpoint, market power is the same as where the hypothetical monopolist imposes a “small but significant and non-transitory” increase in price in a relevant market concerning a product in a given geographic area.¹³

The test of dominance

The Commission is authorised by Section 92 (2) of the Act to publish guidelines and regulations which clarify how it shall apply the test of a “dominant position” to Licensees. These guidelines and regulations may specify the matters which the Commission may take into account, including; the relevant economic market;¹⁴ the global technology and commercial trends affecting market power;¹⁵ the market share of the Licensee;¹⁶ the Licensee’s power to make independent rate setting decisions;¹⁷ the degree of product or service differentiation and sales promotion in the market;¹⁸ and any other matters which the Commission is satisfied are relevant.¹⁹ Section 92 does not however, require the Commission to be exhaustive in listing the factors that it considers as relevant, or of the approaches it will adopt when determining whether a Licensee is in

⁹ See, Nigerian Communications Commission (NCC), *Consultation Paper on Dominance in Selected Communications Markets* (October 27 2009), p. 6.

¹⁰ Organisation for Economic Co-operation and Development (OECD). (2003, January 17). Indicators for the Assessment of Telecommunications Competition [WWW document]. URL <http://www.oecd.org/sti/broadband/2496809.pdf> (visited 2015, April 22), p. 7.

¹¹ However, Professor Hovenkamp defines market power as “a firm’s ability to deviate profitably from marginal cost pricing”, see Herbert Hovenkamp, *Federal Antitrust Policy: The Law of Competition and its Practices* (Thompson/West, 2005), p. 80.

¹² Miles, Jeff. (2012, November 8). ‘Principles of Antitrust Law’ [WWW document] URL https://www.healthlawyers.org/Events/Programs/Materials/Documents/FHL12/e_miles.pdf (visited 2013, December 25), p. 9.

¹³ OECD, *supra*.

¹⁴ Section 92 (3) (a).

¹⁵ Section 92 (3) (b).

¹⁶ Section 92 (3) (c).

¹⁷ Section 92 (3) (d).

¹⁸ Section 92 (3) (e).

¹⁹ Section 92 (3) (f).

a dominant position in a particular communications market. In this regard, the Commission will take into consideration its guideline and/or regulations, but will not be limited to them, especially if the Commission considers that other factors are relevant to its application of the test of a dominant position.

Accordingly, Regulation 18 (1) of the Competition Regulations provides that, Licensees 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 Commission as having a position of economic strength in the defined communications market. The Commission's view of a position of dominance is consistent with the case law of CJEU, which as stated above define a dominant position as being;

*“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”.*²⁰

The ability of a Licensee to act independent of competitors or consumers is evidence that the Licensee is not constrained by competition in the relevant communications market, and thereby exercises substantial market power in that market.²¹ In addition, as read in Regulation 18 (1), it is obvious that the Commission considers the establishment of actual detrimental effect(s) on competition as an indication of dominance, rather than seeking to uncover whether an anti-competitive behaviour or intent really exist.²² In this regard, the Commission adopts an economic or “effects-based” approach in its identification of dominance. An effects-based approach examines the presence of anti-competitive effects harmful to consumers through their impact on competition, on a case-by-case basis in accordance with “sound economic principles” and “rigorous economic and econometric analysis”.²³ An effects-based approach assesses each particular incidence of dominance based on the anti-competitive effects it produces.²⁴

Thus, the Commission in determining whether a Licensee wields market power, will identify a potential anti-competitive effect in the form of either, a unilateral increase in price, or decrease in output or quality (innovation), or the ability to act without constraint from consumers and competitors resulting from the Licensee's conduct, and assess the extent to which such harm has undermined consumer welfare, and whether such effect can be outweighed by any (alleged) efficiency gain²⁵ or other countervailing factors.

²⁰ C27/76 *United Brands v. Commission* (supra), at paragraph 65, Case 85/76 *Hoffmann-La Roche & Co. AG v. Commission of the European Communities* [1979] E.C.R. 461, paragraph 38.

²¹ See Einer Elhauge, Damien Geradin, *Global Antitrust Law and Economics* (New York, Foundation Press, 2007), p. 269.

²² See also Report by the Economic Advisory Group for Competition Policy. (2005, July). ‘An economic approach to Article 82’ [WWW document] URL http://ec.europa.eu/dgs/competition/economist/eagcp_july_21_05.pdf (visited 2015, May 3) p.4.

²³ *Ibid.*, p. 1.

²⁴ *Ibid.*, p. 3.

²⁵ See *Ibid.*

Under EU competition law, the case laws seem to indicate that the presence of anti-competitive effects is a necessary requirement for dominance when finding liability under Article 102. In Case C-52/09 *Konkurrensverket v. TeliaSonera Sverige AB* [2011] ECR I – 527, the Court made clear that dominance is a position of economic strength enjoyed by a firm 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, its customers and ultimately of consumers*”.²⁶ Similarly, in the US, the courts also require direct evidence of anti-competitive effects, such as reduced output, higher prices or diminished quality as proof that a firm possesses market power in monopolisation claims instituted pursuant to Section 2 of the Sherman Act.²⁷ In *Toys “R” Us, Inc. v. FTC* 221 F.3d 928, 937 (7th Cir. 2000), the US Court of Appeal, stated that “*The Supreme Court has made it clear that there are two ways of proving market power. One is through direct evidence of anticompetitive effects.*”²⁸ These cases are consistent with the view of the Commission, particularly Regulation 18 (1) of the Competition Regulations, when identifying Licensees with market power in a particular communications market.

It is pertinent to note that most of the literature on dominance discusses market power from the seller’s perspective.²⁹ However, it is possible, although far less frequently encountered for a buyer to exercise market power, to the extent of being able to unilaterally restrict output and/or depress price, thus impeding effective competition in the relevant market.³⁰ Market power from the buyer’s perspective is referred to as monopsony power.³¹ The United States Court of Appeal for the 10th Circuit in *Richard Campfield d/b/a Ultra Bond Licensing v. State Farm Mutual Automobile Insurance Company*, 532 F.3d 1111 (10th Cir. 2008) describes monopsony as where “*the buyers have market power to decrease market demand for a product and thereby lower prices*”. According to the Court in *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 320 (2007) “*Monopsony power is market power on the buy side of the market. . . As such, a monopsony is to the buy side of the market what a monopoly is to the sell side and is sometimes colloquially called a ‘buyers’ monopoly*”.³²

Monopsony power exists where buyers have a strong negotiating position with their suppliers, who do not have alternative buyers, thus negating the potential of these

²⁶ At paragraph 23.

²⁷ Thomas J. Klotz. (2008, December 1). ‘Monopoly Power: Use, Proof and Relationship to Anticompetitive Effects in Section 2 Cases’ [WWW document] URL https://www.ftc.gov/system/files/documents/public_events/section-2-sherman-act-hearings-single-firm-conduct-related-competition/section2monopolypower.pdf (visited 2015, May 23), pp. 38 - 39.

²⁸ At paragraph 937.

²⁹ Ignacio Herrera Anchustegui. (2015, April, 29). ‘Market Definition in Buyer Power Cases: Revisiting Some Traditional Views’ [WWW document] URL http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2600471 (visited 2016, February 21), p. 9.

³⁰ Herbert Hovenkamp, *supra*, p. 14.

³¹ Organisation for Economic Co-operation and Development, *Glossary of Industrial Organisation Economics and Competition Law*, paragraph 137.

³² At paragraph III.

suppliers (or sellers) to exercise market power.³³ Thus, a buyer will be unable to exercise market power, where the supplier has alternative sources of purchases to which he can turn to, in the event of a decrease in the purchase price by that buyer.³⁴ By reducing its demand for a product, a monopsonist can compel suppliers to sell at a lower price than would have been in a competitive market.³⁵ Where the product is an input essential for the production of another service in a downstream market, a reduction in its demand by the monopsonist will likely result in the production of fewer units of output, which in turn is likely to cause some increase in the price that consumers pay in the downstream market.³⁶ As a monopolist can sell at a lower price in order to eliminate competition from other sellers, so also is the monopsonist capable of buying at a higher price, in order to eliminate competing buyers.³⁷

It then follows that the Act (and by extension the Competition Regulations) also envisage a situation where a Licensee will exercise market power as a monopsonist, in so far as the Licensee has a strong negotiating position with its supplier(s), and is thus able “*to unilaterally restrict output, raise prices, reduce quality or otherwise, and to act independent of competitors or consumers*”.³⁸ For example, an MNO Licensee that represents a very high proportion of purchases of certain communications equipment is unlikely not to have a stronger negotiating position, because suppliers of these equipment are dependent on this Licensee for their sales.³⁹

In determining whether a Licensee is in a dominant position (or exercises market power), Regulation 18 (2) requires the Commission, to consider a range of market circumstances, but must consider at least one of the following;⁴⁰

a) The market share of the Licensee, determined by reference to revenues, number of subscribers or volume of sales

Market share is one of the commonly used factor used for establishing the existence of a dominant position.⁴¹ In accordance with this provision, market share is calculated on the

³³ See, Roger D. Blair, Jeffrey L. Harrison, *Monopsony in Law and Economics* (New York: Cambridge University Press, 2010); Steven C. Salop, ‘Anticompetitive Overbuying by Power Buyers’, *72 Antitrust L.J.* 669-715 (2005) for an excellent discussion on monopsony power.

³⁴ Miles, Jeff, *supra*, p. 12.

³⁵ Herbert Hovenkamp, *supra*.

³⁶ American Antitrust Institute. (2008, August 28). ‘The Next Antitrust Agenda: The American Antitrust Institute’s Transition Report on Competition Policy to the 44th President of the United States’ [WWW document] URL <http://antitrustinstitute.org/content/AAI-book-next-antitrust-agenda> (visited 2016, February 23), p. 101.

³⁷ Roger D. Blair, John E. Lopatka, ‘Predatory Buying and the Antitrust Laws’ *Utah Law Review*, Vol 2008, No. 2 (2008), pp. 415 – 458, pp. 415 – 416.

³⁸ See, Regulation 18 (1) of the Competition Regulations.

³⁹ See also, the anti-competitive offence of *requiring or inducing a supplier to refrain from selling to a competing Licensee* in Regulation 8 (i) (ii) of the Competition Regulations, which suggests that the offending Licensee is a monopsonist in order to be able compel the supplier to act in such a manner. See also, buyer power at paragraphs below.

⁴⁰ Although, Valcke, Queck and Lievens, argue that it is only in circumstances in which several of these market circumstances are present, would it reinforce a firm’s market power, see, Peggy Valcke, Robert Queck, Eva Lievens, *EU Communications Law Significant Market Power in the Mobile Sector* (Cheltenham: Edward Elgar, 2005), p. 34.

basis of the Licensee's percentage of the relevant market that it controls,⁴² share of the market's total sales revenue in the relevant market,⁴³ or subscriber base.⁴⁴ A Licensee with a large share of a properly defined communications market presumptively has market power.⁴⁵ However, according to the EC a high market share alone is not sufficient to establish the possession of dominance, although it is unlikely that a firm without a significant share of the relevant market would be in a dominant position.⁴⁶ Thus, firms with market shares of no more than 25 % are not likely to enjoy a (single) dominant position on the market concerned.⁴⁷

The Commission will presume that a Licensee having market share in excess of 40% in the relevant market, to be the dominant operator in that market.⁴⁸ However, this presumption of dominance can be rebutted where the Licensee's market shares have continued to decline over a period of time,⁴⁹ thus indicating that the market is becoming more competitive.⁵⁰ It is also not clear to what extent the Commission will consider the existence of a gap between the market share of a particular Licensee in relation to its competitors as evidence of that Licensee's dominance.⁵¹ For instance in a hypothetical situation in which a Licensee has 25% of a relevant communications market, but its competitors are only small firms with a market share of around 5% each.⁵²

In its 2010 Dominance Determination, the Commission found MTN dominant in the mobile telecommunications market with a market share of 41.2% as of June, 2009.⁵³ However, it is not clear from the Commission's determination, whether MTN's market share is in reference to its revenue, number of subscribers or volume of sales.⁵⁴

⁴¹ Laurent Garzaniti & Matthew O' Regan, editors, *Telecommunications, Broadcasting and the Internet EU Competition Law & Regulation* (London: Thomson Reuters (Legal) Limited, 2010), p. 456.

⁴² See also, Miles, Jeff, *supra*, p. 11.

⁴³ See also, Janice Hauge, Mark Jamison, 'Analyzing Telecommunications Market Competition: Foundations for Best Practices' (29 October 2009), p. 17.

⁴⁴ See also, Case COMP/M.1795 *Vodafone Airtouch/Mannesman*, paragraph 32.

⁴⁵ See also, Herbert Hovenkamp, *supra*, p. 83.

⁴⁶ 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), paragraph 75.

⁴⁷ *Ibid.*

⁴⁸ Nigerian Communications Commission (NCC), *Determination of Dominance in Selected Communications Market in Nigeria* (March 26 2010), p. 7.

⁴⁹ *Ibid.* However according to the EC and case laws from the CJEU, a steady decline of market shares may not always rebut the existence of a dominant position, particularly where the shares are very high from the initial period, see Case C-202/07 P *France Télécom v. Commission*, paragraph 86.

⁵⁰ Peggy Valcke, Robert Queck, Eva Lievens, *supra*, p. 33.

⁵¹ See, *Ibid.*

⁵² *Ibid.*

⁵³ Nigerian Communications Commission (NCC) (2010), *supra*.

⁵⁴ However, from the submission of MTN during the 2010 Dominance Determination, it does appear that the market share calculation is in respect of its subscriber base.

b) The overall size of the Licensee in comparison to competing Licensees particularly any resulting economies of scale or scope that permit the larger Licensee to produce products or services at lower costs

Significant economies of scale reduce average cost of production by spreading fixed costs over larger output or a broader set of products.⁵⁵ Where there is evidence that a Licensee owns fixed assets (or other forms of assets) nearly as twice as its competitors, coupled with the same number or fewer personnel employed in relation to its competitors, the Commission will consider the Licensee to have achieved significant economies of scale that is suggestive of a position of dominance in the relevant market.⁵⁶ In this regard, the significant economies of scale will give the dominant firm advantages over smaller firms.⁵⁷

c) Control of network facilities or other infrastructure, access to which is required by competing Licensees and that cannot, for commercial or technical reasons, be duplicated by competing Licensees

This refers to a situation in which a particular network facility or infrastructure is necessary to produce a particular product/service; the required infrastructure is exclusively under the control of a certain firm; and there are high and non-transitory barriers to substitute the infrastructure in question.⁵⁸ Thus, the control of infrastructure not easily duplicated can make it possible for a Licensee to act independent of other suppliers of this infrastructure, and to exercise market power in the market for access to this infrastructure.⁵⁹

The Commission will consider the control of a network infrastructure (or facility) required by competing Licensees, and access to it cannot be duplicated for commercial or technical reasons, as a strong indicator of dominance in the market for provisioning access to that infrastructure.⁶⁰ Thus, in the Commission's view, the ownership (or control) of a qualifying "essential facility" is an indication of dominance. In its 2010 Dominance Determination, the Commission expressed concern that competition may have been substantially lessened in the mobile telecommunications market by MTN which controls a significant portion of key network infrastructure in that market, and that other operators stated that they have encountered difficulties in obtaining adequate and timely interconnection with MTN, or in obtaining shared access to needed facilities

⁵⁵ DG Competition (2005, December). 'Discussion paper on the application of Article 82 of the Treaty to exclusionary abuses' [WWW document] URL <http://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf> (visited 2012, January 24), paragraph 40.

⁵⁶ Nigerian Communications Commission (NCC) (2010), *supra*, pp. 7 - 8.

⁵⁷ DG Competition (2005, December), *supra*.

⁵⁸ ERG (2005, September). 'Revised Working paper on the SMP concept for the new regulatory framework' [WWW document] URL http://berec.europa.eu/doc/publications/public_hearing_concept_smp/erg_03_09rev3_smp_common_concept.pdf (visited, 2016, February 12), p. 5.

⁵⁹ *See, Ibid.*

⁶⁰ Nigerian Communications Commission (NCC) (2010), *supra*, p. 8.

such as towers and backbone network transmission in areas where MTN has the only viable infrastructure.⁶¹

d) The absence of buying power or negotiating position by customers or consumers, including substantial barriers to switching service providers

Buyer power is the ability of one or more buyers, based on their economic importance in the market in question to obtain favorable purchasing terms from their suppliers.⁶² Buyer power results from the bargaining strength of the buyer vis-à-vis a seller due to the buyer's size, commercial significance and its ability to switch to another seller.⁶³ The ability of a buyer to constrain the market power exercised by a supplier depends to a large extent on whether the buyer can credibly threaten to switch to other suppliers, to self-provide the service, to significantly reduce consumption or to cease to use the service at all in case of a price increase.⁶⁴

Accordingly, where a Licensee's behaviour in a market is severely constrained by its customers, that Licensee cannot be considered to have market power. For example, where a large proportion of the purchase of network switching subsystem originate from a particular MNO, the MNO may be considered to be dominant as a buyer of these type of communications equipment,⁶⁵ and thus would constrain the market behaviour of the supplier of the equipment. As seen in Cases T-68/89, T-77/89 and T-78/89 *Società Italiana Vetro and others v. Commission* [1992] ECR II-1403 at paragraph 366, failure to consider buyer power may be fatal to a claim founded on Article 82 of the ECT (now Article 102 of the TFEU), prohibiting the abuse of a dominant position in the EU.

In assessing buying power for the purpose of a dominance assessment, the Commission will also consider substantial barriers to switching (or switching cost).⁶⁶ In its analysis of dominance in the market for mobile telecommunications services, the Commission considered the extent to which mobile telecommunications consumers are able to constrain the exercise of market power by an MNO, by switching to other MNOs (rate of customer churn), and observed that the absence of mobile number portability (to reduce this switching cost) and roaming agreements will invariably strengthen the negotiating position of any particular MNO.⁶⁷

⁶¹ *Ibid.*

⁶² Zhiqi Chen, 'Buyer Power: Economic Theory and Antitrust Policy', *Research in Law and Economics*, Volume 22, 17- 40 (2008), p. 19.

⁶³ See Richard Whish, David Bailey, *Competition Law* (New York: Oxford University Press, 2012), p. 45.

⁶⁴ Alistair Lindsay, *The EC Merger Regulation: Substantive Issues* (London: Sweet & Maxwell, 2006), pp. 469 - 479.

⁶⁵ Guidelines on the application of ECC competition rules in the telecommunications sector (91/c 233/02) Official Journal C 233 , 06/09/1991 P. 0002 – 0026, see generally paragraph 82.

⁶⁶ Regulation 18 (2) (d) of the Competition Regulations.

⁶⁷ Nigerian Communications Commission (NCC) (2010), *supra*, p. 8.

e) Ease of market entry, and the extent to which actual or potential market entry protects against the exercise of market power such as raising prices

Barriers to entry (conversely referred to as ease of market entry) is any cost which is borne by a firm seeking to enter a new market, but is not borne by an incumbent market player.⁶⁸ The absence of barriers to entry “*pose[s] a credible competitive constraint on the [ability of the] incumbent [firm]*” to exercise market power.⁶⁹ It then follows, that where barriers to entry into a particular market is low, the ability of a firm to exercise market power by imposing a price increase or reducing its output, is also low because potential competitors can quickly enter the market without incurring significant costs.⁷⁰ However, ease of market entry must be significant enough, in order to act as a competitive restraint on the exercise of market power to a sufficient degree.⁷¹

In its 2010 Dominance Determination, the Commission considered whether there were factors that impede or delay entry into a particular telecommunications market such as licenses required for authorising a particular communications services and/or use of frequency spectrum.⁷² Also, factors such as substantial sunk costs can constrain the ability of new entrants to enter a market.⁷³ In the mobile telecommunications market, the Commission considers the cost of entry to be fundamentally high.⁷⁴

f) The rate of technological or other change in the market, and related effects for market entry or the continuation of a dominant position

The rate at which a firm adopts new technologies could present barriers to market entry for smaller firms or firms unwilling to expend capital on new technologies. According to Jones and Sufrin, “*...expenditure on technological development can be a sunk cost of entry but it is also true that a new entrant on to the market may not have to spend the same resources and development as the incumbent on the market: there is no need to reinvent the wheel*”.⁷⁵ In Case 85/76 *Hoffmann-La Roche & Co. AG v. Commission of the European Communities* EUR-Lex-61976J0085, the ECJ considered the technological lead of a dominant firm over its competitors as contributing to that firm's dominance because of the technical advantages it confers.⁷⁶

⁶⁸ See, George. J. Stigler, *The Organisation of Industry* (Chicago UP, 1968), p. 69.

⁶⁹ ICN Unilateral Conduct Working Group. (2011, May). ‘Chapter 3: Assessment of Dominance’ [WWW document] URL <http://www.internationalcompetitionnetwork.org/uploads/library/doc752.pdf> (visited, 2015, February 25), p. 24.

⁷⁰ *Ibid.*

⁷¹ *Ibid.*, p. 25.

⁷² Nigerian Communications Commission (NCC) (2010), *supra*.

⁷³ Paul J.J. Welfens, ‘Significant Market Power in Telecommunications: Theoretical and Practical Aspects’, *European Economy and International Economic Relations* ISSN 1430-5445 (May 2005), p. 12, Laurent Garzaniti & Matthew O’ Regan, *supra*, p. 457.

⁷⁴ Nigerian Communications Commission (NCC) (2009), *supra*, p. 13.

⁷⁵ Alison Jones, Brenda Sufrin, *EC Competition Law-Text, Cases and Materials* (Second Edition, Great Britain: 2004), p. 356.

⁷⁶ See generally paragraphs 42 and 48.

The consideration of the rate of technological change is relevant when assessing dominance in technology (or innovation) driven markets characterised by ongoing technological progress as seen in the telecommunications industry, where, according to Schumpeter “gales of creative destruction” could displace a previously dominant firm.⁷⁷ As noted by the court in *United States v. Microsoft* 253 F 3d 35, 49 (DC Cir 2001), “rapid technological change leads to markets in which firms compete through innovation for temporary market dominance, from which they may be displaced by the next wave of product advancements”.

Other market circumstances

The Commission in its assessment of dominance will also consider time elements.⁷⁸ This in the Commission’s view is because dominance does not have to continue for a particular period to warrant regulatory intervention,⁷⁹ especially as dominance only prevails within a relevant time horizon.⁸⁰ Thus, if the exercise of market power is only temporary and can be remedied by market forces in a reasonable time, a Licensee will be deemed not dominant.⁸¹ The Commission will however re-examine the market power of a Licensee periodically, in order to determine whether circumstances indicating dominance continues to exist.⁸²

In addition, the Commission has stated that in the mobile telecommunications market consisting of at least five Licensees providing service on a nationwide basis, it is unlikely that any Licensee will be found to have market power unless other Licensees are dependent on this Licensee.⁸³ And, such Licensee controls a disproportionate of the market revenue, infrastructure, and other factors enabling it to influence both competing licensees, and customer costs and price unilaterally.⁸⁴

Procedural preliminaries

Procedurally, the Commission in commencing a proceeding to determine whether a Licensee is in a dominant position, shall deliver a written notice to the Licensee or any other person who is the subject of the proceeding (a “Proceeding Notice”), identifying the nature of the proceeding, including a summary of the events, circumstances, conduct and provisions of the Act, licence conditions or any regulations, decisions, directions, rules or other actions of the Commission relevant to the proceeding and the potential outcome or practical effects of the proceeding.⁸⁵ The Proceeding Notice shall also specify, any additional or other procedures applicable to the proceeding, including the timing for the delivery of submissions, by the person(s) receiving the Proceeding Notice or any

⁷⁷ See, Joseph Alois Schumpeter, *Capitalism, Socialism and Democracy* (New York: Harper & Row, 1975).

⁷⁸ *Report of the Public Inquiry on Competition Practices Regulations*, supra, Commission’s response to 17th comment.

⁷⁹ *Ibid.*

⁸⁰ See generally, Badden Fuller, C, ‘Article 86 EEC: Economic Analysis of the Existence of a Dominant Position’, *European Law Review*, (1979), 4 (6), pp. 423 – 441.

⁸¹ See, ICN Unilateral Conduct Working Group. (2011, May), supra, p. 3.

⁸² *Report of the Public Inquiry on Competition Practices Regulations*, supra.

⁸³ Nigerian Communications Commission (NCC), *Consultation Paper on Dominance in Selected Communications Markets*, supra.

⁸⁴ *Ibid.*

⁸⁵ Paragraph 11 to the Schedule to the Competition Regulations.

other interested persons and the further actions to be taken by the Commission in concluding the proceeding.⁸⁶

Market definition

In order to assess the extent of market power held by a dominant Licensee, it is important to define the relevant market in which the dominant Licensee competes.⁸⁷ Accordingly, Regulation 19 (1) of the Competition Regulations, provides that the evaluation of a dominant position shall begin first with the definition of the relevant communications market or markets. The methodology applied by the Commission in defining the relevant product and geographic communications market have been discussed in Chapter 3. As stated in Chapter 3, the methodology applied in defining a communications market does not differ irrespective of whether the Commission is reviewing an agreement, investigating the abuse of a dominant position, or conducting a merger review.

However, it is important to note that in defining the relevant market when assessing dominance from the seller's perspective, the relevant market includes the sources of supply to which the seller's customers can turn to in the event that the seller decides to increase price.⁸⁸ On the other hand, when assessing dominance from the buyer's perspective, the relevant market will include buyers who, (or distribution channels which) are regarded as reasonably good substitutes by the seller, thus constraining the exercise of market power by any particular buyer.⁸⁹

Presumption of dominance

Pursuant to the provision of Regulation 20 of the Competition Regulations, the Commission will consider a Licensee whose gross revenue in a specific communications market exceed 40% of the total gross revenues of all Licensees in that market as dominant in that market. According to the Commission, a 40% threshold is a common and recommended measure in economic principle in the presumption of dominance and has been adopted in a number of competition jurisdictions,⁹⁰ and this presumption of dominance can be rebutted in circumstances where the shares have been in substantial decline over a period of time.⁹¹ However, it is pertinent to note that this presumption of dominance is not dependent on profitability as profitability can result from a number of factors, including efficient operations and economies of scale.⁹²

Determination of joint dominance

Pursuant to Regulation 21 of the Competition Regulations, the Commission is also authorised to determine that two or more Licensees, acting jointly or collectively, are in a dominant position, including where the Licensees have no common ownership, are not

⁸⁶ Paragraph 12 to the Schedule to the Competition Regulations.

⁸⁷ See, Barry J. Rodger, Angus MacCulloch, *Competition Law and Policy in the EC and UK* 4th Edition (New York: Routledge-Cavendish, 2009), p. 104.

⁸⁸ Miles, Jeff, *supra*, p. 13.

⁸⁹ Roger D. Blair, Jeffrey L. Harrison, *supra*, p. 94.

⁹⁰ *Report of the Public Inquiry on Competition Practices Regulations, supra*, Commission's response to 20th comment.

⁹¹ *Ibid.*

⁹² *Ibid.*, Commission's response to 21st comment.

parties to any formal agreement or operate in different markets. The language of this provision makes clear the anticipation of some form of deliberate and coordinated behaviour between unrelated Licensees in the absence of any express agreement between them.⁹³ Economists refer to this type of conduct as tacit collusion, that is coordination through tacit means, rather than by express communication.⁹⁴ Since there is no form of express communications between the parties, tacit collusion in this regard is not explicit,⁹⁵ otherwise it will be deemed an agreement between the Licensees subject to review pursuant to Section 91 (3) and (4) of the Act, and Part III of the Competition Regulations.⁹⁶ Tacit collusion is expressed only in terms of the outcome it produces, such as an increase in price or reduction of output resulting from the frequent interaction of the firms.⁹⁷ Case laws from the CJEU have severally considered tacit collusion to be synonymous with (or as enabling) collective dominance.⁹⁸

In discussing the concept of collective dominance in the EU, the ECJ at paragraph 36 in Case C-396/96 P *Compagnie Maritime Belge Transports v. Commission* [2000] ECR I-1365 stated that it implies that a dominant position may be held by two or more economic entities legally independent of each other to the extent that they “*they present themselves or act together on a particular market as a collective entity*” from an economic point of view. According to the GC in *Italian Flat Glass* OJ [1989] L33/44, a situation of collective dominance could exist where two or more independent economic entities in a specific market are united by such economic links to the extent that together they hold a dominant position vis-à-vis the other operators on the same market.⁹⁹

In order to establish collective dominance, it is necessary to examine “*the economic links or factors which give rise to a connection between the undertakings concerned*”.¹⁰⁰ Such economic links according to the CFI in Case T – 102/96 *Gencor v. Commission* [1996] ECR-753,¹⁰¹ also includes “*the relationship of interdependence existing between*

⁹³ See *Ibid*; Nigerian Communications Commission (NCC) (2010), *supra*, p. 20.

⁹⁴ Richard Whish, David Bailey, *supra*, p. 562.

⁹⁵ Marc Ivaldi, Bruno Jullien, Patrick Rey, Paul Seabright and Jean Tirole. (2003, March). ‘The Economics of Tacit Collusion’ [WWW document] URL http://ec.europa.eu/competition/mergers/studies_reports/the_economics_of_tacit_collusion_en.pdf (visited 2015, May 28), footnote 2.

⁹⁶ It is however noted that the absence of a written or an express agreement does not relieve a conduct of liability (or review) under Section 91 (3) and (4) of the Act, and Part III of the Competition Regulations, especially if the conduct satisfies the elements of understanding, agreement or arrangement. Indeed an “understanding” may be “tacit” in nature, see *Australian Competition & Consumer Commission v. Leahy Petroleum Pty Ltd* [2007] FCA 794 and Chapter 5.

⁹⁷ Marc Ivaldi, Bruno Jullien, Patrick Rey, Paul Seabright and Jean Tirole. (2003, March), *supra*.

⁹⁸ *Ibid.*, p. 4. See generally, Case T-342/99 *Airtours v. Commission* (CFI, unreported, 6 June 2002), Case T-5/02 *Tetra Laval BV v. Commission* (CFI, unreported, 25 October 2002), and Case T-77/02 *Schneider Electric SA v. Commission* (CFI, unreported, 22 October 2002).

⁹⁹ At paragraph 358.

¹⁰⁰ See Case C-393/92 P *Municipality of Almelo and Others. v. Energiebedrijf IJsselmij NV* [1994] ECR I - 1477.

¹⁰¹ At paragraph 276.

parties" in markets characterised by oligopoly,¹⁰² in particular, in terms of market concentration, transparency and product homogeneity, such as is observed in the telecommunications sector where several operators have some sort of links with one another¹⁰³ in the form of access and/or interconnection agreements. For instance, where access to the local loop¹⁰⁴ is controlled by only two operators, depending on the circumstance and relationship between them, it is possible that neither operator holds a dominant position, however together they may hold a joint or collective dominant position.¹⁰⁵ Collective dominance also exists where firms "*adopt a common policy on the market and act to a considerable extent independently of their competitors, their customers, and also of consumers*".¹⁰⁶ For instance, the common policy could be the adoption of similar pricing policy in the absence of an express agreement to this effect.¹⁰⁷

In Case T-193/02 *Laurent Piau v. Commission* [2005] ECR II-209, the Court at paragraph 111 set out the following three cumulative conditions as necessary for a finding of collective dominance;

- I. *Each member of the dominant oligopoly must have the ability to know how the other members are behaving in order to monitor whether or not they are adopting the common policy*
- II. *The situation of tacit coordination must be sustainable over time, meaning that there must be an incentive not to depart from the common policy on the market*
- III. *The foreseeable reaction of current and future competitors, as well as of consumers, must not jeopardise the results expected from the common policy.*

¹⁰² In economics, an oligopolistic market is one in which control over the supply of a commodity is in the hands of a small number of producers and each one can influence prices and affect competitors.

¹⁰³ *EC Notice on the application of the competition rule to access agreements in the telecommunications sector (98/C 265/02)* (Access Notice), paragraph 79.

¹⁰⁴ Webster's New World Telecom Dictionary at page 292 defines local loop to mean:
"An access circuit from the network edge to the customer premises, a local loop is a short haul circuit for access to a local exchange. The most common example of a local loop is an electrically based, two-wire, copper access circuit between a telephone company central office (CO) switching center and a residential or small business premises. Such a circuit is provisioned over a single unshielded twisted pair (UTP), within which two wires are required to complete the electrical circuit, with the current in one wire opposite to the current in the other, and with both wires carrying the information signal. The two conductors comprise an electrical loop, with one wire carrying the go signal and the other carrying the electrical return signal. In the broader contemporary sense, any access circuit between the customer premises and the edge of the telco network, or that of any other service provider, is termed a local loop, whether it is electrically based or employs optical or radio energy".

¹⁰⁵ Access Notice, paragraph 80.

¹⁰⁶ See, Joined Cases C-68/94 and C-30/95, *French Republic and Société commerciale des potasses et de l'azote (SCPA) and Entreprise minière et chimique (EMC) v. Commission* [1998] ECR I-1375, paragraph 221.

¹⁰⁷ Case C-396/96 P *Compagnie Maritime Belge Transports v. Commission* (supra), paragraph 45.

Lastly, the EC analyses joint or collective dominance under Article 102 in the same manner it analyses joint or collective dominance under the EC Merger Regulation.¹⁰⁸

In Nigeria's communications sector, the Commission stated in its 2010 Dominance Determination that a condition of "joint" or "collective" dominance could emerge among two or more operators, with the effect of limiting competitive market forces.¹⁰⁹ According to the Commission, the main factors that tend to underlie the prospects for collective dominance in a market are:¹¹⁰

- I. Collective dominance can arise in the form of "tacit collusion" among operators in a market, where no explicit agreement or collusion may exist, but conditions evolve such that certain patterns of collective behaviour occur, based on the individual and combined interests of the operators;
- II. Such tacit collusion can take the form of a lack of price competition, where firms determine that the potential gains from price undercutting are small and the losses from a retaliatory price war may be high;
- III. Where firms focus more on longer-term profits and strategic plans, rather than short-term gains, they have more incentive to maintain the balanced structure of a tacit collusion on prices, as the short-term gains are likely to be small, while longer-term losses could be large; and
- IV. Implicit price collusion can also extend to other aspects of service provision, such as quality of service improvements, product differentiation, and capital investments, where firms may have less incentive to attempt to improve their market position via such expenditures, recognising that their competitors will not take similar initiatives.

The Commission further stated that the key factors that contribute to creating the conditions in which tacit collusion and collective dominance may emerge, include the following:¹¹¹

- I. **Entry barriers:** Relatively high entry barriers are a necessary condition for dominance or collusion in any market, as easy entry tends to ensure that new entrants will correct any non-market-based pricing or behaviour. In this regard, it is pertinent to note that the communications industry is characterised by a high barrier to entry such as sunk costs and regulatory permits required to authorise a particular communications service.

¹⁰⁸ Laurent Garzaniti & Matthew O' Regan, *supra*, p. 460.

¹⁰⁹ Nigerian Communications Commission (NCC) (2010), *supra*, p. 6.

¹¹⁰ Nigerian Communications Commission (NCC), *Consultation Paper on Dominance in Selected Communications Markets*, *supra*, citing Rey, Patrick, (2002, September 7). 'Collective Dominance and the Telecommunications Industry' [WWW document] URL http://ec.europa.eu/competition/sectors/telecommunications/archive/telecom/collective_dominance.pdf (visited 2013, September 20).

¹¹¹ *Ibid.*

II. Frequent interaction among firms: Tacit collusion is more possible when firms are required by the nature of the industry to interact directly on a regular basis, as they will be more aware of each others' information and strategies, and the impact of one firm's actions will be more immediately felt by the others. According to the Commission, the communications industry is characterised by frequent and necessary interaction among firms operating in a particular communications market, as they must either interconnect their networks or typically purchase services from each other in order to serve their own customers.

III. Low levels of innovation: Collective dominance is more likely where innovation in the sector is relatively low; rapidly changing technology and business practices make it difficult for firms to remain on the same path simultaneously.

IV. Few market participants: Tacit collusion is only possible when there is a relatively small number of market participants, as coordinated behaviour among many players becomes increasingly impractical.

V. Symmetry among providers: Collective dominance is more likely when there is symmetry among providers, in terms of the structure and scope of their operations, the nature of products and services, and the general business model. This also implies that there are no significant "maverick" firms in the market, which are inclined to take independent, aggressive actions to promote their position.

VI. Structural links and cooperation agreements among firms: As with direct interaction, where there may be more concrete structural links and cooperation agreements among firms, there is a greater likelihood of tacit collusion arising from such close relationships. The frequency of interaction in the communications sector may create an environment for the occurrence of tacit collusion.

VII. Fast demand growth: Collective dominance can be fostered in a market where demand is growing fast, as firms may have a greater incentive to concentrate on increasing their scope of operations and customer base through expansion, rather than through direct competition with other providers.

Consequently, tacit collusion could give rise to a situation of collective dominance in a communications market where there is evidence of lack of price movement, poor quality service, little differentiation in service offerings, and difficulties sharing infrastructure or cooperation between groups of operators, especially if these market conditions enable the dominant firms to coordinate their market behaviour in such a manner that it adversely affects smaller firms in the relevant market.¹¹²

In its assessment of the conditions giving rise to collective dominance, the Commission will also consider one or more of the factors set out in Regulation 18 (2) a – f (discussed

¹¹² Nigerian Communications Commission (NCC) (2010), *supra*, p. 20.

above), and apply them to the market in which collective dominance is evaluated.¹¹³ However, while a 40% threshold of the total gross revenue (or number of subscribers or volume of sales) is presumptive of the individual dominance of a single Licensee, it is not clear whether this same threshold applies in the case of joint or collective dominance by multiple Licensees.¹¹⁴

The concept of abuse

Neither the Act nor the Commission have defined the term abuse. However, the concept of “abuse” in the context of competition law originates from the jurisprudence of the CJEU. For instance, in Case 85/76 *Hoffmann-La Roche* [1979] ECR 461, the ECJ defined the concept of abuse under Article 82 of the ECT (now Article 102 of the TFEU) in the following terms;

*“The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition”.*¹¹⁵

Thus, accordingly, the abuse of a dominant position is said to occur when a firm with market power strengthens its position of dominance by “*using methods other than those which come within the scope of competition on the merits*”.¹¹⁶ In the case of a position of collective dominance, the abuse according to the EC, will be based on clear evidence that the undertakings collectively dominant have “*tacitly or expressly been following a common policy on the market*”, particularly with respect to the abusive conduct.¹¹⁷ This common policy could be exemplified as a denial of competitors’ access to an essential facility (or infrastructure), or a common policy of charging an excessive price.¹¹⁸ According to the EC, the abuse does not necessarily have to result from the conducts of all the collective dominant undertakings, it suffices if the abusive conduct is identifiable as one of the characteristics of the collective dominant position.¹¹⁹

¹¹³ See Nigerian Communications Commission (NCC), *Consultation Paper on Dominance in Selected Communications Markets*, *supra*, p. 14.

¹¹⁴ However, it is noted that the Commission in its 2013 Dominance Determination found MTN and Glo to be collectively dominant in the market for public terrestrial transmission infrastructure as a result of their collective control of 62% of this market.

¹¹⁵ At paragraph 91.

¹¹⁶ See Case C-280/08 P [2010] ECR I – 0000 *Deutsche Telecom v. Commission*, paragraph 177, Case T-201/04 *Microsoft Corporation v. Commission* [2007] ECR II – 360, paragraph 1070.

¹¹⁷ DG Competition (2005, December), paragraph 74.

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*, citing Case T-228/97 *Irish Sugar plc v. Commission* [1999] ECR II-2969T-228/97, paragraph 66; Joined cases C-395/96 P and C-396/96 P *Compagnie maritime belge transports SA, Compagnie maritime belge SA and Dafra-Lines A/S v. Commission* [2000] ECR I-1365, paragraph 633.

From an economic perspective, the abuse of a dominant position constitutes two major types of anti-competitive conducts which are; an “exploitative conduct” which is the ability of a firm to maintain price above the competitive level for some time without worrying about consumers’ switch to other competing sellers, or worrying that new competitors will enter the market,¹²⁰ and an “exclusionary conduct” which is the ability of a firm to dictate the pace of competition in a market by preventing competitors from entering, or significantly harming existing equally efficient competitors - either by driving them out of the market completely or preventing them from expanding.¹²¹

Under the Competition Regulations, the Commission in determining whether a particular conduct engaged in by a dominant Licensee constitutes an abuse that substantially lessens competition, is required to apply the standards and procedures described in Part II (substantial lessening of competition) of the Competition Regulations.¹²² Thus, the Commission is obligated to among other things apply the substantial lessening of competition test prescribed in Regulation 6 when determining whether a dominant Licensee has exercised its market power in an abusive manner.

It is pertinent to note that the abuse need not occur in the market in which a Licensee has market power.¹²³ The ECJ noted at paragraph 27 of Case C-333/94 *Tetra Pak International SA v. Commission of the European Communities* [1996] ECR I-5951 that there could be an abuse of a dominant position “*where conduct on a market distinct from the dominated market produces effects on that distinct market*”. The EC has also observed that where a telecommunications operator has a dominant position on an upstream infrastructure market and 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.¹²⁴ This is illustrated in Case COMP/38.784 – *Wanadoo España v. Telefónica*, where the EC concluded that Telefónica had leveraged its dominance in the upstream markets for wholesale broadband access at regional level and wholesale broadband access at national level so as to distort competition in the mass market for retail broadband access (downstream market) by engaging in margin squeeze, and during the 2013 Dominance Determination where the Commission expressed concerns that Licensees with presence in both the wholesale and retail markets have the ability to leverage their dominance in the wholesale market by “squeezing” the margins¹²⁵ of their customers, who are also their competitors in the retail market, thus substantially lessening competition in the retail market.¹²⁶

¹²⁰ Bruce Lyons, ‘The Paradox of the Exclusion of Exploitative Abuse’, *CCP Working Paper 08-1*, (December 2007), p. 2.

¹²¹ 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.

¹²² Regulation 24.

¹²³ See Richard Whish, David Bailey, *supra*, pp. 205 - 208.

¹²⁴ Access Notice, *supra*, paragraphs 65 - 66.

¹²⁵ See the discussion on margin squeeze in Chapter 4.

¹²⁶ Nigerian Communications Commission (NCC), *Determination of Dominance in Selected Communications Market in Nigeria* (2013), *supra*, p. 8.

The foregoing examples illustrate scenarios in which an abusive conduct committed in the market in which market power is maintained, produces anti-competitive effects in another market. Other scenarios in which an abuse could occur are; where the abusive conduct occurs in a market other than the market in which the dominant firm has market power and has effects on a market in which the firm has market power;¹²⁷ and where the abusive conduct occurs in a market other than the market in which market power is maintained and has effects other than this market.¹²⁸

In Nigeria's communications sector, a dominant Licensee may abuse its dominant position by engaging in various types of conducts. These conducts may primarily be categorised as either; non-price related (such as failure to interconnect/supply essential facility,¹²⁹ engaging in discriminatory practices,¹³⁰ bundling,¹³¹ pre-emptively acquiring scarce resources,¹³² or the anti-competitive use of information);¹³³ or price related (such as predatory pricing,¹³⁴ cross-subsidisation¹³⁵ or margin squeeze).¹³⁶ As stated above (in the introductory part of this chapter), conducts deemed by the Commission to result in a substantial lessening of competition discussed in Chapter 4, all constitute an abuse of a dominant position by a Licensee, however it should be noted that the provisions of the Act and the Competition Regulations are not exhaustive in their list of anti-competitive conducts in the light of the use of the phrase "*any conduct*" in Section 91 (1) of the Act and Regulation 4 of the Competition Regulations respectively.

Pursuant to Regulation 25, where the Commission determines that any Licensee acting individually or as a collective has abused its (or their) position of dominance, the Commission may issue directions to remedy the conduct under its Regulation 34 power. Regulation 34 authorises the Commission to issue various directions.¹³⁷

The regulation of market power for the purpose of applying *ex ante* regulatory obligations

The authority for the Commission to impose *ex ante* regulatory obligation(s) on Licensees with market power, derives from Section 4 (1) (d) of the Act, which provides that the Commission *shall* have the function of "... *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*". The use of the word "*shall*" in this provision connotes the mandatory discharge of a duty or obligation,¹³⁸ and

¹²⁷ Access Notice, *supra*, paragraph 81.

¹²⁸ *Ibid.*

¹²⁹ Regulation 8 (a).

¹³⁰ Regulation 8 (b).

¹³¹ Regulation 8 (c).

¹³² Regulation 8 (e).

¹³³ Regulation 8 (i) (v).

¹³⁴ Regulation 8 (f).

¹³⁵ Regulation 8 (g).

¹³⁶ Regulation 8 (i) (i).

¹³⁷ Chapter 8 discusses the various directions that the Commission is authorised to issue pursuant to its Regulation 34 power.

¹³⁸ See *Tabik Investment Limited & Anor v. Guarantee Trust Bank* (2011) LPELR-SC.101/2005.

accordingly transforms this function into an active obligation requiring that the Commission take positive action to condemn anti-competitive conducts, or to prevent a dominant Licensee from misusing its market power in an abusive manner.

The Act also authorise the Commission to make written declarations that an individual license, or a classification of individual licenses, or a class license is subject to such terms and conditions as the Commission deems fit.¹³⁹ The Commission is also authorised by Section 37 (1) of the Act to amend, modify, vary or revoke any licence condition or a declaration regarding a licence.¹⁴⁰ In addition, by virtue of the provision of Section 92 (1) of Act, the Commission is authorised to determine that a Licensee is in a dominant position in any aspect of the Nigerian communications market. Lastly, Regulation 25 of the Competition Regulations authorises the Commission to issue directions to a Licensee in a dominant position, pursuant to Regulation 34, where the Commission determines that the conduct of the Licensee has or may have the effect of substantially lessening competition. Further to the foregoing provisions, the Commission may conduct a dominance determination for the purpose of identifying markets that may be subject to *ex ante* regulation,¹⁴¹ and where necessary impose *ex ante* regulatory obligation(s) on Licensees dominant in the identified markets.

The imposition of *ex ante* regulatory obligations by sector regulators, on firms with market power is to mitigate the opportunity for these firms to exercise this market power in an abusive manner.¹⁴² The primary characteristics of *ex ante* regulatory obligations are that they are; forward looking in nature as they seek to constrain future market behaviour irrespective of whether an abuse has been committed, based on public interest considerations, used to address persistent market failures, not fact specific, characterised by detailed remedies in terms of both price and quality parameters, and best enforced under sector specific regulations instead of competition law.¹⁴³ Due to its timely response and the extensive compliance requirement inherent in an *ex post* competition analysis, *ex ante* regulatory obligations are normally preferred over traditional competition law, as an efficient tool for remedying market failure.¹⁴⁴

¹³⁹ Section 34 (1).

¹⁴⁰ It is however, pertinent to note that all declarations, amendments, modifications, variations and/or revocations made in respect of a license and/or license condition must be consistent with the objects and provisions of the Act which are relevant to the particular undertaking, matter or activity, *See*, Sections 34 (2) and 37 (2) of the Act.

¹⁴¹ *See*, Nigerian Communications Commission (NCC), *Determination of Dominance in Selected Communications Market in Nigeria* (2013), *supra*, p. 1.

¹⁴² Vladica Tintor, Milan Janković, Vladi Milićević, 'The Legal and Economic Framework of EU Telecom Market Regulation' *Economic Annals*, Volume LV, No. 185 / April – June 2010, (2010), pp. 107 – 128, p. 111.

¹⁴³ Peter Alexiadis. (2011). 'Balancing the Application of *Ex Post* and *Ex Ante* Disciplines Under Community Law in Electronic Communications Markets: Square Pegs in Round Holes' [WWW document] URL <http://www.gibsondunn.com/publications/Documents/Alexiadis-BalancingtheApplicationofExPostandExAnteDisciplines.pdf> (visited 2015, May 3), pp. 139 - 140.

¹⁴⁴ Peggy Valcke, Robert Queck, Eva Lievens, *supra*, p. 15. This is especially so when conducting an *ex post* investigation into a price related abuse where detailed accounting information and assessment of costs will be required.

Thus, in imposing *ex ante* obligations, the Commission is only required to establish that a Licensee is dominant (or exercises market power) in a particular communications market, and need not find the existence of a conduct that constitutes an abuse.¹⁴⁵ Based on the commercial incentive of a dominant Licensee to exploit its market power by engaging in an exploitative and/or exclusionary conduct, *ex ante* regulation will intervene to prescribe the particular behaviour a dominant Licensee is supposed, and not supposed to engage in, thus decreasing the likelihood that the dominant Licensee will engage in a conduct that substantially lessens competition.¹⁴⁶ Stated differently, *ex ante* regulatory obligations will be applied to remedy a specific anti-competitive problem (or effect) which can arise where a dominant operator decides to abuse its position of dominance on a communications market.¹⁴⁷ *Ex ante* regulatory obligations therefore, eliminates the possibility of dominant Licensees misusing their market power, and creates conditions for the emergence of effective competition, thereby reversing the effect(s) of market failure in the relevant communications market.¹⁴⁸

In practice, for example, the major *ex ante* regulatory obligations applied by communications sector regulators of the Member States of the EU (and the EC) for controlling operators with (significant) market power on a wholesale and/or retail communications market are;

a) Transparency: The obligation of transparency may be used in relation to an interconnection and/or access market, requiring SMP operators to make public specified information, such as accounting information, technical specifications, network characteristics, terms and conditions for supply and use, and prices.¹⁴⁹ To achieve transparency, communications sector regulators may require that operators publish a reference offer¹⁵⁰ that provides a description of the relevant offerings, broken down into its components, according to market needs, and associated terms and conditions, including prices available at a level of detail dictated by the communications sector regulator.¹⁵¹

¹⁴⁵ See, Mira Burri Nenova, *EC Electronic Communications and Competition Law* (London: Cameron May Ltd, 2007), p. 115; ERG (2006, May). 'Revised ERG Common Position on the approach of Appropriate Remedies in the ECNS Regulatory Framework' (ERG Remedies Paper) [WWW document] URL https://pfs.is/upload/files/erg_06_33_remedies_common_position_june_06.pdf (visited, 2016, February 12), p. 69.

¹⁴⁶ See, Mira Burri Nenova, *supra*; ERG Remedies Paper, p. 26.

¹⁴⁷ ERG Remedies Paper, pp. 60 – 61.

¹⁴⁸ See, *Ibid.*, p. 69.

¹⁴⁹ 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), Article 9.

¹⁵⁰ Without a reference offer, interconnection negotiations may be unduly prolonged, and several disputes may arise, thus rendering an access obligation nugatory, Case PL/2006/0382: *Access to end users for the purpose of ensuring end-to-end connectivity in Poland*, EC Comments of May 24, 2006, paragraphs 1 – 247.

¹⁵¹ Access Directive, Article 9 (4).

By requiring an SMP operator to make available specific information, transparency obligation ensures that access obligation is not rendered nugatory through an SMP's use of selected standards, quality degradation, late delivery etc.¹⁵²

b) Non-discrimination: Non-discrimination may also be used in relation to interconnection and/or access,¹⁵³ and requires that SMP operators apply equivalent conditions in equivalent circumstances to other operators providing equivalent services, and provide 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.¹⁵⁴

The obligation of non-discrimination will ensure that an SMP operator with presence in both wholesale and retail markets does not unduly restrain competition in the retail market, by applying differences in terms and conditions, when supplying wholesale inputs to retail competitors.¹⁵⁵

c) Accounting separation: The obligation of accounting separation may be imposed in relation to interconnection and/or access, and in particular requires that a vertically integrated SMP operator disclose its wholesale prices and its internal transfer prices especially where there is a requirement for non-discrimination.¹⁵⁶ Accounting separation provides transparency in all the costs, revenues and capital in the communications services of a vertically integrated operator.¹⁵⁷ Where necessary, accounting separation may identify cases in which a vertically integrated SMP operator engages in anti-competitive cross-subsidisation.¹⁵⁸

d) Access to, and use of specific network facilities: A communications sector regulator may impose obligations on SMP operators to meet reasonable requests for access to, and use of, specific network elements and associated facilities, *inter alia* in situations where the communications sector regulator considers that denial of access or unreasonable terms and conditions having a similar effect would forestall the emergence of a competitive market at the retail level, or would not be in the consumer's interest.¹⁵⁹

In imposing this obligation, communications sector regulators may require SMP operators: to give third parties access to specified network elements and/or facilities, including unbundled access to the local loop; to negotiate in good faith with

¹⁵² ERG Remedies Paper, p. 43.

¹⁵³ Access Directive, Article 10 (1).

¹⁵⁴ *Ibid.*, Article 10 (2).

¹⁵⁵ Peggy Valcke, Robert Queck, Eva Lievens, *supra*, p. 74.

¹⁵⁶ Access Directive, Article 11 (1).

¹⁵⁷ ERG (2005). 'ERG Common Position: Guidelines for Implementing the Commission Recommendation C (2005) 3480 on Accounting Separation & Cost Accounting Systems under the Regulatory Framework for Electronic Communications' [WWW document] URL http://berec.europa.eu/doc/publications/consult_accounting_sep/erg_05_29_erg_cp_rec_as_and_cas_final.pdf (visited 2016, February 12), p. 4.

¹⁵⁸ Access Directive, *supra*.

¹⁵⁹ *Ibid.*, Article 12 (1).

undertakings requesting access; not to withdraw access to facilities already granted; to provide specified services on a wholesale basis for resale by third parties; to grant open access to technical interfaces, protocols or other key technologies that are indispensable for the interoperability of services or virtual network services; to provide co-location or other forms of facility sharing, including duct, building or mast sharing; to provide specified services needed to ensure interoperability of end-to-end services to users, including facilities for intelligent network services or roaming on mobile networks; to provide access to operational support systems or similar software systems necessary to ensure fair competition in the provision of services; and to interconnect networks or network facilities.¹⁶⁰ Communications sector regulators, depending on the circumstance, may also attach conditions covering fairness, reasonableness and timeliness.¹⁶¹

e) Price control and cost accounting obligations: A communications sector regulator may, impose obligations relating to cost recovery and price controls, including obligations for cost orientation of prices and obligations concerning cost accounting systems, for the provision of specific types of interconnection and/or access.¹⁶² This obligation normally applies where a lack of effective competition means that the SMP operator might apply either excessive prices,¹⁶³ or implement a margin squeeze to the detriment of consumers.¹⁶⁴

f) Functional Separation: A communications sector regulator may in extreme circumstances (where other *ex ante* obligations such as transparency, non-discrimination, accounting separation, access and price controls have failed to achieve infrastructure based competition and/or remedy market failure) separate the wholesale access service from the other services provided by a vertically integrated SMP operator, in such a manner that the wholesale access service is provided by an independent business entity, which shall supply wholesale access to all operators, including other business entities within the (original) parent company, on the same timescales, terms and conditions, including those relating to price and service levels, and by means of the same systems and processes.¹⁶⁵ The purpose of functional separation is to ensure the provision of equivalent access to products and services, to all downstream operators, including the operator's own vertically integrated

¹⁶⁰ *Ibid.*

¹⁶¹ *Ibid.*

¹⁶² *Ibid.*, Article 13 (1).

¹⁶³ As noted in Chapter 4, a price is "excessive" if it bears no reasonable relationship to the economic value of the goods or services provided, *see*, Case 26/75, *General Motors v. Commission* [1975] E.C.R. 1367; *United Brands v. Commission* (supra) and Case 226/84 *British Leyland v. Commission* [1986] E.C.R. 3263.

¹⁶⁴ Access Directive, *Ibid.*

¹⁶⁵ Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 (Better Service Directive), Article 13 (a). *See also*, Section 128 (1) of the Investment and Securities Act (ISA), where the Security and Exchange Commission (SEC) determines that the business practice of a company substantially prevents or lessens competition, SEC may in the public interest order the break-up of the company into separate entities in such a way that its operations do not cause a substantial restraint of competition in its line of business or in the market. As at the time of this writing SEC is yet to exercise this power.

downstream divisions,¹⁶⁶ and thus eliminates the incumbent's commercial incentive to exploit its market power through discriminatory practices against its downstream competitors.¹⁶⁷

A good example of the application of functional separation in the telecommunications sector is the separation of American Telephone and Telegraph Company (AT&T) from the 7 Regional Bell Operating Companies (RBOCs) following an antitrust complaint filed against AT&T by the DoJ in *United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982). With this separation from AT&T, the RBOCs no longer had the incentive to favour AT&T over its long distance competitors. Therefore, all long distance competitors obtained access to local telecommunications services from RBOCs on similar, non-discriminatory terms. The divestiture also eliminated concerns about anti-competitive cross-subsidies between AT&T's local and long distance operations.¹⁶⁸ Another example is in the UK, where, Ofcom, the communications sector regulator, as part of its initial conclusions from the Strategic Review of Digital Communications, is at the time of this writing, considering the structural separation of BT owned Openreach (the dominant provider of essential broadband infrastructure in UK) from BT, because of concern that the current model of functional separation¹⁶⁹ fails to remove sufficiently BT's ability to discriminate against competitors.¹⁷⁰

g) *Ex ante* controls on a retail market: The foregoing discussions are in respect of *ex ante* obligations applicable to only wholesale markets. However, communications sector regulators may impose *ex ante* obligations at the retail level, where obligations imposed at the wholesale level is insufficient to remedy the lack of competition at the retail level.¹⁷¹ *Ex ante* obligations that may be imposed at the retail level include requirements that the SMP operator does not charge excessive prices, inhibit market entry or restrict competition by setting predatory prices, show undue preference to specific end-users or unreasonably bundle communications services.¹⁷² A communications sector regulator may also apply to such SMP operator, appropriate retail price cap measures, measures to control individual tariffs, or measures to orient

¹⁶⁶ Better Service Directive, Recital 61.

¹⁶⁷ Paul W. J. de Bijl, 'Structural Separation and Access in Telecommunication Markets', *CESifo Working Paper*, No. 1554 (2005), p. 6.

¹⁶⁸ In this particular case, it is important to note that structural separation was applied to remedy AT&T's anti-competitive conduct, and not as a form of *ex ante* remedy.

¹⁶⁹ Under this model, a divisional board with non-executive members who act independently from the group board, is created.

¹⁷⁰ See generally, Ofcom (2016, February 25). 'Making communications work for everyone Initial Conclusions from the Strategic Review of Digital Communications' [WWW document] URL <http://stakeholders.ofcom.org.uk/telecoms/policy/digital-comms-review/dcr-feb-16/> (visited 2016, August 16).

¹⁷¹ Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive), Article 17 (1).

¹⁷² Universal Service Directive, Article 17 (2).

tariffs towards costs or prices on comparable markets, in order to protect end-user interests whilst promoting effective competition.¹⁷³

Nonetheless, it is important to note, that the Commission in its 2010 Dominance Determination¹⁷⁴ stated that premature *ex ante* regulatory intervention would be in breach of the provisions of the Act and Competition Regulations,¹⁷⁵ and could also discourage investment in the communications market.¹⁷⁶

While there is no specific statutory or regulatory prescribed analytical framework, to be applied in order to establish whether or not a Licensee is dominant for the purpose of imposing *ex ante* obligations,¹⁷⁷ experience from dominance determinations conducted in the past shows that the Commission's analytical framework as applied involves a three (3) stage process *to wit*; (i) identification and definition of the relevant communications market(s); (ii) determination of dominance and/or assessment of the level of competition in the identified communications market(s); and (iii) addressing the competition concern raised by imposing *ex ante* regulatory obligations.

i. *Identification and definition of the relevant communications market*: In identifying the relevant communications market subject to *ex ante* regulation, the Commission relies on its statutory power to regulate competition in Nigeria's communications sector and to protect consumers. In accordance with the provision of Regulation 19 (1) of the Competition Regulations, the evaluation of a dominant position shall begin first with the definition of the relevant communications market(s). The process for defining the relevant market is set out in Regulation 19 (2), which was discussed extensively in Chapter 3.¹⁷⁸

However, it is not entirely clear how the Commission identifies communications market subject to *ex ante* regulation. The EC for instance, selects markets subject to *ex ante* regulatory obligations based on the 3-criteria test of; (i) the existence of high

¹⁷³ *Ibid.*

¹⁷⁴ Nigerian Communications Commission (NCC), *Determination of Dominance in Selected Communications Market in Nigeria* (2010), *supra*, p. 31.

¹⁷⁵ Especially if a Licensee without market power is subjected to *ex ante* regulatory obligations.

¹⁷⁶ Some Economists have argued that some costing methodologies used in imposing *ex ante* price control and cost accounting obligations may discourage entry and investment, *see*, Hausman, J.A, 'Valuing the Effects of Regulation on new Services in Telecommunications', *Brookings Papers on Economic Activity: Microeconomics*, (1997), pp. 1 – 38; Fiona M. Scot Morton. (2001). 'The Problem of Price Controls' [WWW document] URL

<http://object.cato.org/sites/cato.org/files/serials/files/regulation/2001/4/morton.pdf> (visited

2016, August 18), p. 54; and econ. (2002, April 29). 'OfTel's Cost Benefit Analysis of Price

Controls Proposals A Comment' [WWW document] URL

<http://www.btplc.com/Thegroup/RegulatoryandPublicaffairs/Consultativeresponses/OfTel/2002/PriceControlReviewApril2002/AnnexC.pdf> (visited 2016, August 18), p. 4.

¹⁷⁷ It is however, pertinent to note that paragraphs 10 – 12 of the Schedule to the Competition Regulations sets out the specific procedural steps to be applied by the Commission when initiating a dominance determination, and not the analytical framework by which the Commission establishes its conclusion of whether or not a Licensee is dominant for the purpose of *ex ante* regulation.

¹⁷⁸ However, the Commission appears to have deviated from this provision in its 2013 Dominance Determination.

and non-transitory barriers to entry of a structural or regulatory nature; (ii) a market structure, which taking into account of the barriers to entry, will not tend towards effective competition within the relevant time horizon; and (iii) the insufficiency of competition law alone to adequately address the market failure(s) present on the market.¹⁷⁹ In addition, according to the EC, market analysis and/or market definition for the purpose of imposing *ex ante* regulatory obligation should be done on a prospective (or forward looking) basis that takes into account foreseeable market development over a reasonable period of time.¹⁸⁰ This is unlike an *ex post* intervention when investigating the abuse of a dominant position, which is retrospective and based on circumstances that have already occurred in the past.

- ii. *Determination of dominance and/or assessment of the level of competition in the identified communications market(s)*: Having identified the relevant communications market,¹⁸¹ the Commission will proceed to determine if and whether any particular Licensee acting individually or collectively is dominant in that market and/or undertake an assessment of the level of competition in the identified market. For its dominance analysis, the Commission, in accordance with Regulation 18 (1), will identify Licensees having the ability to unilaterally restrict output, raise prices, reduce quality or otherwise, and to act independent of competitors or consumers as dominant in the identified market. The Commission will also presume that a Licensee is dominant if that Licensee has a gross revenue in a specific communications market in excess of 40% of the total gross revenues of all Licensees in that market.¹⁸² The Commission will also consider one or more of the factors set out in Regulation 18 (2) a – f of the Competition Regulations which have been discussed above. In this regard, it is pertinent to note that the Commission's approach to assessing dominance for *ex ante* purpose is the same as its approach to assessing dominance on an *ex post* basis (abuse of dominance cases). This approach to the *ex ante* analysis of market power differs from the EC's *ex ante* analysis of SMP under the SMP Guidelines, where unlike the Competition Regulations, market power is measured in reference to the power of the undertaking to "raise prices by restricting output without incurring a significant loss of sales or revenues".¹⁸³ Thus, a firm designated as having SMP for *ex ante* purpose under the SMP Guidelines, does not automatically imply that this undertaking is also dominant for the purpose of an Article 102 TFEU proceeding.¹⁸⁴

In its 2013 Dominance Determination, the Commission applied the Structure-Conduct-Performance (S-C-P) model in assessing the level of competition in the

¹⁷⁹ Peggy Valcke, Robert Queck, Eva Lievens, *supra*, p. 11.

¹⁸⁰ SMP Guidelines, paragraph 20; Commission Recommendation of 9 October 2014 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, Recital 9.

¹⁸¹ See communications markets identified and/or defined for *ex ante* purposes in Chapter 3.

¹⁸² Regulation 20 of Competition Regulations.

¹⁸³ SMP Guidelines, paragraph 73.

¹⁸⁴ *Ibid.*, paragraph 30.

identified communications markets.¹⁸⁵ The S-C-P model contends that; concentrations¹⁸⁶ will facilitate collusion, whether tacitly or explicitly; and that as barriers to entry rise, the optimal price-cost margin of leading firm(s) in the market will also increase.¹⁸⁷ Thus, in the S-C-P model, the conduct of firms in a market is primarily dependent on market structure such as high concentrations and high entry barriers, which in turn leads to poor performance (or market failure) namely, reduced output and monopoly prices, to the detriment of consumers.¹⁸⁸

According to the Commission, the S-C-P model is useful when conducting an *ex ante* analysis because the structural characteristics of a market can be used to anticipate anti-competitive conducts.¹⁸⁹ Consequently, regulating market structure will lead to improved market performance and effective competition.¹⁹⁰ In this regard, there is a direct relationship between the degree of market concentration and the degree of competition among firms in that market.¹⁹¹

A summary of the market evaluation criteria for competition assessment using the S-C-P model, as applied by the Commission in its 2013 Dominance Determination¹⁹² is set out in the table below.

Category	Indicators	Parameters
<ul style="list-style-type: none"> Market Structure 	<ul style="list-style-type: none"> Market Share Trends 	<ul style="list-style-type: none"> Volume based – number of subscribers/ number of call minutes Capacity-based – number of lines installed/active Value-based – revenues

¹⁸⁵ Nigerian Communications Commission (NCC), *Determination of Dominance in Selected Communications Market in Nigeria* (2013) *supra*, p. 5.

¹⁸⁶ Concentration refers to the extent to which a small number of firms or enterprises account for a large proportion of economic activity such as total sales, assets or employment.

¹⁸⁷ Joe S. Bain, *Industrial Organization* (second edition, John Wiley & Sons, 1968), pp. 252 – 255; 269 – 276.

¹⁸⁸ *Ibid.* See also Herbert Hovenkamp, *supra*, p. 43.

¹⁸⁹ Nigerian Communications Commission (NCC), *Determination of Dominance in Selected Communications Market in Nigeria* (2013) *supra*, citing *Notification of the Commission’s Intention to Declare Regulated Services*, Communications Commission Kenya. For criticisms of the S-C-P model see, Stephen Martin, ‘Remembrance of Things Past: Antitrust, Ideology, and the Development of Industrial Economics, in Vivek Ghosal, Johan Stennek (ed.) *The Political Economy of Antitrust (Contributions to Economic Analysis, Volume 282)* Emerald Group Publishing Limited, pp.25 – 57.

¹⁹⁰ Herbert Hovenkamp, *supra*.

¹⁹¹ Seanicaa Edwards, Albert J. Allen, Saleem Shaik. (2005). ‘Market Structure Conduct Performance (SCP) Hypothesis Revisited using Stochastic Frontier Efficiency Analysis’ [WWW document] URL <http://ageconsearch.umn.edu/bitstream/21350/1/spo6ed01.pdf> (visited 2015, April 28), p. 1.

¹⁹² Nigerian Communications Commission (NCC), *Determination of Dominance in Selected Communications Market in Nigeria* (2013), *supra*, pp. 5 – 6.

		<ul style="list-style-type: none"> • Market concentration measured by Herfindahl Hirschman Index (HHI)
	<ul style="list-style-type: none"> • Structural barriers to entry 	<ul style="list-style-type: none"> • Absolute Barriers – number of firms, regulatory restrictions, control of essential facilities, extent of economies of scale and scope • Strategic barriers – intensity of advertising and capital investments • Vertical integration
<ul style="list-style-type: none"> • Conduct (Suppliers) 	<ul style="list-style-type: none"> • Pricing strategies 	<ul style="list-style-type: none"> • Pricing trends • Extent of reaction to a price change • Existence of price leadership, exploitative pricing, exclusionary pricing etc
	<ul style="list-style-type: none"> • Non-pricing behaviour 	<ul style="list-style-type: none"> • Level of marketing and advertising costs
	<ul style="list-style-type: none"> • Provision of Innovative services 	<ul style="list-style-type: none"> • Product/service diversification
	<ul style="list-style-type: none"> • Market transparency 	<ul style="list-style-type: none"> • Quality of website for information • Availability of product/service information via print, radio and TV advertisements
<ul style="list-style-type: none"> • Conduct (Consumers) 	<ul style="list-style-type: none"> • Countervailing power 	<ul style="list-style-type: none"> • Number of consumer groups • Consumer satisfaction with the quality and price of services
	<ul style="list-style-type: none"> • Costs and barriers to Switching suppliers 	<ul style="list-style-type: none"> • Extent and substance of barriers to switching suppliers
<ul style="list-style-type: none"> • Performance 	<ul style="list-style-type: none"> • Geographic coverage 	<ul style="list-style-type: none"> • Network coverage and penetration
	<ul style="list-style-type: none"> • Financial Performance 	<ul style="list-style-type: none"> • Profitability, efficiency etc

These criteria were subsequently applied to each of the markets identified by the Commission, as a basis for assessing the level of competition. A finding by the Commission that no Licensee either individually or collectively enjoys a position of

dominance in the relevant market, in effect means a determination that the market is effectively competitive.¹⁹³ Conversely, a finding that one or more Licensee has a dominant position on a relevant market, means that the market is not effectively competitive.¹⁹⁴

- iii. *The imposition of regulatory obligations where necessary:* If any Licensee acting individually or in conjunction with another Licensee is determined by the Commission to have market power in the identified relevant communications market, the Commission will decide whether; it will subject the Licensee(s) to *ex ante* regulatory obligation; and the particular obligation to be imposed. However, the Commission will impose regulatory obligation(s) *only* in circumstances where it is satisfied that there is a real threat of potential anti-competitive harm and/or if market conditions will not tend towards effective competition.¹⁹⁵ For instance, the Commission imposed *ex ante* regulatory obligations during its 2013 Dominance Determination on MTN that was determined to be the dominant operator in the mobile voice market and subjected to the following regulatory obligations;¹⁹⁶
- a) Accounting separation of all its commercial operations;¹⁹⁷
 - b) Collapse of on-net and off-net retail tariffs: After finding a wide differential (of about 300%) between the on-net and off-net retail tariff of MTN, the Commission directed that MTN immediately collapse this differential by making equal its on-net and off-net retail tariff.¹⁹⁸ The Commission also subjected MTN to periodic review;¹⁹⁹ and
 - c) Submission of required details:²⁰⁰ MTN was required to subject itself to the obligation of submitting details on specific aspects of its operations from time to time as may be required by the Commission.

¹⁹³ See generally, Nigerian Communications Commission (NCC) (2013), *supra*, p. 13.

¹⁹⁴ See, SMP Guidelines, paragraph 112.

¹⁹⁵ See, Nigerian Communications Commission (NCC), *Determination of Dominance in Selected Communications Market in Nigeria* (2010), *supra*, p. 30.

¹⁹⁶ *Ibid.*

¹⁹⁷ This obligation is different from Condition 10.1 of the Universal Access Service License (UASL) held by MTN which requires that MTN establishes as soon as reasonably practicable, not later than 12 months from when the License enters into force, accounting and reporting arrangements sufficient to enable its finances in relation to a Communications Services provided under the Licence to be assessed and reported separately from its other Communications Services, and from its other commercial activities.

¹⁹⁸ Although this obligation was imposed on an *ex ante* basis, it is pertinent to note that MTN at the material time, was already engaging in (a form of price) discrimination, which the Commission deems to result in a substantial lessening of competition under Regulation 8 (b) of the Competition Regulations, and constitutes an abuse of a dominant position. As explained in Chapter 4, economic analysis indicates that on-net/off-net price differentials have foreclosure effects on smaller operators. See, Chukwuyere Ebere Izuogu, 'The Anti-competitive Dimension of On-Net/Off-Net Price Differentials', *Businessday*, 14 January, 2016, for a discussion on the anti-competitive effect of this type of price discrimination.

¹⁹⁹ Nigerian Communications Commission (NCC), *Determination of Dominance in Selected Communications Market in Nigeria* (2010), *supra*.

²⁰⁰ This obligation is same as the obligation under Condition 18 of the UASL requiring that holders of a UASL furnish information to the Commission as may be requested.

While Globacom and MTN were determined by the Commission to collectively enjoy dominance in the market for wholesale-leased lines and transmission capacity, and subsequently subjected to the following *ex ante* regulatory obligations;²⁰¹

- a) Price cap for wholesale services and a price floor for retail services as to be determined by the Commission on a periodic basis. In imposing this obligation, the Commission intervened at the market in which the market power is present (wholesale-leased lines and transmission capacity) by setting a price cap for wholesale services, and in the market in which the market power may be felt (retail services) by setting a price floor for retail services. Thus, the Commission was concerned that both Globacom and MTN could leverage their market power in the market for wholesale-leased lines and transmission capacity, so as to distort competition in the retail market, thereby strengthening their collective market power. The specific anti-competitive conducts sought to be prevented when *ex ante* price controls such as price cap and price floor are applied to an incumbent with market power on a wholesale communications market, are excessive pricing of the upstream wholesale input and/or a margin squeeze;²⁰²
- b) Accounting separation of all their commercial operations. This will require that both Globacom and MTN immediately establish accounting and reporting arrangements sufficient to enable their finances in relation to all their commercial activities, including their wholesale (upstream) operation(s) and retail (downstream) operation(s), to be assessed and reported separately.²⁰³ Accounting separation for both competitive and non-competitive services enables their costs to be transparent so that the Commission can more easily detect a price related abuse.²⁰⁴ Imposing accounting separation will enable regulators to set cost based tariffs for access and interconnection, and prevent discrimination and possible cross subsidisation;²⁰⁵ and
- c) Submission of details on specific aspects of their operation to the Commission as may be required from time to time.

²⁰¹ See Nigerian Communications Commission (NCC), *Determination of Dominance in Selected Communications Market in Nigeria* (2010), *supra*, p. 14.

²⁰² See, paragraphs above, where the Commission prior to imposing *ex ante* regulatory obligations on Globacom and MTN in the 2013 Dominance Determination, expressed its concern that Licensees with presence in both the wholesale and retail markets have the ability to "squeeze" the margins of their customers, who are also their competitors in the retail market; See also, Laurent Garzaniti & Matthew O' Regan, *supra*, p. 169, citing Case MT/2006/0373: *Minimum set of leased lines in Malta*, Case MT/2006/0374: *Wholesale terminating segments of leased lines in Malta*, and Case MT/2006/0375: *Wholesale trunk segments of leased lines in Malta*, the EC's comments of May 19, 2006, 7.

²⁰³ See also, Condition 10 (Separate Account for All Activities) of the UASL. Although it is not clear the particular format and accounting methodology that will be used by Globacom and MTN in complying with this obligation.

²⁰⁴ See infoDev, ITU (undated) 'ICT Regulation Toolkit' [WWW document] URL <http://www.ictregulationtoolkit.org/2> (visited 2015, February 27), 2. Competition and Price, pp. 23 and 30.

²⁰⁵ Laurent Garzaniti & Matthew O' Regan, *supra*, p. 158.

These *ex ante* regulatory obligations to the best of the author's knowledge are still in force as at the time of this writing.²⁰⁶

Though neither the Act nor any Regulations/Guidelines issued by the Commission has stated in the literal sense of the word, "*ex ante*" regulatory obligations that may be imposed on a Licensee determined by the Commission to be dominant in a particular communications market. It is however important to note that a determination of dominance by the Commission should automatically trigger the application of the regulatory obligations contained in Regulations 10 – 12 of the Telecommunications Networks Interconnection Regulations 2007 (the Interconnection Regulations) to the extent that the Licensee determined to be dominant is a "licensed telecommunications operator"²⁰⁷ within the meaning of the Interconnection Regulations, and is dominant in one or more communications market relating to interconnection.²⁰⁸ It is important to also note that these regulatory obligations mirror the obligations that may be imposed by communications sector regulators of Member States of the EU under Articles 9 – 13 of the Access Directive (discussed above), for the regulation of operators with SMP.

These regulatory obligations are that a dominant licensed operator shall; meet all reasonable requests for access to its telecommunications network, in particular access at any technically feasible point on its telecommunications network;²⁰⁹ adhere to the principle of non-discrimination with regard to interconnection offered to other licensed telecommunications operators, in particular, it shall apply similar conditions in similar circumstances to interconnected licensed telecommunications operators providing similar services and provide interconnection facilities and information to other licensed telecommunications operators under the same conditions and of the same quality as it provides for its own services or those of the group of companies or partners;²¹⁰ make available on request to other licensed telecommunications operators considering interconnection with its telecommunications network, all information and specifications reasonably necessary in order to facilitate conclusion of an agreement for interconnection, including information on changes planned for implementation within the next six months, unless agreed otherwise by the Commission;²¹¹ submit to the

²⁰⁶ However, the Commission on October 13, 2015 in a bid to ensure sustainability, growth and development of the data service market, approved the removal of price floor for data services. The Commission stated that it would reinstate the price floor if any distortion is observed within the market (See, Nigerian Communications Commission, *Public Notice: Withdrawal of data floor price for operators* at <http://www.ncc.gov.ng/>). It is not clear whether this Direction also applies to MTN and Glo, thereby revoking the *ex ante* price control obligation imposed by the Commission, on their retail data services in the 2013 Dominance Determination.

²⁰⁷ The Interconnection Regulations defines a "*Licensed telecommunications operator*" to mean a network services provider or a network facilities provider licensed under section 32 of the Act and for the avoidance of doubt, a "licensed telecommunications operator" includes interconnect exchange operators.

²⁰⁸ See, Regulation 19 of the Interconnection Regulations. However, as each MNO is dominant on the market for interconnecting for the purpose of terminating a mobile voice call on its network, it is not clear to what extent these provisions will apply.

²⁰⁹ Regulation 10 (1) (a) of the Interconnection Regulations.

²¹⁰ Regulation 10 (1) (b) of the Interconnection Regulations.

²¹¹ Regulation 10 (1) (c) of the Interconnection Regulations.

Commission for approval and publish a Reference Interconnection Offer, sufficiently unbundled, giving description of the interconnection offerings broken down into components according to market needs and the associated terms and conditions including tariffs;²¹² and provide access to the technical standards and specifications of its telecommunications network with which another operator shall be interconnected.²¹³

In addition, the dominant licensed telecommunications operator shall, except where the Commission has determined interconnection rates, set charges for interconnection on objective criteria and observe the principles of transparency and cost orientation and the burden of proof that charges are derived from actual costs lies with the licensed telecommunications operator providing the interconnection service to its facilities.²¹⁴ The dominant licensed operator may set different tariffs, terms and conditions for interconnection of different categories of telecommunications services where such differences can be objectively justified on the basis of the type of interconnection provided.²¹⁵ A dominant licensed telecommunications operator shall also; give written notice of any proposal to change any charges for interconnection services in accordance with the procedure set out in the guidelines on interconnection adopted by the Commission and the provisions of the operating licence;²¹⁶ offer sufficiently unbundled charges for interconnection, so that the licensed telecommunications operator requesting the interconnection is not required to pay for any item not strictly related to the service requested;²¹⁷ maintain a cost accounting system which: (i) in the opinion of the Commission is suitable to demonstrate that its charges for interconnection have been fairly and properly calculated, and (ii) provides any information requested by the Commission;²¹⁸ make available to any person with a legitimate interest, on request, a description of its cost accounting system showing the main categories under which costs are grouped and the rules for the allocation of costs to interconnection and the Commission or any other competent body independent of the dominant telecommunications operator and approved by the Commission, shall verify compliance of the dominant telecommunications operator with the cost accounting system and the statement concerning compliance shall be published by the Commission annually.²¹⁹

Lastly, if interconnection services are not provided through a structurally separated subsidiary, the dominant licensed operator shall; keep separate accounts as if the telecommunications activities in question were in fact carried out by legally independent companies, so as to identify all elements of cost and revenue with the basis of their calculation and the detailed attribution methods used;²²⁰ maintain separate accounts in respect of interconnection services and its core telecommunications services and the

²¹² Regulation 10 (1) (d) of the Interconnection Regulations.

²¹³ Regulation 10 (1) (3) of the Interconnection Regulations.

²¹⁴ Regulation 11 (1) of the Interconnection Regulations.

²¹⁵ Regulation 11 (5) of the Interconnection Regulations.

²¹⁶ Regulation 11 (7) (a) of the Interconnection Regulations.

²¹⁷ Regulation 11 (7) (b) of the Interconnection Regulations.

²¹⁸ Regulation 11 (7) (c) of the Interconnection Regulations.

²¹⁹ Regulation 11 (7) (d) of the Interconnection Regulations.

²²⁰ Regulation 12 (1) of the Interconnection Regulations.

accounts shall be submitted for independent audit and thereafter published;²²¹ and supply financial information to the Commission promptly on request and to the level of detail required by the Commission.²²²

²²¹ Regulation 12 (2) of the Interconnection Regulations.

²²² Regulation 12 (3) of the Interconnection Regulations.

CHAPTER 7

MERGERS, ACQUISITIONS AND TAKEOVERS

Introduction

This chapter examines the main competition issues involved in the substantive assessment of mergers, acquisitions and take-overs occurring in Nigeria's communications sector. Pursuant to Regulation 32 of the Competition Regulations, the substantive test for merger review is whether the transaction may result in a substantial lessening of competition in one or more communications markets or may, result in the Licensee or any successor company having a dominant position in one or more communications markets. In this regard, this chapter will discuss how the substantial lessening of competition and dominance tests earlier discussed in Chapters 4 and 6 respectively, may from a theoretical perspective, be applied in the substantive assessment of mergers.

It is pertinent to note that because mergers are transactions resulting from an agreement, they will also come within the ambit of Regulation 14 of the Competition Regulations, which authorises the Commission to review agreements between Licensees or between Licensees and third parties, including joint-venture and similar collaboration agreements, however it is unlikely that the Commission will exercise its Regulation 14 power for the purpose of merger reviews. It then follows that while joint-ventures may be analysed under the Regulation 14 power of the Commission, mergers will be reviewed pursuant to the authority granted to the Commission in Regulation 26. Stated differently, joint-ventures may only be analysed under the substantial lessening of competition test, while mergers in addition to being analysed under the substantial lessening of competition test, may also be analysed under the dominance test.

This chapter also discusses the role of the Securities and Exchange Commission (SEC), which pursuant to the Investment and Security Act (ISA) exercises concurrent authority with the Commission in reviewing mergers, although the principal substantive standard applied by SEC are the tests of a "substantial lessening or prevention of competition", or justification "on substantial public interest grounds".

As at the time of this writing, there are no regulatory precedents for the substantive assessment of mergers in Nigeria as details of how the Commission and SEC analyse (or have analysed) mergers are not available to the public, neither have these agencies issued any guidance on how they will conduct merger reviews. Consequently, relevant case laws from the CJEU, US courts, decisional practices of both the EC and FCC, and DoJ Guidelines will be used in this chapter, to explain and illustrate the analytical framework applied in the substantive assessment of mergers.

Lastly, this chapter discusses the defences of efficiencies and failing firm in merger analysis, and the various remedies available under the Competition Regulations and ISA that are used to prevent and/or mitigate the anti-competitive effect(s) of a merger.

In this chapter, unless expressly stated, any reference to mergers constitutes a reference to acquisitions, take-overs, joint-venture (JV) and/or other forms of business combinations.

Definition of terms

Merger: Neither the Act or the Competition Regulations defines the term “merger” however, Section 199 (1) of ISA defines a merger as “... *any amalgamation of the undertakings or any part of the undertakings or interest of two or more companies or the undertakings or part of the undertakings of one or more companies and one or more bodies corporate.*” Under ISA, a merger may be achieved in any manner, including through; the purchase or lease of the shares, interests or assets of the other company in question;¹ amalgamation or other combination with the other company in question.² The term undertaking is not defined in ISA, neither was it defined in the Companies and Allied Matters Act (CAMA), however pursuant to CJEU case laws, it covers any natural or legal person engaged in economic activity, regardless of its legal status and the way in which it is financed.³ Thus, it includes companies, firms, businesses, partnerships, individuals operating as sole traders, agricultural co-operatives, associations of undertakings (e.g. trade associations), non profit-making organisations and (in some circumstances) public entities that offer goods or services on a given market. In assessing whether an entity is an undertaking for the purpose of a merger, the key question is whether it is engaged in economic activity. Company on the other hand is defined by Section 117 of ISA as anybody corporate and includes a firm or association of individuals. Thus, a Licensee under the Act is an undertaking or company for the purpose of a merger under the ISA and Competition Regulations.

Acquisition: Neither the Act nor the ISA defines the term “acquisition”. However, the Securities and Exchange Commission Rules and Regulations 2013 (as amended in 2015) (the SEC Rules) made by SEC pursuant to its rulemaking powers under Section 313 of the ISA defines acquisition as “*the takeover by one company of sufficient shares in another company to give the acquiring company control over that other company*”.⁴ A person controls a company if that person; beneficially owns more than one half of the issued share capital of the company;⁵ is entitled to vote a majority of the votes that may be cast at a general meeting of the company, or has the ability to control the voting of a majority of those votes, either directly or through a controlled entity of that person;⁶ is

¹ Section 119 (2) (a) ISA.

² Section 119 (2) (a) ISA.

³ See Case C-41/90 *Höfner and Elser v. Macrotron* [1991] ECR I-1979, [1993] 4 CMLR 306 and Case T-319/99 *Fenin v. Commission*, [2003] ECR IT-357.

⁴ Rule 421.

⁵ Section 119 (3) (a) ISA.

⁶ Section 119 (3) (b) ISA.

able to appoint or veto the appointment of a majority of the directors of the company;⁷ is a holding company, and the company is a subsidiary of that company as contemplated by the CAMA;⁸ in the case of a company that is a trust, has the ability to control the majority of the votes of the trustees, to appoint the majority of the trustee or to appoint or change the majority of the beneficiaries of the trust;⁹ or has the ability to materially influence the policy of the company in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control to in paragraphs (a) to (e) above.¹⁰

In an acquisition unlike a merger, the parties may not necessarily combine their respective businesses under a single entity, in fact, they may still retain their separate identities after the transaction.¹¹

Takeover: Section 117 of ISA defines a take-over as “*the acquisition of one company of sufficient shares in another company to give the acquiring company control over that other company*”. Thus, the terms *acquisition* and *take-over* have similar meanings and can be used interchangeably.¹²

Horizontal merger: A merger between firms that sell competing products.

Vertical merger: A merger between firms that operate at different levels of the supply chain of an industry. For example, a merger between a supplier and a customer. If the customer acquires the supplier, it is backward vertical integration; if the supplier acquires the customer, it is forward vertical integration.

Conglomerate merger: A merger between companies whose businesses are not directly related.

Joint-venture: A joint-venture is any association of two or more firms for carrying on some activity that each firm might otherwise perform alone.

Anti-competitive effects of mergers¹³

Competition authorities in several jurisdictions, including the EC in the EU and the DoJ in the US have developed “theories of competitive harm” which recognises three main

⁷ Section 119 (3) (c) ISA.

⁸ Section 119 (3) (d) ISA.

⁹ Section 199 (3) (e) ISA.

¹⁰ Section 199 (3) (f) ISA.

¹¹ See also, Dimgba Nnamdi, *et al.*, (2015, July 28). ‘Law and Practice of Mergers and Acquisition in Nigeria’ [WWW document] URL http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2652362 (visited 2015, October 20), p. 3.

¹² J. Olakunle Orojo, *Company Law and Practice in Nigeria* (LexisNexis, 2008), pp. 339 – 340.

¹³ The anti-competitive effects of a merger will be discussed further under the substantial lessening of competition test as applied in the substantive assessment of mergers.

sources of potential adverse effects of a proposed merger on competition¹⁴ and ultimately on consumers. These theories of competitive harm are;

I. Unilateral or non-coordinated effects

This applies to horizontal mergers between two (or more) competing firms. As a result of this merger, the competition between the merging firms is eliminated allowing the post-merger firm to exercise market power by profitably raising price, reducing output, quality, variety or innovation.¹⁵

In some other cases, the merger may enable a competitor of the post-merger firm to exercise market power by increasing its price in response to a price increase by the post-merger firm that results in a customer switch to the competitor.¹⁶ Where the competitor to the post-merger firm acts in such a manner without any express coordination between it and the post-merger firm, it is referred to as “non-collusive oligopoly”.¹⁷

The unilateral or non-coordinated effects of a horizontal merger constitute a substantial lessening of competition.¹⁸

II. Coordinated effects

Coordinated effects may arise in both horizontal and vertical mergers. A merger may lead to coordinated effects where the merger creates or strengthens the conditions that facilitates the ability of competitors including the post-merger firm to coordinate their behaviour in the market such that, they are able to profitably increase their price or reduce quality standards in the relevant market.¹⁹ The success of their coordination is dependent on their cooperative reactions to each other's price or other competitive initiative.²⁰

In analysing the coordinated effects of a merger, the focus of inquiry is whether the “*merger materially increases the likelihood that firms in the market will successfully coordinate their behaviour or strengthen existing coordination*”,²¹ and thereby substantially lessening competition in the relevant market(s).²²

¹⁴ Alistair Lindsay, *The EC Merger Regulation: Substantive Issues* (London: Sweet & Maxwell, 2006), p. 29.

¹⁵ ICN Merger Working Group: Investigation and Analysis Subgroup (2006, April). ‘ICN Merger Guidelines Workbook’ [WWW document] URL <http://www.internationalcompetitionnetwork.org/uploads/library/doc321.pdf> (visited 2015, August 17), p. 39.

¹⁶ Richard Whish, David Bailey, *Competition Law* (New York: Oxford University Press, 2012), p. 818.

¹⁷ *Ibid*, pp. 818 – 819.

¹⁸ U.S. Department of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines* (August 19, 2010), paragraph 6.

¹⁹ Alistair Lindsay, *supra*, p. 31.

²⁰ U.S. Department of Justice and the Federal Trade Commission, *supra*, paragraph 7.

²¹ ICN Merger Working Group: Investigation and Analysis Subgroup, *supra*, p. 45.

²² Richard Whish, David Bailey, *supra*, p. 819.

III. Vertical effects

Vertical effects arise in vertical mergers. In competition law, there is a general presumption, that vertical mergers: - that is the merger of firms that do not compete in the same market are unlikely to have an adverse reaction on competition because they do not eliminate competition between horizontal competitors, and will in most cases result in efficiencies.²³ However, vertical effects of mergers arise where as a result of the merger (or vertical integration), the post-merger firm is able to leverage its market power in the upstream market to foreclose competition in the downstream market by denying competitors in the downstream market, access to an essential upstream input.²⁴

Merger review under the Competition Regulations

The authority for the Commission to review mergers, acquisitions and take-overs in the communications sector is grounded in Section 90 of the Act which provides that;

*“Notwithstanding the provisions of any other written law, the Commission shall have exclusive competence to determine, pronounce upon, administer, monitor and enforce compliance of all persons with competition laws and regulations, whether of a general or specific nature, as it relates to the Nigerian communications market”.*²⁵

In addition, Regulation 26 of the Competition Regulations expressly authorise the Commission to review all mergers, acquisitions and take-overs occurring in the communications sector.

Jurisdictional threshold for merger review

Under the Competition Regulations, the types of qualifying merger transaction that are subject to the Commission’s review are;

I. Acquisition of more than 10% of the shares of a Licensee

Pursuant to Regulation 27 (a), the Commission shall apply its merger review procedures to transactions that involve the acquisition of more than 10% of the shares of a Licensee. Thus, the acquisitions of more than 10% shares in a Licensee typically qualify as “mergers” for merger review purposes under the Competition Regulations. In this regard, a qualifying transaction arises whenever a person purchases more than 10% of the shares in the target Licensee. Conversely, a qualifying transaction does not arise where the shares proposed to be acquired in a Licensee, when aggregated do not exceed 10% of the total number of shares of that Licensee. However, it is not clear whether concurrent transactions in which different persons purchase shares, when collectively

²³ Steven C. Salop, Daniel P. Culey. (2014, December 8). ‘Potential Competitive Effects of Vertical Mergers: A How-To Guide for Practitioners’ [WWW document] URL http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2522179 (visited 2016, March 22), p. 5.

²⁴ Jeffrey Church. (2004, September). ‘The Impact of Vertical and Conglomerate Mergers on Competition’ [WWW document] URL <http://bookshop.europa.eu/en/the-impact-of-vertical-and-conglomerate-mergers-on-competition-pbKD7105158/> (visited 2015, August 18), p. iv; ICN Merger Working Group: Investigation and Analysis Subgroup, *supra*, p. 73.

²⁵ See also, *Report Of the Public Inquiry on Competition Practices Regulations* (Nigerian Communications Commission, 2006), the Commission’s response to 8th comment.

aggregated, exceeds 10% of the total number of shares in a Licensee, would be subject to the Commission's review.

For the avoidance of doubt, CAMA defines share to mean "*the interests in a company's share capital of a member who is entitled to share in the capital or income of such company...*".²⁶

II. A transaction that results in a change or control of the Licensee

By virtue of Regulation 27 (b) of the Competition Regulations, a transaction resulting in the change or control of a Licensee is a qualifying merger transaction subject to review by the Commission. Thus, for example, a qualifying transaction arises whenever a person obtains control of a Licensee. Under the ISA, an acquisition of "control" presumptively arises whenever the purchaser acquires more than one-half of the issued share capital of the target Licensee,²⁷ such that the purchaser obtains voting rights that permit it to control the target company's board, management and/or business direction. In addition, other circumstances by which a person obtains control of another company are set out in Section 119 (3) of ISA and have been listed above.

III. Direct or indirect transfer or acquisition of an individual License

Pursuant to Regulation 27 (c) of the Competition Regulations, a transaction in which the purchaser acquires directly or indirectly, an individual License previously granted by the Commission will be deemed as qualifying transactions for merger review purposes under the Competition Regulations. A direct acquisition of an individual license occurs where an individual license is purchased directly from the company that holds it, while an indirect acquisition of an individual license occurs where shares in the company holding the license are purchased.

"Licensee" for the purpose of merger review

Even though, the Competition Regulations applies to a "Licensee" within the meaning of the Act,²⁸ it is more likely than not that, the Commission will limit its merger review process to only holders of an individual License.²⁹ In other words, it is likely that the Commission will forebear from applying the provisions of Part VI (Review of Mergers, Acquisitions and Takeovers) to firms undertaking activities subject to a class License. This conclusion is further buttressed by the fact that, the general conditions applicable to an individual License require the holder among other things; not to transfer or assign the License to another party without the prior written approval of the Commission;³⁰ not to enter into any form of joint-venture with another person without the approval of the

²⁶ Section 567 (1).

²⁷ See Section 199 (3) (a) of ISA.

²⁸ See Regulation 3 of the Competition Regulations.

²⁹ This is due to the fact that all the mergers that have been approved by the Commission till date, involve only holders of an individual License.

³⁰ See for instance Conditions 12 of the Universal Access Service License (UASL), 11 of the Wholesale Wireless Access Service License (WWASL), 8 of the Infrastructure Sharing and Collocation Services Licence (ISCSL) and 10 of the Internet Service License (ISL).

Commission;³¹ and to notify the Commission of any change in the control of shares exceeding 10% of its total number of shares.³²

In this regard, the concept of a “Licensee” in the context of merger reviews under the Competition Regulations should be interpreted narrowly.

Prior notification

Where a proposed merger transaction constitutes a qualifying merger transaction as described above, the transaction will require prior notification of the Commission.³³ Accordingly, the Licensee(s) involved in the transaction is/are required by Regulation 28 (2) to submit a written notification and request for approval of the proposed merger transaction at least sixty (60) days, prior to the completion date.

The notification to the Commission must as a minimum be accompanied by the following information; the identification of all persons involved in the transaction, including buyers, sellers, their shareholders and affiliated companies, and any persons, having a greater than 10% ownership interest in all such persons;³⁴ a description of the nature of the proposed transaction, including a detailed analysis of the resulting scheme of arrangement and summary of its commercial terms;³⁵ financial information on the persons involved in the proposed transaction, including their annual revenues from all communications markets, identified by specific markets, the value of assets allocated to communications businesses and copies of any recent annual or quarterly financial report;³⁶ a description of the communications markets in which the persons involved in the proposed transaction operate;³⁷ and a description of the effects of the transaction, on the control of network facilities or related infrastructure, including any interconnection or access arrangements with other Licensees.³⁸

Thus by virtue of the foregoing provisions, it does appear that the Licensee through the preliminary information contained in its initial transaction notification to the Commission, bears the “evidential burden”³⁹ of proving that the transaction will not result in a substantial lessening of competition or result in the Licensee or post-merger firm having a dominant position. However, it is the Commission pursuant to Regulation 27 (d) that has the statutory mandate to determine whether or not the proposed merger will result in a substantial lessening of competition or result in the Licensee or post-merger firm having a dominant position.

³¹ See for instance Conditions 13 of the UASL, 12 of the WWASL, 9 of the ISCSL and 11 of the ISL.

³² See for instance Conditions 15 of the UASL, 14 of the WWASL, 11 of the ISCSL and 13 of the ISL.

³³ Regulation 28 (1).

³⁴ Regulation 28 (2) (a).

³⁵ Regulation 28 (2) (b).

³⁶ Regulation 28 (2) (c).

³⁷ Regulation 28 (2) (d).

³⁸ Regulation 28 (2) (e).

³⁹ An evidential burden is generally the burden of introducing, adducing or producing evidence on any particular issue (See *Esangbedo v. The State* (1989) 4 N.W.L.R. (Pt. 113) 57 at p.70); or the burden of proof in the sense of adducing evidence in proof of a particular fact asserted either in the positive or negative by a party to a case (See *Gilsod Associates Limited v. Association of Local Government of Nigeria (ALGON)* (2011) LPELR-CA/A/58/2007).

Where a proposed merger transaction by which shares in a Licensee are to be acquired, is notified to the Commission and such transaction also includes the transfer of license(s) held by the acquired Licensee, it appears that the Commission will consider the acquisition of shares and the transfer of license(s) as separate applications, for merger review purpose. This is gleaned from the acquisition of Visafone by MTN, whereby a statement credited to the Commission at the time of this writing stated that what was approved in the transaction is only the acquisition of 100% shareholding in Visafone by MTN, and that the Commission is yet to take a decision on the transfer of Visafone's spectrum license to MTN.⁴⁰

Failure of a Licensee to notify a merger to the Commission, as required by Regulation 28 (2) and the relevant License Condition, will expose the Licensee to liability under the Nigerian Communications (Enforcement Processes, Etc.) Regulations 2005 (the Enforcement Regulations). This is by virtue of Regulation 33, which provides that "*Any person who contravenes any of the provisions of these Regulations, is in breach thereof and is liable to such fines, sanctions or penalties, including any penalties determined under the Enforcement Processes Regulations, 2005 or as may be determined by the Commission from time to time*". In particular, the Licensee is liable to the payment of an administrative fine in the amount of One Million Naira (N1, 000, 000:00), for failure to provide information required by the Commission.⁴¹ This administrative fine will also apply where the Licensee provides such information, which it knows or has reason to believe, is false or misleading.⁴² In addition, a Licensee may also be liable to the payment of an administrative fine of Five Million Naira (N5, 000,000:00) for failing to comply with a direction of the Commission, imposing an administrative fine, and a further sum of Five Hundred Thousand Naira (N500, 000:00) per day after expiration of the notice for as long as this contravention persists.⁴³ In 2016, the Commission issued a final warning and cease-and-desist order to Arctic Spatial Limited, an Automated Vehicular Tracking Service (AVTS) license holder for entering into a joint venture agreement with Vodacom Business Africa Nigeria Limited, a licensed ISP, for the marketing and distribution of AVTS services without obtaining the regulatory approval of the Commission as required by Condition 13 of the AVTS License and Condition 11 of the ISL.⁴⁴ The Commission in taking this particular enforcement measure, considered the plea of leniency, and the fact that the Licensees are first-time offenders.⁴⁵

⁴⁰ Thisday. (2016, October 12). 'No Approval for Visafone Spectrum License Transfer to MTN, NCC Insists' [WWW document] URL <http://www.thisdaylive.com/index.php/2016/10/12/no-approval-for-visafone-spectrum-licence-transfer-to-mtn-ncc-insists/> (visited 2016, October 12); Vanguard. (2016, October 12). 'NCC approves Visafone's share to MTN, not license-Official' [WWW document] URL <http://www.vanguardngr.com/2016/10/ncc-approves-visafones-share-mtn-not-licence-official/> (visited 2016, October 12).

⁴¹ See, Second Schedule to the Enforcement Regulations, Part A, 1.

⁴² *Ibid.*

⁴³ *Ibid.*, 12.

⁴⁴ Nigerian Communications Commission (2016). 'Summary of the Commission's Compliance Monitoring and Enforcement Activities for Quarter 1 (1), 2016' [WWW document] URL http://www.ncc.gov.ng/index.php?option=com_content&view=article&id=1259&Itemid=214 (visited 2016, September 14), pp. 1 - 2.

⁴⁵ *Ibid.*, p. 2.

The substantive assessment of mergers

As a pre-emptive measure, merger review law and policy generally favours the substantive assessment of mergers prior to consummation, because it is easier to prevent the anti-competitive effects of a merger at its early stages—that is, in its incipiency, rather than to unwind or “unscramble” an anti-competitive merger after consummation, or the market structure or anti-competitive effects resulting from such mergers.⁴⁶ This approach therefore, requires that competition authorities in reviewing mergers, must be able to reasonably predict through detailed analysis, its anti-competitive effects, if any, that is there must be a clear showing that anti-competitive effects of the merger are more likely than not.⁴⁷

In this regard, it is equally important to note that due to the unavailability of information concerning details of merger reviews undertaken by the Commission, it is unknown how the analytical process for assessing mergers is applied in practice, by the Commission. This unavailability of information may be due to the concern of the Commission that the details of all merger transactions are confidential because they contain trade secrets and commercial information, which are privileged and confidential to the Licensees, involved in the merger transaction.⁴⁸

However, in accordance with Regulation 32 of the Competition Regulations, the Commission will apply the substantial lessening of competition test, (and/) or the dominance test.⁴⁹ It is important to note that these tests are not equivalent and do not necessarily focus on the same issues. While the analysis of a merger under the dominance test focuses only on the question of whether as a result of the merger, the post-merger firm will acquire market power. On the other hand, the substantial lessening of competition test in addition to being used to analyse a merger that creates market power,⁵⁰ may also be used to challenge a merger though not creating market power, but market conditions that makes it conducive for the firms remaining post-

⁴⁶ Einer Elhauge, Damien Geradin, *Global Antitrust Law and Economics* (New York, Foundation Press, 2007), p. 872.

⁴⁷ *Ibid.*

⁴⁸ The Commission’s letter dated February 3, 2015 in response to the author’s request for information concerning mergers that have occurred in Nigeria’s communications sector since 2013. However some of these mergers as reported in the news media are; the acquisition of Visafone Communications by MTN in 2016, the acquisition of ATC Nigeria Wireless Infrastructure Limited by Tower Sites in 2015; the restructuring of SWAP Telecoms Plc and SWAP Telecoms Plc in 2012; the acquisition of Fibretech Ltd by Emerging Markets Telecommunications in 2011; the acquisition of Cellcom Communications Ltd by Visafone Communications in 2012; the acquisition of Multilinks by Helios Towers in 2011; the acquisition of Alheri Mobile Ltd by Emerging Markets Telecommunications Ltd in 2010; the acquisition of VGC Communications Ltd by MTN in 2010; the acquisition of Independent Telephone Network (ITN) and Bourdex Telecom by Visafone in 2009; the merger of VGC Communications Ltd and MTN in 2007; and the merger of Jap Telecoms Ltd and Danjay Telecoms in 2006.

⁴⁹ It is not clear whether the Commission is required to apply both tests or either of them in its substantive assessment of mergers. It is also important to note that the substantive assessment of mergers under the Competition Regulations is similar to the antitrust review of whether a merger may be to “substantially lessen competition” or “tend to create a monopoly”, stated in Section 7 of the *Clayton Antitrust Act 1914* in the US.

⁵⁰ Because it incorporates the dominance test by virtue of its 5th limb.

merger, to be more able on an individual basis, to exercise market power post-merger.⁵¹ Stated differently, the anti-competitive effects of a merger resulting from the non-coordinated behaviour of firms, which would not have a dominant position on the market concerned, would be caught by the substantial lessening of competition test (or conversely, escape enforcement scrutiny under the dominance test, because it does not create market power).⁵² For instance in Case M.7421 – *Orange/ Jazztel*, where French based telecom operator Orange, sought to acquire Spanish telecom operator Jazztel, the EC in its competition analysis concluded that, despite the fact that the transaction would not lead to the creation or strengthening of a (single) dominant position of the post-merger firm, there would be a substantial lessening of competition in the fixed internet access service market, as a result of the elimination of an important competitive constraint that the merging parties previously exerted upon each other together with a reduction of competitive pressure on the remaining competitors.⁵³

In this regard, the substantial lessening of competition test in addition to focusing on the market power of the post-merger firm, will also examine the effects of the proposed merger on parameters of competition (such as price, output, quality, efficiencies, etc) in the merging market.⁵⁴ Thus, the scope of the substantial lessening of competition test is much wider than the dominance test.⁵⁵ This enforcement gap in the dominance test that makes it inapplicable to merger cases not involving the creation of market power is referred to as the non-collusive oligopoly gap.⁵⁶ For example, in a communications merger, examples 1 and 2 in the table below illustrate the application of the substantial lessening of competition test to the non-collusive oligopoly gap.

Example 1	Example 2
MNOs A, B and C operate in the same market and respectively have a market share of 50%, 30% and 20% each. Thereafter, MNO A merges with MNO B to form MNO AB with a market share of 80%. In this example, the merger can be challenged in accordance with the	MNOs A, B and C respectively have a market share of 20%, 28% and 52% in the relevant market. Thereafter MNO A merges with MNO B to form MNO AB with a market share of 48%. Clearly, the merger cannot be challenged under the dominance test, because it does not create market power in MNO AB. However, if market conditions post-merger makes it possible for MNO AB and MNO C to be more able on an individual basis, to exercise market power, the merger can be challenged under the substantial lessening of

⁵¹ Richard Whish, David Bailey, *supra*, p. 866.

⁵² See also, *EU Merger Regulations, Regulation 139/2004* (the EUMR), Recital 25, which reformulated the substantive standard for assessing mergers in the EU from the dominance test to whether the merger would significantly impede effective competition (SIEC).

⁵³ See, paragraph 188.

⁵⁴ Lars-Hendrik Röller, Miguel de la Mano, ‘The Impact Of The New Substantive Test In European Merger Control’ *European Competition Journal*, vol. 2, no. 1, (2006), pp. 9 – 28, p. 16.

⁵⁵ Nnamdi Dimgba, Chukwuyere Ebere Izuogu, Joseph Seun Onele, *Report on a Comparative Review of the Nigerian Competition Bills* (2015), p. 27.

⁵⁶ See generally, Ioannis Kokkoris, *Merger Control in Europe: The Gap in ECMR and National Merger Legislations* (Routledge, 2011).

dominance test.	competition test.
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The substantial lessening of competition test as presently formulated by the Commission in the Competition Regulations can also be used for analysing mergers, which does not create market power, but rather leverages existing market power from an upstream market into a downstream market, thus resulting in vertical effects.⁵⁷ This leveraging of market power by the post-merger firm may be in the form of raising the price of an upstream input or an outright refusal to supply the upstream input. For example, a dominant wholesale bandwidth provider that acquires (or merges with) a retail ISP has the opportunity and commercial incentive in refusing to sell wholesale bandwidth to competitors of its downstream ISP business, thus restricting these ISPs' access to wholesale bandwidth and thereby "strengthening" its market power in the market for wholesale bandwidth and substantially lessening competition in the downstream market for retail internet service.

Lastly, the substantial lessening of competition test can also be used to challenge a merger, which creates or strengthens a dominant position held by a third party or third parties (*i.e.* one which is not held by the merging parties),⁵⁸ unlike the dominance test which is limited to only the question of whether the (post-merger) Licensee or any successor company will acquire a dominant position in one or more communications markets.

I The substantial lessening of competition test

The first analytical framework for merger reviews undertaken by the Commission is the substantial lessening of competition test (set out in Part II of the Competition Regulations). In accordance with Regulation 32 of the Competition Regulations, the Commission is obligated to review a merger for the purpose of determining whether the transaction may result in a substantial lessening of competition in one or more communications markets. The phrase "*may, result in a substantial lessening of competition*" as used in the context of this provision indicates that the Commission when reviewing a proposed merger transaction against the substantial lessening of competition test is concerned with a reasonable *probability* of the occurrence of a substantial lessening of competition resulting from the transaction, rather than with the *certainty* of an occurrence.⁵⁹ Consequently, the determination by the Commission that a

⁵⁷ Alistair Lindsay, *supra*, p. 48; pp. 51 – 52; Steven C. Salop, Daniel P. Culey. (2014, December 8), *supra*. Vertical effects would have been caught by the dominance test under the Competition Regulations, had the Commission framed it to also include the "strengthening of a dominant position".

⁵⁸ See generally, Alistair Lindsay, *supra*, pp. 59 – 60.

⁵⁹ See also, *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962), where the US Supreme Court stated at paragraph 38 that "Congress used the words "may be substantially to lessen competition", to indicate that its concern was with probabilities, not certainties".

merger substantially lessens competition, is based on probable, rather than a definite lessening of competition.⁶⁰

In determining whether the proposed merger may substantially lessen competition in a communications market, the Commission is required to apply the standards and procedures described in Part II (substantial lessening of competition) of the Competition Regulations.⁶¹ As set out in Regulation 6 of Part II of the Competition Regulations (and further discussed in Chapter 4), the substantial lessening of competition test involves five different limbs (penta-furcated test).⁶²

These limbs are;

- a) Definition of the relevant market or markets;
- b) Impact of the conduct on existing competitors in the identified markets;
- c) Impact of the conduct on further market entry;
- d) Impact of the conduct on consumers, including the availability and pricing of products and services;
- e) Degree of interference with competition that results in identifiable injury to competitors or consumers.

These limbs are examined below in relation to the substantive assessment of a merger against the substantial lessening of competition test. As was done in Chapter 4, the examples used for illustrating the application of the various limbs of the substantial lessening of competition test in a merger analysis are not intended to provide an exhaustive coverage of all the relevant issues that should be considered.

Definition of the relevant market or markets: From an economic perspective, market definition in a merger analysis is important because; firstly, it provides a useful analytical framework in which the competitive effects of a merger can be assessed.⁶³ Secondly, (as explained in Chapter 6), the question of whether the post merger firm will become dominant can only be affirmatively answered, after the relevant market has been properly defined.⁶⁴ Market definition was extensively discussed in Chapter 3, to which the reader is referred to.

⁶⁰ See also, ABA Section of Antitrust Law, *Mergers and Acquisitions: Understanding the Antitrust Issues* (Chicago: American Bar Association, 2000), p. 5; Einer Elhauge, Damien Geradin, *supra*.

⁶¹ Regulation 32.

⁶² It should be noted that the fifth limb of this test involves an additional three sub limbs (trifurcate).

⁶³ ICN Merger Working Group: Investigation and Analysis Subgroup, *supra*, p. 16.

⁶⁴ See, *Ibid*.

However, it should be borne in mind that the relevant market for merger purposes under EU competition law is primarily dependent on the business activities of the merging firms or the effects of the merger.⁶⁵ Similarly, in the US, for the purpose of the relevant market in a merger transaction, it is important to note the *dicta* of the Court in *United States v. EI du Pont de Nemours & Co.*, 353 US 586 Supreme Court 1957, at paragraph 649 that “[t]he relevant market is the area of effective competition within which [the merging firms] operates”. In other words, market definition in a merger transaction occurring in the US, is primarily based on the products (or services) sold by the merging firms and the geographic area in which those products are sold.

A merger market may also be defined to include another market affected by the proposed merger.⁶⁶ Lastly, similar to market definition in *ex ante* cases, market definition in merger cases should ordinarily be done on a forward looking (or prospective) basis that takes into account foreseeable development of the market(s) post-merger, such as technological developments and possible new competing products.⁶⁷

Impact of the conduct on existing competitors in the identified markets: A horizontal merger that gives rise to unilateral (or non-coordinated) effects is capable of creating market power. A firm with market power as stated in Chapter 6 is capable of unilaterally restricting output, raising price or retarding innovation. As will be discussed subsequently,⁶⁸ a post-merger firm with market power has the opportunity and capability of foreclosing competitors in order to protect its market power. The foreclosure effects arising from an anti-competitive merger is of concern to the Commission in the substantive assessment of a proposed merger, as it is apparent from Regulation 28 (2) (e), which requires that the Licensee(s) involved in the proposed merger provide the Commission with information on the description of the *effects* of the transaction, *on the control* of network, facilities or related infrastructure, including any interconnection or access arrangement with other Licensees. However, the Commission as at the time of this writing has not articulated any particular analytical framework that it will apply when analysing foreclosure issues in a (horizontal) merger.

As explained above, a vertical merger will also harm existing competitors in the relevant downstream market, if the post merger firm refuses to supply an essential upstream input to them, raises their costs by increasing the price of this essential input, or delays in the supply of the essential input.⁶⁹ In *Brown Shoe co. v. United States*, 370 U.S. 294 (1962), the US Supreme Court emphasised the importance of considering the extent of market foreclosed to competitors, in assessing whether a vertical relationship is anti-

⁶⁵ See, generally, Alistair Lindsay, *supra*, pp. 96 – 99.

⁶⁶ *Ibid.*, p. 96.

⁶⁷ Chukwudiebube Bede Abraham Opata, ‘Looking towards Europe: Regulation of Dominance in Nigerian Telecommunications’, *Competition and Regulation in Network Industries*, Volume 14, (2013), p. 346, citing A. Bavasso (2003), *Communications in EU Antitrust Law: Market Power and Public Interest*, The Hague: Kluwer Law International, 107.

⁶⁸ See, Dominance test below.

⁶⁹ 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.

competitive.⁷⁰ As explained in Chapter 4, the refusal of a vertically integrated company to supply an essential upstream input (or raising the cost of this input) to its downstream competitors is referred to as vertical foreclosure.

In the EU, the EC in *Telia/Sonera* COMP/M.2803 at paragraph 91, set forth the analytical framework for analysing upstream input foreclosure issues in vertical mergers by stating that “*In assessing whether the foreclosure problem is significant, it is necessary to establish not only that the merged entity will have the incentive to foreclose, but also whether it has the ability to do so, and whether it will have any significant effect on competition on the market in question*”. This analysis involves identifying the leveraging conduct, analysing whether the post-merger firm will have an *incentive* and the *ability* to pursue such conduct; identifying the foreclosure *effect*, if any, arising from the leveraging conduct; and assessing whether there is a *causal link* between the foreclosure effect and the merger.⁷¹ In identifying the leveraging conduct, the behaviour, which the post-merger firm might adopt in order to exclude its rivals, will be taken into consideration.⁷² In practice, this behaviour could either be, a refusal to supply or increasing the price of the upstream input,⁷³ or engaging in discriminatory practices against downstream competitors.

In determining whether the post-merger firm will have the *incentive* to engage in upstream foreclosure, the EC will consider whether the upstream foreclosure would be a profit maximising strategy for the post-merger firm, and if so, whether it would be practicable to implement.⁷⁴ The question here is to what degree, would input foreclosure be *profitable*.⁷⁵ In this regard, the vertically integrated post-merger firm will take into account how its refusal to supply upstream inputs to its downstream competitors, will commercially affect not only the profits of its upstream division, but also that of its downstream division.⁷⁶ This profitability analysis is based on the post-merger firm's profits, margins and market shares on the upstream and downstream markets.⁷⁷ If other circumstances remain the same, the lower the margins upstream, the lower the loss from restricting input sales.⁷⁸ Similarly, the higher the downstream margins, the higher the profit gain from increasing market share downstream at the expense of foreclosed rivals.⁷⁹ In Case M.3920 *France Télécom/Amena*, the EC concluded that the incentive of Amena to foreclose, by refusing to supply wholesale international roaming services to its competitors would have been unprofitable given both that Amena's outbound roaming

⁷⁰ At paragraph 44.

⁷¹ Alistair Lindsay, *supra*, p. 383.

⁷² *Ibid.*, pp 383 – 384.

⁷³ *Ibid.*, p. 384.

⁷⁴ Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2008/C 265/07), paragraph 40.

⁷⁵ Laurent Garzaniti & Matthew O' Regan, editors, *Telecommunications, Broadcasting and the Internet EU Competition Law & Regulation* (London: Thomson Reuters (Legal) Limited, 2010), p. 694.

⁷⁶ Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, *supra*.

⁷⁷ *Ibid.*, paragraphs 41 - 44.

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*, paragraph 41.

traffic from Spain was negligible and competitors could easily switch to France Télécom's rivals in the country where France Télécom was active.⁸⁰

In terms of the *ability* to foreclose, the EC will consider whether the vertically integrated firm resulting from the merger has a “significant degree of market power” in the upstream market as it is only in these circumstances that the merged firm can be expected to have a significant influence on the conditions of competition in the upstream market and thus, possibly, on prices and supply conditions in the downstream market.⁸¹ According to the EC, the merged entity would only have the ability to foreclose downstream competitors if, by reducing access to its own upstream products or services, it could negatively affect the overall availability of inputs for the downstream market in terms of price or quality.⁸² Thus, dominance in the upstream market is a necessary precondition for a finding of upstream input foreclosure, because any attempt to engage in upstream foreclosure without market power, will be neutralised by the downstream customers’ switch to another supplier of the upstream input.⁸³ However, where most of the capacity of an upstream input (for example wholesale broadband access) is used captively by the post-merger firm for its own downstream operations, the post-merger firm will not have market power, and thus will not have the ability to engage in foreclosure.⁸⁴

In identifying the foreclosure *effect*, the EC would expect a clear showing that the upstream foreclosure distorts competition in the downstream market, by increasing prices in the downstream market.⁸⁵ This could be achieved either through the merging parties’ increase of the costs of downstream rivals in the market, thereby leading to an upward pressure on their sales prices,⁸⁶ or by raising barriers to entry in the downstream market whereby the merged entity would be unlikely to supply potential downstream entrants, or supplies them only on less favourable terms than absent the merger.⁸⁷

Lastly, the *causal link* is the extent to which there is a nexus between the merger and the foreclosure effect⁸⁸ or whether the vertical foreclosure will be a direct consequence of the merger. In this regard, the EC will compare the competitive condition that would result from the proposed merger, with the conditions that would have existed absent the merger,⁸⁹ otherwise known as the counterfactual.

⁸⁰ Paragraphs 40 – 41.

⁸¹ Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, paragraph 35.

⁸² *Ibid.*, paragraph 36.

⁸³ Alistair Lindsay, *supra*, p. 394; Section of Antitrust Law, *Telecoms Antitrust Handbook* (first edition, ABA Publishing, 2005) p. 314.

⁸⁴ *See*, Case M.5532, *Carphone Warehouse/Tiscali UK*, paragraphs 84 – 87.

⁸⁵ Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, paragraph 47.

⁸⁶ *Ibid.*, paragraph 48.

⁸⁷ *Ibid.*, paragraph 49.

⁸⁸ *Ibid.*, p. 392.

⁸⁹ Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2004/C 31/03), paragraph 9.

As explained in Chapter 4, vertical mergers in the US telecommunications sector has traditionally been analysed under the raising rivals' cost theory, where the primary concern is whether as a result of the merger, it is probable that the upstream firm will have both the incentive and ability to exclude its downstream competitors from the downstream market to a degree that it could raise prices without decreasing its profit, or in other words, whether it could exercise market power in the downstream market. A rival's cost is raised if it cannot substitute to another cost-effective (upstream) input or, if available substitutes are inferior or more expensive.⁹⁰ In *United States v. AT & T Corp. and McCaw Cellular Communications Inc*, 59 Fed. Reg. 44, 158 (August 26, 1994), the DoJ was concerned that the post-merger AT&T would have the incentive to raise the costs of McCaw's competitors dependent on it for cellular infrastructure equipment by increasing the prices of its equipment and software, or by withholding or delaying the development or delivery of necessary equipment, software, services or other upgrades, imposed various non-discrimination obligations on AT&T.

However, the FCC in its Memorandum Opinion and Order *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 (the Order) rendered on 20 January, 2011, wherein it granted approval to an application for consent to transfer control of various communications licenses from General Electric Company to Comcast Corporation subject to conditions set forth in the Order, laid down a comprehensive test grounded in contemporary antitrust analysis for analysing the probability of a vertical merger (or integration) to result in upstream input foreclosure.⁹¹

The background facts to this Order are that Comcast Corporation (Comcast), General Electric Company (GE), and NBC Universal, Inc. (NBCU), sought authorisation from the FCC to assign and transfer control of broadcast, satellite, and other radio licenses from GE to Comcast. The proposed transaction would combine, in a single joint venture (Comcast-NBCU or the JV), the broadcast, cable programming, online content, movie studio, and other businesses of NBCU with some of Comcast's cable programming and online content businesses.⁹² The JV's assets would include two broadcast television networks (NBC and Telemundo), 26 broadcast television stations, and NBCU's cable programming (such as CNBC, MSNBC, Bravo, and USA Network), all of which would be under the control of Comcast, the nation's largest cable operator and internet service provider.⁹³ The transaction was primarily a vertical one, as NBCU was a major content provider while Comcast the leading multichannel video programming distributor (MVPD) in the US, operated downstream in the distribution of that content.⁹⁴

⁹⁰ Steven C. Salop, Daniel P. Culley, 'Revising the US vertical merger guidelines: policy issues and an interim guide for practitioners' *Journal of Antitrust Enforcement*, 0, (2015), pp. 1 – 41, p. 18.

⁹¹ Jonathan B. Baker, 'Comcast/NBCU: The FCC Provides a Roadmap for Vertical Merger Analysis', *Antitrust*, Vol. 25, No.2, (Spring 2011), pp. 36 – 42, p. 36.

⁹² Paragraph 1.

⁹³ *Ibid.*

⁹⁴ Jonathan B. Baker, *supra*.

In its analysis, the FCC concluded that the proposed transaction creates the possibility that Comcast-NBCU, either temporarily or permanently, could implement various foreclosure strategies to either block MVPDs that compete with Comcast in video distribution, from access to Comcast's video programming content, or raise the programming costs to these MVPDs.⁹⁵ As a result of which Comcast could obtain or maintain market power in the video distribution market.⁹⁶

The FCC's analytical framework for input foreclosure commenced with a consideration of the *possibility of excluding rivals*.⁹⁷ In this regard, the FCC addressed the issue of whether the proposed transaction would give "Comcast an increased ability to disadvantage some or all of its video distribution rivals by exclusion".⁹⁸ The FCC concluded that Comcast could disadvantage its downstream rivals by engaging in restricting/delaying their access to the JV's video programming or by increasing the price of programming to video distribution competitors.⁹⁹ This conclusion was based on among other things the previous finding by FCC that Comcast had engaged in similar input foreclosure strategy in the past.¹⁰⁰

Secondly, the FCC considered *harm to competition resulting from the foreclosure*.¹⁰¹ In this regard, the FCC found that the successful exclusion (whether involving complete foreclosure or cost-raising strategies) of video distribution rivals would likely harm competition by allowing Comcast to obtain or (to the extent it may already possess it) maintain market power.¹⁰² The FCC reached this conclusion by defining the video distribution markets, and finding that Comcast could use exclusionary program access strategies to reduce competition from all significant current and potential rivals participating in those markets.¹⁰³

In the third and final step of its analysis, the FCC evaluated the *potential benefits* of the transaction by comparing the competitive benefits of the transaction with the harms to competition.¹⁰⁴ Primarily, the task for the FCC under this limb is whether "public interest, convenience and necessity will be served" by its approval of the transaction.¹⁰⁵ In considering the public interest benefit served by the transaction, the FCC analysed the several possible efficiencies that would result from the transaction such as (i) claims that

⁹⁵ Paragraph 25.

⁹⁶ *Ibid.*

⁹⁷ Jonathan B. Baker, *supra*, p. 37.

⁹⁸ Paragraph 36.

⁹⁹ *Ibid.*,

¹⁰⁰ Paragraph 37.

¹⁰¹ Jonathan B. Baker, *supra*.

¹⁰² Paragraph 39.

¹⁰³ *Ibid.*

¹⁰⁴ Jonathan B. Baker, *supra*, p. 38.

¹⁰⁵ The FCC evaluates transaction under a public interest standard, which encompasses the "broad aims of the Communications Act" (See ABA Section of Antitrust Law, *Telecoms Antitrust Handbook, supra*, pp. 72 – 75. According to the FCC in *Applications of AT&T Inc. and Atlantic Tele-Network, Inc., Memorandum Opinion and Order*, 28 FCC Rcd. 13670, (2013) ("AT&T-ATN Order"), paragraph 12, the public interest standard incorporates a "deeply rooted preference for preserving and enhancing competition in relevant markets, accelerating private sector deployment of advanced services, promoting a diversity of license holdings, and generally managing the spectrum in the public interest".

the combination would enhance the prospect of innovation by reducing the transaction costs associated with coordinating content development with the development of new forms of media distribution, (ii) cost savings arising from the elimination of the double marginalisation of programming costs and (iii) cost reduction resulting from the increased economies of scale and scope.¹⁰⁶ The FCC found these claimed efficiencies to prevail over the competitive harms identified in the foregoing second step.¹⁰⁷

Impact of the conduct on further market entry: Foreclosure of a particular market from access to an upstream input resulting from a vertical merger, will cause a substantial barrier to entry for potential entrants into that market.¹⁰⁸ As explained in Chapter 6, barriers to entry is any cost, which is borne by a firm seeking to enter a new market, but is not borne by an incumbent market player. The ease of entry into a particular market determines the extent to which an incumbent firm can profitably increase its prices without inducing potential competitors to enter, and existing competitors to expand in that market.¹⁰⁹ If barriers to entry in a particular market are low, then there is the likelihood that a new entrant will enter that market in response to a price increase by the incumbent.¹¹⁰ The ability of a new entrant to easily enter a new market exerts a competitive restraint on the ability of existing players in that market to exercise market power.¹¹¹

A merger is unlikely to substantially lessen competition in a relevant market, if there is ease of entry into that market to the extent that the post-merger firm and its competitors, either unilaterally or collectively, are not able to profitably raise price or otherwise reduce competition,¹¹² because the presence of a new entrant in that market constrains their ability to exercise market power or facilitate collusion.¹¹³ As explained by the U.S Court of Appeals at paragraph 984 of *US v. Baker Hughes Inc.*, 908 F. 2d 981 Court of Appeals, Dist. of Columbia Circuit 1990 “*In the absence of significant barriers, a company probably cannot maintain supracompetitive pricing for any length of time*” and in *Rebel Oil Co., Inc. v. Atlantic Richfield Co.*, 51 F. 3d 1421 Court of Appeals, 9th Circuit 1995, where the US Court of Appeals stated at paragraph 11 that “*to justify a finding that a defendant has the power to control prices, entry barriers must be significant-they must be capable of constraining the normal operation of the market to the extent that the problem is unlikely to be self correcting*”. Thus, where new

¹⁰⁶ Jonathan B. Baker, *supra*.

¹⁰⁷ *Ibid.*

¹⁰⁸ See, Dimgba Nnamdi, *et al.*, *supra*, p. 19; Herbert Hovenkamp, *Federal Antitrust Policy: The Law of Competition and Its Practices* (Thompson/West, 2005), p. 389.

¹⁰⁹ Commerce Commission. (2006, October 10). ‘A Review of Cellular Mobile Market Entry Issues’ [WWW document] URL http://www.comcom.govt.nz/regulated_industries/telecommunications/archive/determinations-archive/service-deregulation-reviews-archive/mobile-roaming-and-co-location-investigation/ReviewofCellularMobileMarketEntryIssues/ (visited 2015, August 18), paragraph 38.

¹¹⁰ Alistair Lindsay, *supra*, p. 488.

¹¹¹ Daniel Hosken, Steven Tenn. (2015, January 19). ‘Horizontal Merger Analysis in Retail Markets’ [WWW document] URL http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2552548 (visited 2015, July 23), p. 8.

¹¹² U.S. Department of Justice and the Federal Trade Commission, *supra*, paragraph 9.

¹¹³ ABA Section of Antitrust Law, *Mergers and Acquisitions: Understanding the Antitrust Issues*, *supra*, p. 120.

competitors are able to easily enter a market in response to a price increase by the post-merger firm, the post-merger firm will be compelled to return to its pre-merger price.¹¹⁴

Several competition authorities, as part of their assessment of the competitive effects of a proposed merger will also consider the extent to which market entry or expansion is able to counteract the anti-competitive effects of the merger.¹¹⁵ In assessing the possibility of market entry in counteracting the ability of the post-merger Licensee to exercise market power, it is not known what particular test the Commission will apply. However, according to the EC and the DoJ, for entry to overcome the ability of the post-merger firm to profitably raise its price or exercise market power, it must satisfy all the three prongs of *likely*, *timely* and *sufficient* in its magnitude and scope in order to counteract any potential anti-competitive effects of the merger.¹¹⁶

Entry is likely unless it is not profitable.¹¹⁷ Entry is timely if it is quick and sustained to defeat the exercise of market power,¹¹⁸ otherwise the post-merger firm will take a long time in responding to the competitive threat posed by a new entrant entering the market.¹¹⁹ The EC is of the view that entry is timely if it occurs within two (2) years.¹²⁰ Lastly, entry is sufficient where it is able to offset the anti-competitive effects of the merger.¹²¹ In *Skansa/Scancem* Case IV/M. 1157 [1999] O.J. L183/I, the EC at paragraph 184 articulated the sufficient prong of the entry analysis as “...*the relevant question is not whether new entry is possible, but also whether it is likely to be on a scale sufficient to restrict Skanska from behaving independently of its competitors...*” However, entry will not be sufficient where the post-merger firm controls an essential facility, or its products does not compete with that of a new entrant.¹²²

In *United States v. Waste Management, Inc.*, 743 F. 2d 976 Court of Appeals, 2nd Circuit 1984, where Waste Management Inc (WWI) and EMW Ventures Incorporated (EMW) appealed the district court’s decision to the United States Court of Appeals for the 2nd Circuit, that WWI’s acquisition of EMW violated Section 7 of the Clayton Act. The Court

¹¹⁴ *Ibid.*, pp. 120 – 121.

¹¹⁵ ICN Merger Working Group: Analytical Framework Subgroup (2004, April). ‘ICN Report on Merger Guidelines – Chapter 5’ [WWW document] URL <http://www.internationalcompetitionnetwork.org/uploads/library/doc559.pdf> (visited 2015, August 18), p. 1.

¹¹⁶ Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, *supra*, paragraph 68; U.S. Department of Justice and the Federal Trade Commission, *supra*.

¹¹⁷ Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, *supra*, paragraph 69; U.S. Department of Justice and the Federal Trade Commission, *supra*, paragraph 9.2.

¹¹⁸ Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, *supra*, paragraph 74; U.S. Department of Justice and the Federal Trade Commission, *supra*, paragraph 9.1.

¹¹⁹ Alistair Lindsay, *supra*, p. 485.

¹²⁰ Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, *supra*.

¹²¹ Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, *supra*, paragraph 75; U.S. Department of Justice and the Federal Trade Commission, *supra*, paragraph 9.3.

¹²² U.S. Department of Justice and the Federal Trade Commission, *supra*.

in its entry analysis observed that “*entry into the trash collection business [the relevant market] is relatively easy, and the barriers to entry not great. A person wanting to start in the trash collection business can acquire a truck, a few containers, drive the truck himself, and operate out of his home*”. According to the Court, “*entry into the relevant product and geographic market by new firms or by existing firms [...] is so easy that any anticompetitive impact of the merger [...] would be eliminated more quickly by such competition*”. For this reason (among several others), the Court concluded that the merger did not substantially lessen competition, and thus reversed the decision of the district court by approving the merger.

Entry barriers in the communications industry are classified into three (3) main types; technical, strategic, and regulatory (or legal).¹²³ Technical barriers to entry arise from the nature of the technological resources or inputs required to provide a particular type of communications services.¹²⁴ In the case of mobile telecommunications services, this will include the “sunk cost” of building a mobile telecommunications network. For instance, in *United States v. United Tote, Inc.*, 768 F. Supp. 1064 Dist. Court, D. Delaware 1991, the U.S States District Court found that totalisator systems needed a high processing speed as a result of which the Court concluded that the high performance requirement of these systems constituted an additional technical barrier to entry.¹²⁵ Strategic barriers may arise from the established position of an incumbent operator. This may include brand reputation and/or customer loyalty.¹²⁶ Lastly, regulatory or legal barriers such as the requirement to obtain a communications license to authorise a particular communications services constitutes a barrier to entry.¹²⁷ In *FTC v. University Health*, 938 F. 2d 1206 (11th Circ.1999), the Court at paragraph 1211 found that Georgia’s certificate of need law, which restricts the ability of existing hospitals to expand their output and the ability of outsiders to build new hospitals, is a “substantial” regulatory barrier to entry into the relevant market.

It should be noted that the communications market is generally characterised as a market with high (or significant) barriers to entry, as it involves substantial sunk cost in terms of the infrastructure and capital outlay required to provide the various types of communications services.¹²⁸ In Nigeria, the Commission considers entry barriers into the mobile telecommunications market to be fundamentally high.¹²⁹

Impact of the conduct on consumers, including the availability and pricing of products and services: Horizontal and vertical mergers can impair consumer welfare through higher prices or reduced quality, innovation or constrained choice (variety) if there is a

¹²³ Commerce Commission, *supra*, paragraph 39.

¹²⁴ *Ibid.*, paragraph 40.

¹²⁵ See, generally paragraphs 1072 – 1073.

¹²⁶ ABA Section of Antitrust Law, *Mergers and Acquisitions: Understanding the Antitrust Issues*, *supra*, p. 125.

¹²⁷ Alistair Lindsay, *supra*, p. 489.

¹²⁸ ABA Section of Antitrust Law, *Telecoms Antitrust Handbook*, *supra*, p. 95.

¹²⁹ Nigerian Communications Commission (NCC), *Consultation Paper on Dominance in Selected Communications Markets* (October 27 2009), p. 13.

“reasonable probability” that it will lead to unilateral effects, coordinated effects, and/or vertical effects.¹³⁰

i. *Unilateral effects*

As explained above, unilateral effects is likely to result from the elimination of a horizontal competitor, enabling the post-merger firm to “unilaterally” increase price.¹³¹ The most common unilateral effects scenario in the telecommunications industry involves the acquisition of MNO A by MNO B. Both MNO A and MNO B provide similar services and respectively have 30% and 45% of the relevant merging market consisting of two (2) other MNOs. As a result of the removal of MNO A as a competitive alternative, the post-merger MNO B would have a unilateral incentive to raise price (or to a similar extent reduce quality of mobile telecommunications service or otherwise exercise market power).¹³² In this scenario, due to the unavailability of MNO A as a competitive alternative to the services provided by MNO B, the customers of the post-merger MNO B would not be able to respond by switching to MNO A, in the event that the post-merger MNO B decides to increase price. Consequently, the post-merger MNO B would find it profitable to increase price post-merger, even though such price increase would not have been possible prior to the merger. As can be seen in this scenario, it is the unavailability of a competitive alternative to the services provided by MNO B that permits a post-merger price increase, to the detriment of consumers. Thus, where the services of the other MNOs are regarded by consumers as reasonably good substitutes for the services of the post-merger MNO B, then any attempt to increase price by the post-merger MNO B would be defeated by consumers switching to these rival MNOs.¹³³

The merger would also confer a unilateral incentive to raise price on the remaining 2 non-merging rival MNOs for the same reason, especially in circumstances where the customers of the non-merging MNOs regard the services provided by MNO A as their second choice. With the exit of MNO A from the market, some of these customers would not switch away from their current MNO, potentially conferring a unilateral incentive on these MNOs to increase price. Moreover, if the post-merger MNO B or any of the non-merging MNOs were to raise their price unilaterally, that action would reduce competition pressure on other market participants, potentially leading to additional price increases far beyond the incentive created from the absence of MNO A in the market. The pre-merger customers of MNO B and the non-merging MNOs would be harmed by such price increase.

ii. *Coordinated effects*

In the scenario given above, the acquisition of MNO A by MNO B may also harm consumers by making coordinated interaction among the remaining MNOs more

¹³⁰ See, ICN Merger Working Group: Investigation and Analysis Subgroup, *supra*, p. 39.

¹³¹ See also, Case M.3916, *T-Mobile Austria/tele.ring*, on unilateral effects resulting from the reduction of the number of significant players from four to three.

¹³² *Ibid.*

¹³³ See, Simon Baker, Andrea Coscelli, “The Role of Market Shares in Differentiated Product Markets” *European Competition Law Review*, Vol. 20, (1999), pp. 412 – 419, p. 414.

likely and/or more effective. In *FTC v. PPG Industries, Inc.*, 798 F. 2d 1500 Court of Appeals, Dist. of Columbia Circuit 1986, the US Court of Appeals stated that “*where rivals are few, firms will be able to coordinate their behavior, either by overt collusion or implicit understanding, in order to restrict output and achieve profits above competitive levels*”.¹³⁴ The US Courts of Appeal *per* Posner, J in *Hospital Corporation of America v. Federal Trade Commission*, 807 F. 2d 1381 Court of Appeals, 7th Circuit 1986 has made clear that the primary task in a merger review is whether the merger “*...is likely to hurt consumers, as by making it easier for the firms in the market to [coordinate their behaviour], and thereby force price above or farther above the competitive level*”.¹³⁵

A market with few players selling similar products and high barriers to entry such as in this scenario, is vulnerable to coordination post-merger.¹³⁶ The features of this market would make it likely that the MNOs remaining in the market would be able to easily reach a consensus on the terms of coordination, and prevent new competition.¹³⁷ Because these MNOs offer almost similar prices within the relevant geographic market, increased coordination is likely to be in the form of a price increase (or a reduction in quality or innovation) to the detriment of their customers.¹³⁸

iii. Vertical effects

In addition, upstream foreclosure issues arising from a vertical merger will harm consumers in the form of price increase by the post-merger firm,¹³⁹ or the inability of communications consumers to choose resulting from the foreclosure strategy implemented by the post-merger firm.

Degree of interference with competition that results in identifiable injury to competitors or consumers: In assessing whether a particular conduct results in “identifiable injury” to consumers, the Competition Regulations requires the Commission to apply the following further considerations;

- a) A trivial or *de minimis* degree of lessening of competition will not be acted on by the Commission;¹⁴⁰

The reference to a “substantial lessening of competition” indicates that the Commission taking into consideration the cumulative market share of the merging parties, will condemn only mergers, which substantially lessens competition. Accordingly where the cumulative market share of the merging parties is trivial or *de*

¹³⁴ At paragraph 1503.

¹³⁵ At paragraph 1386.

¹³⁶ ABA Section of Antitrust Law, *Mergers and Acquisitions: Understanding the Antitrust Issues*, *supra*, pp. 87 - 88.

¹³⁷ *Ibid*, p. 35.

¹³⁸ See, Alistair Lindsay, *supra*, pp. – 294 - 295.

¹³⁹ Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, *supra*, paragraphs 18, 29 and 31.

¹⁴⁰ Regulation 7 (a).

minimis (or below a certain threshold), the Commission is unlikely to prohibit the merger. As stated in Chapter 4, the Commission as at the time of this writing is yet articulate the *de minimis* rule.

- b) The degree of market power of the Licensee (using the market definition and assessment of market power methodologies described in Part IV of the Competition Regulations)¹⁴¹

Chapter 6 discusses the various market methodologies for evaluating the market power of a Licensee pursuant to the provisions of Part IV of the Competition Regulations.

- c) A smaller degree of interference or injury resulting from the conduct of a Licensee with a large degree of market power (including Licensees found to be in a dominant position) may be found to constitute substantial lessening of competition.¹⁴²

Accordingly, a smaller degree of harm resulting from the conduct of a Licensee with market power may be found by the Commission to constitute a substantial lessening of competition. However, as stated in Chapter 4, it remains a question whether the Commission may require a greater degree of harm to find a substantial lessening of competition in a conduct engaged in by a Licensee with a very small degree of market power.

In *Emerging Markets Telecommunications Services (EMTS) v. MTN & Visafone* Suit FHC/L/CS/130/2016 (unreported), EMTS challenged the acquisition of Visafone by MTN by seeking several injunctive reliefs among which was to restrain MTN from using or deploying the 800MHz spectrum (an asset owned by Visafone). This particular relief was premised on the argument that MTN's pre-emptive acquisition of the 800MHz spectrum is an act and practice that is deemed to result in a "substantial lessening of competition" by virtue of Regulation 8 (e) of the Competition Regulations.¹⁴³

While this argument may be appropriate in abuse of dominance cases,¹⁴⁴ the author is of the view that the appropriate approach under the Act and Competition Regulations would have been for EMTS to challenge the acquisition under Part VI (Review of Mergers, Acquisition and Takeovers), by articulating a particular theory (or theories) of

¹⁴¹ Regulation 7 (b).

¹⁴² Regulation 7 (c).

¹⁴³ At that time, EMTS and indeed the general public were unaware that the Commission was yet to grant approval of the transfer of the license authorising use of this spectrum, from Visafone to MTN.

¹⁴⁴ It should be noted that the Commission stated in the 2010 Dominance Determination that all the conducts described in Regulation 8 including "*Pre-emptively acquiring or securing scarce facilities or resources, including rights of way, required by another Licensee for the operation of its business, with the effect of denying the use of the facilities or resources to the other service provider*" constitutes incidences of abuse of a dominant position by a Licensee, see, Nigerian Communications Commission (NCC), *Consultation Paper on Dominance in Selected Communications Markets* (October 27 2009), p. 30.

competitive harm (unilateral or non-coordinated effects, coordinated effects and/or vertical effects) or stated differently, the anti-competitive effects resulting from the acquisition which is likely to lead to a “substantial lessening of competition” in an aspect of the communications sector. In addition, EMTS in that case offered only a “formulaic recitation” of the applicable statutory provisions together with the elements of the cause of action, by stating that MTN’s pre-emptive acquisition of the 800MHz spectrum is an act and practice that is deemed to result in a “substantial lessening of competition”, without any substantive assessment of the acquisition in accordance with the substantial lessening of competition test, as required by Regulation 32 of the Competition Regulations. In other words, EMTS neither applied the substantial lessening of competition test, nor did it define the relevant communications market implicated in the acquisition, in which competition is likely to be substantially lessened.

However, the Court in declining jurisdiction to entertain the case, held among other things that the failure to join the Commission as a necessary party vested with the authority to regulate competition in the Communications sector in Nigeria, and which had approved the acquisition, was fatal to EMTS’ case.

II Dominance test

The likelihood that a merger will cause anti-competitive harm depends on among other things, whether, it creates a dominant firm or a firm with market power.¹⁴⁵ A merger enhances market power if it is likely to encourage one or more firms to raise price, reduce output, diminish innovation, or otherwise harm customers as a result of diminished competitive constraints or incentives, through the elimination of competition between the merging parties.¹⁴⁶ Under the dominance test, a merger will be challenged as being anti-competitive if it creates a dominant position in the relevant market. The concept of dominance under the Competition Regulations involves situations in which the dominant Licensee is able to unilaterally restrict output, raise prices, reduce quality or, otherwise act with a degree of independence from competitive pressures.¹⁴⁷

Under the Competition Regulations, dominance can be either based on a narrow reading whereby it covers only situations where the merged firm is individually dominant in the relevant market, or broadly read to include collective dominance whereby the merger affects the market structure in such a manner that is enables coordinated interaction among the remaining competitors.¹⁴⁸ The concern for assessing a merger against the dominance test is that a post-merger firm with market power has the ability to reduce output or quality, and/or raise price.¹⁴⁹ Furthermore, that firm might be inclined to engage in exclusionary (or anti-competitive) practices, such as sustaining a campaign of

¹⁴⁵ ABA Section of Antitrust Law, *Mergers and Acquisitions: Understanding the Antitrust Issues*, *supra*, p. 79.

¹⁴⁶ U.S. Department of Justice and the Federal Trade Commission, *supra*, paragraph 1.

¹⁴⁷ Regulation 18 (1).

¹⁴⁸ See also, OECD. (2010, May 10). ‘Policy Roundtables Standard for Merger Review’ [WWW document] URL <http://www.oecd.org/competition/mergers/45247537.pdf> (visited 2015, September 9), p. 7.

¹⁴⁹ Herbert Hovenkamp, *supra*, p. 292.

predatory pricing¹⁵⁰ in order to foreclose one or more of its competitors, thereby enabling it to illegally maintain market power.¹⁵¹

In determining whether the proposed merger may result in a dominant position in the relevant market, the Commission is required to apply the standards and procedures described in Part IV (determination of a dominant position) of the Competition Regulations.¹⁵² Thus, unlike the substantial lessening of competition test, the dominance test focuses on market circumstances including at least one or more of those set out in Regulation 18 (2) of the Competition Regulations rather than on the effects of the proposed merger on competition and consumers.

The reference to “*may, result in the Licensee or any successor company having a dominant position*” in the dominance test means that the “creation” of a position of dominance post-merger is the relevant test, thus indicating the absence of market power prior to the proposed merger transaction. The focus of inquiry under the dominance test is whether it is *possible* that the post-merger firm will acquire market power as a result of the merger,¹⁵³ taking into consideration one or more of the market circumstances listed under Regulation 18 (2). In other words, when analysing a merger under the dominance test, the primary concern is whether there exist any change in market structure, and to what extent such change may influence the post-merger firm’s ability to behave independently of competitive constraints.

The market circumstances that are relevant for the consideration of dominance, discussed in Chapter 6 are equally valid when assessing a merger against the dominance test. However, it is important to note below, the following in relation to mergers;

a) The market share of the Licensee, determined by reference to revenues, number of subscribers or volume of sales

From an economic perspective, market share gives an indication of whether the post-merger firm is able to raise prices or reduce quality post-merger.¹⁵⁴ The Commission will presume a post-merger market share of above 40% as sufficient to establish a dominant position in the post-merger Licensee.¹⁵⁵ It is not clear whether in addition to finding the post-merger Licensee dominant on the basis of a post-merger market share in excess of 40%, the Commission will also require a finding that the post-merger Licensee has a “significantly higher market share than the next competitor post-merger” as required by the EC under EU competition law.¹⁵⁶ It is also not entirely clear to what extent the

¹⁵⁰ See, *R.C Bigelow, Inc v. Unilever N.V.*, 867 F.2d 102, 111 (2d Cir. 1989).

¹⁵¹ Herbert Hovenkamp, *supra*. See also, Alistair Lindsay, *supra*, p. 13.

¹⁵² Regulation 32.

¹⁵³ This conclusion is based on the literary meaning of the word “may” as used in the dominance test (See, the meaning of “may” in the Black’s Law Dictionary (9th Edition) at page 1068).

¹⁵⁴ Alistair Lindsay, *supra*, pp. 190 - 191.

¹⁵⁵ See, Nigerian Communications Commission (NCC), *Determination of Dominance in Selected Communications Market in Nigeria* (March 26 2010), p. 7.

¹⁵⁶ See, Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, *supra*, paragraph 25.

Commission will consider the rate of increment in the market share of the post-merger dominant Licensee. For instance, in Case No COMP/M.3764. *Belgacom/Swisscom/JV*, where Swisscom Fixnet Ltd (Swisscom) sought to acquire joint control of Belgacom International Carrier Services S.A. (BICS), solely controlled by Belgacom S.A. (Belgacom). Swisscom is the incumbent telecommunications operator in Switzerland, BICS (also referred to as the Joint-Venture) is a Belgian company created in 2005 through a spin-off of all Belgacom's existing international telecommunications carrier services activities and related assets. Prior to the proposed operation, BICS was a wholly owned subsidiary of Belgacom, while Belgacom is the incumbent telecommunications operator in Belgium. During the merger investigation, the EC found that although the transaction would have led to an increase in the market shares of the joint-venture to 35-55% in the market for international wholesale voice carrier services on the Belgium/Switzerland route and, to 60-80% in the market for international wholesale voice carrier services on the Switzerland/Belgium route, competition concern did not arise given the limited increment in market share.¹⁵⁷

However, in accordance with CJEU case law, it should be noted that this presumption of dominance on the basis of market shares of the post-merger Licensee, can be rebutted where the individual market share of the merging firms have continued to decline over a period of time.¹⁵⁸

In calculating market share for the purpose of assessing the dominance of the post-merger Licensee, both the Commission and the Competition Regulations are silent on the relevance of the level of concentration in the market.¹⁵⁹ For instance, both the EC and DoJ in determining the market share of each party to a proposed merger transaction, will also consider the level of concentration in the relevant market measured by the overall percentage of the market controlled by the various competitors. In particular, both the EC and DoJ rely on the Herfindahl–Hirschman Index (HHI), which measures market concentration by summing the squares of the market share of firms in the market.¹⁶⁰ The HHI gives an indication of the competitive pressure in the market before and after the merger, and the change in the HHI as a result of the merger (known as the “delta”) is a proxy for the change in market concentration as a result of the merger.¹⁶¹

¹⁵⁷ At paragraph 23.

¹⁵⁸ See, *Ibid.* As stated in Chapter 6, according to the EC and case laws from the CJEU, a steady decline of market shares may not always rebut the existence of a dominant position, particularly where the shares are very high from the initial period, see Case C-202/07 P *France Télécom v Commission*, paragraph 86.

¹⁵⁹ It bears emphasis to note that, the Commission referred to market concentration measured by Herfindahl Hirschman Index (HHI) when applying the Structure-Conduct-Performance (S-C-P) during its 2013 Dominance Determination. However, this reference to HHI in the 2013 Dominance Determination was not accompanied by any definition or explanation.

¹⁶⁰ Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, *supra*, paragraphs 19 - 21, U.S. Department of Justice and the Federal Trade Commission, *supra*, paragraph 5.3. For example, for a market consisting of four firms with shares of 30%, 30%, 20%, and 20%, the HHI is 2,600 ($30^2 + 30^2 + 20^2 + 20^2 = 2,600$).

¹⁶¹ Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, *supra*, paragraph 16.

The higher the resulting HHI, the more concentrated a market is.¹⁶² The more concentrated a market becomes after the merger, the more likely the merger will have an adverse effect on competition in the relevant market.¹⁶³ A proposed merger transaction would be presumed to be anti-competitive, if the post-merger HHI cross certain thresholds.

Lastly, where post-merger market conditions make it conducive for firms to coordinate their behaviour in the absence of any express agreement such that they “*adopt a common policy on the market and act to a considerable extent independently of their competitors, their customers, and also of consumers*”,¹⁶⁴ it is likely that the Commission will consider these firms to be collectively dominant in the relevant market.¹⁶⁵ According to the Commission, these market conditions are; entry barriers, frequent interaction among firms, low levels of innovation, few market participants, symmetry among providers, structural links and cooperation agreements among firms, and fast demand growth.¹⁶⁶ However, it should be borne in mind that the Commission is yet to make clear how a determination of joint or collective dominance, when investigating the abuse of a dominant position and/or conducting a dominance determination will differ from the assessment of joint or collective dominance when analysing a merger under the dominance test. As stated in Chapter 6, it is also not clear whether a 40% threshold post-merger will also apply in the case of joint or collective dominance by multiple Licensees.

b) The overall size of the Licensee in comparison to competing Licensees particularly any resulting economies of scale or scope that permit the larger Licensee to produce products or services at lower costs

Where a merger results in efficiency gains¹⁶⁷ in the form of economies of scale whereby there is a reduction in the cost of production on a per unit basis as the amount being produced increase, the Commission is likely to find dominance, especially if the post-merger Licensee become larger in relation to the other competing Licensees, and the resulting economies will lead to a reduction in its cost of production.¹⁶⁸

¹⁶² Richard Whish, David Bailey, *supra*, p. 43.

¹⁶³ ABA Section of Antitrust Law, *Mergers and Acquisitions: Understanding the Antitrust Issues*, *supra*, p. 96.

¹⁶⁴ See Joined Cases C-68/94 and C-30/95, *French Republic and Société commerciale des potasses et de l'azote (SCPA) and Entreprise minière et chimique (EMC) v. Commission* [1998] ECR I-1375, paragraph 221.

¹⁶⁵ See, Case M. 1524, *Airtours/First Choice* where the CFI invalidated the EC's decision to prohibit the acquisition by Airtours of First Choice. In that case, the CFI indicated that there cannot be a finding of collective dominance unless the EC can clearly show a situation of “coordinated oligopoly” or tacit collusion”.

¹⁶⁶ Nigerian Communications Commission (NCC), *Consultation Paper on Dominance in Selected Communications Markets* (October 27 2009), pp. 13 – 14, citing Rey, Patrick, (2002, September 7). ‘Collective Dominance and the Telecommunications Industry’ [WWW document] URL http://ec.europa.eu/competition/sectors/telecommunications/archive/telecom/collective_dominance.pdf (visited 2013, September 20). These market conditions were discussed in Chapter 6.

¹⁶⁷ The role of efficiencies in merger analysis is discussed in the section below.

¹⁶⁸ See generally Regulation 18 (2) (b).

The Commission in assessing the resulting economies will also consider the combined fixed assets of the merging firms and, whether the post-merger Licensee will have fewer personnel than each of the other competing Licensees, suggesting that it can achieve significant economies of scale in its operations.¹⁶⁹

c) Control of network facilities or other infrastructure, access to which is required by competing Licensees and that cannot, for commercial or technical reasons, be duplicated by competing Licensees

Where the post-merger firm will control network facilities or other infrastructure required by competing Licensees, and access to it cannot be duplicated for commercial or technical reasons, the Commission is likely to find the post-merger firm dominant¹⁷⁰ to the extent that the market implicated in (or affected by) the merger transaction, is the market for access to that network facility and/or infrastructure, or the network facility is used for providing a product or service in a downstream market.

For instance, several competition authorities in reviewing mergers between MNOs, will seek to impose usage restriction on scarce resources such as spectrum or alternatively impose spectrum caps, where they reason that the concentration of spectrum in the hands of the post-merger MNO is likely to provide it with advantages over its rivals, and will result in market power that can be exploited anti-competitively.¹⁷¹ This is validated by Case M.5650 *T-Mobile/Orange*, whereby France Télécom and Deutsche Telekom proposed to acquire joint control of a newly created company constituting a joint venture (JV), by contributing to the JV, their subsidiaries Orange UK and T-Mobile UK, respectively in the UK.¹⁷² With respect to the concentration of spectrum, the EC found that T-Mobile and Orange would hold a combined amount of contiguous spectrum at the 1800 MHz frequency level significantly larger than their competitors in the UK,¹⁷³ which would result in the post-merger firm being the only MNO in the UK able to offer next-generation mobile data services through Long Term Evolution (LTE) technology at the best possible speeds within the medium term.¹⁷⁴ To address the competition concern

¹⁶⁹ See, Nigerian Communications Commission (NCC), *Determination of Dominance in Selected Communications Market in Nigeria* (2010), *supra*, pp. 7 - 8.

¹⁷⁰ *Ibid.*, p. 8.

¹⁷¹ See generally, Report of the Competition Commission of South Africa on the merger of Vodacom and Neotel, 30 June 2015, Case number: 2014Jul0382; ERG (2009, June). 'ERG-RSPG Report on Radio Spectrum Competition Issues' [WWW document] URL http://rspg-spectrum.eu/wp-content/uploads/2013/05/rspg09_278_erg_rspg_report_on_radio_spectrum_competition_is_sues_0906041.pdf (visited, 2016, February 12); Arthur D Little. (2009). 'Mobile Broadband, Competition and Spectrum Caps' [WWW document] URL <http://www.gsma.com/spectrum/wp-content/uploads/2012/07/Spectrum-Mobile-broadband-competition-and-caps-report-2009.pdf> (visited 2016, August 13).

¹⁷² Paragraph 1.

¹⁷³ Paragraph 111.

¹⁷⁴ European Commission. (2010, March 1). 'Press Release Mergers: Commission approves proposed merger between UK subsidiaries of France Telecom and Deutsche Telekom, subject to conditions' [WWW document] URL http://europa.eu/rapid/press-release_IP-10-208_en.htm (visited 2016, September 6).

identified by the EC, the parties *inter alia*, offered to divest 15 MHz of spectrum at the 1800 MHz level.¹⁷⁵

In *Emerging Markets Telecommunications Services (EMTS) v. MTN & Visafone* (supra), despite failing to apply the substantial lessening of competition (or dominance) test, EMTS argued (rightly, although prematurely in the author's view) that MTN's acquisition of Visafone is illegal under the Act and the Competition Regulations, as a result of the spectrum concentration effects that would accrue to the post-merger MTN, which in turn would further entrench MTN's dominance (on the retail market for mobile internet service). However, as explained above, the court refused to entertain the case for want of jurisdiction.

d) The absence of buying power or negotiating position by customers or consumers, including substantial barriers to switching service providers

As stated in Chapter 6, buyer power is the ability of one or more buyers, based on their economic importance in the market in question to obtain favorable purchasing terms from their suppliers. The existence of countervailing buyer power post-merger is unlikely to arouse dominance concerns.¹⁷⁶ The relevant issue under consideration in this regard, is whether customers would be able to act as a constraint on the ability of the post-merger firm to exercise market power.¹⁷⁷

In Case No. IV/Mo42 - *Alcatel/Telettra*, a case involving the acquisition by Alcatel of a controlling interest in Telettra, a subsidiary of Fiat active in the telecommunications systems and equipment sector, the EC found that although the post-merger firm would have accounted for a high market share in the markets for line transmission equipment (an aggregate of 81%), and microwave equipment (an aggregate of 83%),¹⁷⁸ it did not occupy a dominant position given the buying power of Telefónica as the dominant purchaser of this equipment, and having the ability to source this equipment from alternative suppliers, thereby constraining the market power of the post-merger firm.¹⁷⁹

As explained in Chapter 6, the Commission will consider substantial barriers to switching service providers (or switching cost),¹⁸⁰ when assessing buying power for the purpose of a dominance assessment.

e) Ease of market entry, and the extent to which actual or potential market entry protects against the exercise of market power such as raising prices

Despite the presence of high market shares in the post-merger firm, its ability to exercise market power will be severely constrained if entry into the relevant merging market is

¹⁷⁵ *Ibid.*

¹⁷⁶ See, Laurent Garzaniti & Matthew O' Regan, *supra*, pp. 679 - 680.

¹⁷⁷ Alistair Lindsay, *supra*, p. 33.

¹⁷⁸ At paragraph 37.

¹⁷⁹ See generally, paragraphs 38 - 40.

¹⁸⁰ Regulation 18 (2) (d).

easy.¹⁸¹ As stated above under the substantial lessening of competition test, in accordance with EC and DoJ guidelines, entry must be *likely, timely and sufficient* in order to defeat attempts by the post-merger firm to exercise market power.

It should be borne in mind that there are substantial barriers to entry in various areas of the communications market, especially in the market for mobile telecommunications services, which the Commission consider to be fundamentally high.¹⁸²

Merger review under the ISA

The ISA in Section 13 (p) expressly authorise SEC to approve and regulate mergers and acquisitions occurring in Nigeria,¹⁸³ including mergers occurring in the communications sector. Section 118 (1) of the ISA further provides that every merger, acquisition or business combination or among companies shall be subject to the prior review and approval of SEC.

Jurisdictional threshold for merger review under the ISA

A merger transaction will require notification to SEC if it satisfies the jurisdictional threshold requirement set forth in both the ISA and SEC Rules.

I. Small mergers

Pursuant to Section 122 of ISA, a party to a small merger is not required to notify SEC unless SEC requires it to do so. Under SEC Rules, a small merger is a merger involving firms with a combined assets or turnover of N1,000,000,000.00 (One billion Naira).¹⁸⁴ However, SEC may, within 6 months of the commencement of the implementation of a small merger, require that the parties notify it of the merger if, in its opinion, such merger may substantially prevent or lessen competition or cannot be justified on public interest grounds.¹⁸⁵ Where a party to a small merger is required to notify SEC of a merger, it is prohibited from taking any further steps to implement the merger until the merger has been approved or conditionally approved.¹⁸⁶

II. Intermediate mergers and large mergers

Parties to an intermediate or large merger are required by ISA to notify SEC.¹⁸⁷ An intermediate merger is between N1,000,000,000 (one billion Naira) and N5,000,000,000 (five billion Naira) of either combined assets or turnover or a combination of both assets and turnover in Nigeria, while a large merger is above N5,000,000,000 (five billion Naira).¹⁸⁸

¹⁸¹ Alistair Lindsay, *supra*, p. 480.

¹⁸² Nigerian Communications Commission (NCC), *Determination of Dominance in Selected Communications Market in Nigeria* (2010), *supra*, p. 18.

¹⁸³ Some commentators have however argued that the power of SEC under ISA in terms of merger control is limited to only public companies whose shares are publicly traded on the Nigerian stock exchange (See, Dimgba Nnamdi, *et al.*, *supra*, p. 8 and pp. 11 - 12).

¹⁸⁴ Rule 427.

¹⁸⁵ Section 122 (3) ISA.

¹⁸⁶ Section 122 (4) ISA.

¹⁸⁷ Section 123 ISA.

¹⁸⁸ Rule 427 SEC Rule.

Failure to notify

It is important to note that although ISA and SEC Rules make no specific provision with respect to the failure of the parties to notify SEC of a proposed merger, nevertheless parties who fail to notify SEC, are potentially liable to the general penalty provision of Regulation 421 (2) of the SEC Rules. This Regulation provides that; “*Failure by any person covered by this part to comply with the provisions of [Part I] shall, after being given an opportunity of being heard, be liable to a penalty of N5, 000 per day during the period of default*”.

Substantive assessment of mergers by SEC

Mergers are assessed against the test of “substantial lessening or prevention of competition” and/or “on substantial public interest grounds” by SEC. Merger reviews conducted by SEC are evaluated *firstly*, on the basis of whether or not the merger is likely to substantially prevent or lessen competition.¹⁸⁹ In its assessment of whether the merger is likely to substantially prevent or lessen competition, SEC is required to assess the strength of competition in the relevant market, and the probability that the post-merger firm will behave competitively or co-operatively, taking into account any factor that is relevant to competition in that market including:¹⁹⁰

- a) *the actual and potential level of import competition in the market;*¹⁹¹ Import into a particular country can constrain the ability of any firm to exercise market power.¹⁹² For instance in Australia, the Australian Competition and Consumer Commission (ACCC) is unlikely to challenge a merger where the existing local firms face significant import competition.¹⁹³
- b) *the ease of entry into the market, including tariff and regulatory barriers;*¹⁹⁴ As previously discussed above, most competition authorities in their entry analysis require that entry be *likely, timely and sufficient* in order to defeat attempts by the post-merger firm to exercise market power.
- c) *the level and trends of concentration, and history of collusion, in the market;*¹⁹⁵ The likelihood of collusion occurring in a market may sometimes be dependent on the level of concentration in that market - that is the number and size of the firms in the market.¹⁹⁶ The more concentrated a market is post-merger, the greater the chances of collusion among the remaining firms (coordinated effects) or the possibility that the post-merger firm will exercise

¹⁸⁹ Section 121 (1) (a) ISA.

¹⁹⁰ *Ibid.*, and Section 121 (2) ISA.

¹⁹¹ Section 121 (2) (a) ISA.

¹⁹² See generally, Julie Brebner, ‘The Relevance of Import Competition to Merger Assessment in Australia’, *Competition and Consumer Law Journal*, Vol. 10, No. 2, (2002), pp. 119-143. Fels, Allan. (2001, March 15). ‘Mergers and Market Power’, [WWW document] URL <https://www.accc.gov.au/system/files/Australia.doc> (visited 2015, September 9).

¹⁹⁴ Section 121 (2) (b) ISA.

¹⁹⁵ Section 121 (2) (c) ISA.

¹⁹⁶ Herbert Hovenkamp, *Antitrust* (West Publishing Co., 2011), p. 278.

market power unilaterally (unilateral effects).¹⁹⁷ The concentration level of a market can be measured by the HHI, the four-firm concentration ratio (CR4) or the Lerner Index.¹⁹⁸

- d) *the degree of countervailing power in the market;*¹⁹⁹ As explained above, the ability of the post-merger firm to exercise market power by raising price can be constrained by the countervailing power of its customers.
- e) *the dynamic characteristics of the market, including growth, innovation, and product differentiation;*²⁰⁰ As a general rule, a merger is unlikely to substantially lessen competition in a market that is rapidly evolving.²⁰¹
- f) *the nature and extent of vertical integration in the market;*²⁰² As explained above, vertical integration carries the risk of vertical effects (or vertical foreclosure), where the post-merger firm supplies an essential input to its downstream competitors.
- g) *whether the business of part of the business of a party to the merger of proposed merger has failed or is likely to fail;*²⁰³ and
- h) *whether the merger will result in the removal of an effective competitor.*²⁰⁴ A merger that eliminates an effective competitor (such as a maverick²⁰⁵), removes competitive constraint on the behaviour of market participants and thereby may result in a substantial lessening of competition.²⁰⁶ For instance in COMP/M.3916 - *T-Mobile Austria / Tele.ring*, where T-Mobile Austria wanted to acquire an independent MNO, Tele.ring, which had been very active in the market. The analysis of market shares alone showed that in the three years before notification, Tele.ring had more than doubled its market share in terms of turnover or even almost tripled it in terms of customers. The EC concluded that the elimination of such a “maverick” in the market and the simultaneous creation of a market structure with two leading, symmetrical network

¹⁹⁷ ABA Section of Antitrust Law, *Mergers and Acquisitions: Understanding the Antitrust Issues*, *supra*, p. 35.

¹⁹⁸ See, Alistair Lindsay, *supra*, pp. 225 - 229 for an explanation on the various methods for measuring market concentration.

¹⁹⁹ Section 121 (2) (d) ISA.

²⁰⁰ Section 121 (2) (e) ISA.

²⁰¹ See, *United States v. Bazaarvoice Inc*, 2014 WL 203966, 260 (N.D. Cal.), where the Court stated that the Defendant, a party to the merger challenged by the DoJ, “*indisputably operates in a dynamic and evolving field, it did not present evidence that the evolving nature of the market itself precludes the merger’s likely anticompetitive effects*”.

²⁰² Section 121 (2) (f) ISA.

²⁰³ Section 121 (2) (g) ISA. See, the failing firm defence below.

²⁰⁴ Section 121 (2) (h) ISA.

²⁰⁵ The DoJ describes a maverick as “*a firm that plays a disruptive role in the market to the benefit of customers*” (See, U.S. Department of Justice and the Federal Trade Commission, *supra*, paragraph 2.1.5)

²⁰⁶ See generally, Courtney D. Lang, ‘The Maverick Theory: Creating Turbulence for Mergers’, *Saint Louis University Law Journal*, Vol. 59 (2014), pp. 257 – 282.

operators (T-Mobile Austria and Mobilkom) would have been likely to produce unilateral effects, thus substantially lessening competition.

After a consideration of the foregoing factors, and it still appears that the merger is likely to substantially prevent or lessen competition, SEC shall *secondly* then determine whether or not the merger is likely to result in any technological efficiency²⁰⁷ or other pro-competitive gain which can offset, the effects of any lessening of competition, and would not likely be obtained if the merger is prevented,²⁰⁸ and whether the merger can or cannot be justified on substantial public interest grounds²⁰⁹ by assessing the effect of the merger on;²¹⁰ a particular industrial sector or region; employment; the ability of small business to become competitive; and the ability of national industries to compete in international markets. The use of “and” in this provision indicates that the consideration of technological efficiencies (or other pro-competitive gains) and substantial public interest grounds are cumulative requirements. In addition, as explained below,²¹¹ the reference to “*would not likely be obtained if the merger is prevented*”, indicates that the technological efficiency (or other pro-competitive gain) must be “merger specific”, that is it must be a direct consequence of the merger.

Thirdly, SEC can otherwise determine whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors listed in Section 121 (3) ISA.²¹² It is however pertinent to note that in addition to these tests, SEC is obligated by the ISA to also make a determination as to whether all shareholders are fairly, equitably and similarly treated and given sufficient information regarding the merger.²¹³

The treatment of efficiencies in merger analysis

One of the primary reasons why companies merge is to generate efficiencies in the form of economies of scale and scope, cheaper products and/or improved quality.²¹⁴ Efficiencies allow the combined firm to better utilise existing assets more efficiently, thereby lowering their cost of production than either firms could have achieved individually.²¹⁵ Most competition authorities will normally consider efficiencies generated by a merger in deciding whether or not to approve it, especially if the efficiencies generated are able to offset any anti-competitive harm, by increasing consumer and/or producer/seller welfare due to the ability of the post-merger firm to provide its products or service at a lower price (or better quality) and or at lower costs,

²⁰⁷ See below, on the treatment of efficiencies in a merger analysis.

²⁰⁸ Section 121 (1) (b) (i) ISA.

²⁰⁹ Section 121 (1) (b) (ii) ISA.

²¹⁰ Section 121 (3) ISA.

²¹¹ In the treatment of efficiencies in merger analysis.

²¹² Section 121 (1) (c) ISA.

²¹³ Section 121 (1) (d) ISA.

²¹⁴ See generally, Nnamdi Dimgba. (2013, March 12). ‘Sanctions and Remedies in Nigeria’s Merger Control Law’ [WWW document] URL <http://thenationonlineng.net/sanctions-remedies-under-nigerias-merger-control-law/> (visited 2012, September, 20); Richard Whish, David Bailey, *supra*, pp. 813 - 814.

²¹⁵ ABA Section of Antitrust Law, *Telecoms Antitrust Handbook*, *supra*, p. 111.

and thus ultimately benefiting consumers.²¹⁶ The reason why most competition authorities take into account efficiencies claimed are that, firstly, mergers are generally thought to generate efficiencies as against cartel type conducts.²¹⁷ Secondly, efficiency itself is consistent with one of the goals of a competition law framework in terms of promoting consumer welfare and/or economic efficiency.²¹⁸ Thirdly, efficiencies increasing competition have been argued to be encouraged.²¹⁹

In Nigeria, the SEC will consider technological efficiency or other pro-competitive gain capable of offsetting the effects of an anti-competitive merger,²²⁰ while the Commission is authorised to approve a conduct (including an anti-competitive merger) with the effect or purpose of substantially lessening of competition, if it is satisfied that such approval is in national interest.²²¹ It is thus arguable that efficiencies generated by an otherwise anti-competitive merger would be consistent with national interest consideration(s) under the Act,²²² to the extent that the efficiencies generated by the merger will prevail over the merger's harmful effects in a communications market. Unfortunately, as at the time of this writing, neither the Commission nor SEC have articulated their respective position on how efficiencies will be assessed in the context of a merger review.

On the other hand, competition authorities like the EC and DoJ also take into consideration, the efficiencies claimed by the merging parties in their competitive assessment of a merger in the EU and US respectively.²²³ For instance in the EU, the general principles guiding the consideration of efficiencies by the EC are that they must; benefit consumers; be merger specific; and be verifiable.²²⁴ According to the EC, the benchmark in assessing efficiency claims is that consumers will not be worse off as a result of the merger.²²⁵ Efficiencies benefiting consumers may be in the form of lower prices or, cost savings in production or distribution, which gives the post-merger firm the ability and incentive to charge lower prices following the merger.²²⁶

Efficiencies will be "merger specific" if they are a direct consequence of the merger and cannot be achieved to a similar extent by less anti-competitive alternatives.²²⁷ In Case No. IV/MO53 - *Aerospatiale-Alenia/de Havilland*, a case involving the joint the acquisition by Aerospatiale SNI (Aerospatiale) and Alenia-Aeritalia e Selenia Spa

²¹⁶ ICN Merger Guidelines Project. (2004). 'Chapter 6 – Efficiencies' [WWW document] URL <http://www.internationalcompetitionnetwork.org/uploads/library/doc558.pdf> (visited 2015, August 18), p. 1.

²¹⁷ Alistair Lindsay, *supra*, pp. 511 – 512.

²¹⁸ *Ibid*, p. 512; also *see* Chapter 2 on the goals of competition law

²¹⁹ *Ibid*, p. 512.

²²⁰ *See*, Section 121 (b) (i) ISA.

²²¹ *See*, Section 93 (1) and (2) of the Act.

²²² In the author's opinion, national interest considerations would among other things include the objectives of the Act.

²²³ ICN Merger Guidelines Project. (2004), *supra*, p. 4, paragraph 6.

²²⁴ Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, *supra*, paragraphs 76 - 77.

²²⁵ *Ibid*, paragraph 79.

²²⁶ *Ibid*, paragraph 80.

²²⁷ *Ibid*, paragraph 85.

(Alenia) of the assets of the de Havilland division (de Havilland) from Boeing Company (Boeing), the EC in rejecting the argument advanced by the parties that their reason for acquiring de Havilland is to reduce cost in the sum of 5 million European Currency Unit (ECU) per year, concluded that these cost savings are not a direct consequence of the acquisition *per se*, but rather are cost savings which could be achieved by de Havilland's existing owner or by any other potential acquirer.²²⁸ Similarly, in *Orange/ Jazztel* (supra), the EC rejected as merger specific, the efficiency claim of Orange a France based telecoms operator, that the increase in the fibre coverage to be achieved post-merger could only be achieved through the merger, on account of the fact that fixed operators in Spain had in recent years entered into a number of co-deployment agreements for fibre to the home (FTTH) networks.²²⁹

Lastly, the efficiencies must be verifiable such that the EC can be reasonably certain that the efficiencies are likely to materialise, and be substantial enough to counteract a merger's potential harm to consumers,²³⁰ and the merger parties must be able to demonstrate this by providing the EC with the relevant information.²³¹

The treatment of efficiencies in the US does not substantially differ from the approach adopted by the EC. For instance, the DoJ also considers whether the efficiencies claimed are "merger specific" in that, they are likely to be accomplished with the proposed merger and unlikely to be accomplished in the absence of either the proposed merger or another means having comparable anti-competitive effects.²³² In *US v. Rockford Memorial Corporation & SwedishAmerican Corporation* 717 F. Supp. 1251 Dist. Court, ND Illinois 1989, the Court in response to the defence of efficiencies advanced by the Defendants, made clear that "*savings relevant for determining procompetitive efficiencies must be made possible only through the merger and in no other manner*".²³³

In terms of whether the claimed efficiencies are verifiable, the DoJ requires the merging firms to substantiate efficiency claims so that it can be verified by reasonable means, the likelihood and magnitude of each claimed efficiency, how and when each would be achieved (and any costs of doing so), how each would enhance the merged firm's ability and incentive to compete, and why each would be merger specific.²³⁴ The DoJ will not consider efficiency claims if they are vague or speculative or otherwise cannot be verified by reasonable means,²³⁵ for example, the DoJ will consider efficiencies that result from shifting production among facilities separately owned by the merging firms, which

²²⁸ At paragraph 65.

²²⁹ See, generally paragraphs 708 – 711.

²³⁰ Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, *supra*, paragraph 86.

²³¹ *Ibid*, paragraph 87.

²³² U.S. Department of Justice and the Federal Trade Commission, *supra*, paragraph 10. This was affirmed in *Federal Trade Commission v. HJ Heinz Co.*, 246 F. 3d 708 Court of Appeals, Dist. of Columbia Circuit 2001, paragraph 722.

²³³ At paragraph 1289.

²³⁴ U.S. Department of Justice and the Federal Trade Commission, *supra*.

²³⁵ *Ibid*.

enables them to reduce the incremental cost of production²³⁶ as easily verifiable.²³⁷ In *US v. H & R Block, Inc., & Ors* 833 F. Supp. 2d 36 Dist. Court, Dist. of Columbia 2011, the Court rejected the efficiencies claimed by the Defendants. According to the Court, “*the lack of a verifiable method of factual analysis resulting in the cost estimates [savings] renders them not cognizable by the Court*”²³⁸ and “*any claimed efficiencies [be] independently verifiable in order to constitute evidence that can rebut the government’s presumption of anticompetitive effects*”.²³⁹ On this basis, the Court enjoined the proposed merger between the Defendants, because they did not demonstrate that the claimed efficiencies among other things are verifiable.²⁴⁰

The benefits of the claimed efficiencies to consumers will be assessed in the light of whether the merger is “*of a character and magnitude such that the merger is not likely to be anticompetitive in any relevant market*”.²⁴¹ The DoJ in making this determination will consider whether the claimed efficiencies are “*sufficient to reverse the merger’s potential to harm customers in the relevant market, e.g., by preventing price increases in that market*”.²⁴² In *US v. United Tote, Inc.* (supra), the Court in rejecting the Defendants’ efficiencies justification, held that “*even if the merger resulted in efficiency gains, there are no guarantees that these savings would be passed on to the consuming public*”.²⁴³ Accordingly, a merger is unlikely to be approved if it puts consumers in a worse position that they were prior to the merger.²⁴⁴

The failing firm defence

In most competition jurisdictions, the defence of “failing firm” can be invoked to justify the approval of an anti-competitive merger, where one of the merging firms is in financial difficulties or at the risk of bankruptcy.²⁴⁵ Under the “failing company” defence, a merger or an acquisition that would otherwise be blocked due to its adverse effect on competition is permitted when the company is a qualifying a failing firm, and an alternative, less detrimental merger is unavailable.²⁴⁶ The justification for the “failing firm” defence seems to indicate that the protection of small firms and their shareholders are its primary concern, especially if it can be demonstrated that such firm would exit the market in the absence of a buyer.²⁴⁷ As the US Supreme Court in *United States v. General Dynamic Corp.*, 415 U.S. 486, 507 (1974), has recognised, an acquisition of a

²³⁶ The cost of producing one more unit of a good. Also referred to as marginal cost.

²³⁷ U.S. Department of Justice and the Federal Trade Commission, *supra*.

²³⁸ At paragraph 91.

²³⁹ At paragraph 92.

²⁴⁰ *Ibid.*

²⁴¹ U.S. Department of Justice and the Federal Trade Commission, *supra*.

²⁴² *Ibid.*

²⁴³ At paragraph 1085.

²⁴⁴ Herbert J. Hovenkamp. (2015, September 25). ‘Appraising Merger Efficiencies’ [WWW document] URL http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2664266 (visited 2015, October 10), p. 9.

²⁴⁵ Lars Persson, ‘The Failing Firm Defense’, *The Journal of Industrial Economics*, Vol. 53, (June, 2005), pp. 175 – 201, p. 175.

²⁴⁶ Robin Mason, Helen Weeds, ‘The Failing Firm Defence: Merger Policy and Entry’ *Volume 3664 of Discussion paper: Centre for Economic Policy Research*, (2002), abstract.

²⁴⁷ Herbert Hovenkamp, (2011), *supra*, p. 294.

firm that will otherwise disappear from the market through failure will not harm competition but will minimise harm to shareholders, employees, customers, and the communities where it operates.

In its consideration of whether or not a merger is likely to substantially prevent or lessen competition, SEC will also consider whether the business or part of the business of a party to the (proposed) merger has failed or is likely to fail.²⁴⁸ However, it remains to be seen whether the Commission will also consider the failing firm defence as neither the Act nor the Competition Regulations expressly refers to it.²⁴⁹ Under SEC Rules, where a company involved in the merger transaction claims that it qualifies as a failing company, it shall furnish SEC with the following information; financial information demonstrating that the firm will be unable to meet its financial obligations in future;²⁵⁰ information indicating that the failing firm would reasonably be expected to exit the market unless the merger is implemented;²⁵¹ the latest financial statement of the merging companies;²⁵² and certificate of the incorporation of the merging companies.²⁵³ In addition, the company relying on the defence of failing firm shall also submit information concerning efforts taken to elicit reasonable alternative offers.²⁵⁴

The requirements of the failing firm defence under the SEC Rules are almost similar to the criteria considered by the EC that are relevant for the application of the “failing firm” defence in EU merger control. In particular, the EC will consider whether; the allegedly failing firm would in the near future be forced out of the market because of financial difficulties if not taken over by another undertaking; there is no less anti-competitive alternative purchase than the notified merger; and in the absence of a merger, the assets of the failing firm would inevitably exit the market.²⁵⁵ In addition, it is noted that the decisional practices of the EC indicates that the defence of failing firm will also require that the deterioration of the competitive structure resulting from the merger is at least no worse than that which would have occurred in the absence of the merger.²⁵⁶ In this regard, the EC in its application of the failing firm defence will compare the competitive conditions that would result from approving the merger with the conditions that would

²⁴⁸ See, Section 121 (2) (g) of the ISA.

²⁴⁹ In the recent acquisition of Visafone (a CDMA operator) by MTN (a GSM operator) in 2016, the Commission justified its approval of the transaction as saving the CDMA industry, on account of Visafone being the only surviving CDMA operator, see, Punch. (2016, February 2). ‘NCC approved Visafone’s acquisition to save CDMA – Danbatta’ [WWW document] URL <http://punchng.com/ncc-approved-visafones-acquisition-to-save-cdma-danbatta/> (visited 2016, February 5). However, it is unlikely that Visafone is a qualifying failing firm as there was no evidence that it was financially distressed, prior to the acquisition.

²⁵⁰ Rule 426 (1) (b) (viii) (a).

²⁵¹ Rule 426 (1) (b) (viii) (b).

²⁵² Rule 426 (1) (b) (viii) (c).

²⁵³ Rule 426 (1) (b) (viii) (d).

²⁵⁴ Securities and Exchange Commission, Nigeria. (2015, February). ‘Checklists for Processing Equities, Fixed Income, Mergers, Acquisitions and Takeovers Applications’ [WWW document] URL <http://www.sec.gov.ng/files/Checklists%20for%20Processing%20Applications.pdf> (visited 2015, October 16), paragraph 1.2.5 (a).

²⁵⁵ Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, *supra*, paragraph 90.

²⁵⁶ See, Case No COMP/M. 2876 *Newscorp / Telepiù* [2004] O.J. L1 10/73, paragraph 290.

have prevailed absent the merger in order to satisfy itself that the competitive structure of the market would deteriorate to at least the same extent in the absence of the merger, or that the deteriorating competitive structure will not be caused by the merger.²⁵⁷

Merger remedies

I. Merger remedies under the Competition Regulations

It is important to note that neither the Act nor the Competition Regulations expressly authorise the Commission to prohibit a merger likely to produce anti-competitive effects in the relevant communications market,²⁵⁸ rather the Competition Regulations authorises the Commission to do any of the following actions specified in Regulations 30 (a) – (d) upon its conclusion of the merger review process. As at time of this writing, the Commission has not articulated the key principles that it shall consider in seeking to take any of these actions.²⁵⁹

The actions, which the Commission is authorised to take in respect of a merger, are;

- a) Approve the proposed transaction without condition²⁶⁰

The Commission will approve a proposed merger where it is satisfied that the merger is unlikely to result in any anti-competitive effect(s).

- b) Approve the proposed transactions with such conditions as the Commission determines are necessary, to prevent or compensate for any substantial lessening of competition resulting from the transaction,²⁶¹ especially where the merger will generate efficiencies. Competition law generally recognises two broad categories of conditions (or remedies) that may be applied to remedy, prevent or mitigate the anti-competitive harm resulting from an approved merger.²⁶² These remedies are;²⁶³

²⁵⁷ Alistair Lindsay, *supra*, p. 500.

²⁵⁸ However, it is very likely that the prohibition of “...any conduct which has the purpose or effect of substantially lessening competition in any aspect of the Nigerian communications market” by Section 91 (1) of the Act can be relied upon to prohibit a merger that may substantially lessen competition.

²⁵⁹ Generally, the key principles guiding the application of a particular merger remedy are; assessment of the remedies; proportionality; effectiveness; potential remedy burden and costs; transparency and consistency (ICN Merger Working Group: Analytical Framework Subgroup. (2005, June) ‘Merger Remedies Review Project Report for the fourth ICN annual conference’ [WWW document] URL <http://www.internationalcompetitionnetwork.org/uploads/library/doc323.pdf> (visited 2015, September 22), pp. 3 – 5). For instance, the Competition Commission of the UK in applying a particular merger remedy will consider; the effectiveness of the remedy; cost of the remedy and proportionality; and relevant customer benefits, (*Merger Remedies: Competition Commission Guidelines*, November 2008, paragraphs 1.8 – 1.20).

²⁶⁰ Regulation 30 (a).

²⁶¹ Regulation 30 (b).

²⁶² U. S. Department of Justice Antitrust Division. (2011, June). ‘Antitrust Division Policy Guide to Merger Remedies’ [WWW document] URL

1. Structural remedies;

Structural remedies involve the sale or divestment of physical assets of the merging firms or requiring the merging firms to transfer intellectual property rights to existing competitors unrelated to them, or to a new market participant in order to create a new source of competition.²⁶⁴ Structural remedies are best suited for a recently merged entity or a merger about to be consummated, because of the links between the merging entities and their respective units.²⁶⁵ In addition, there is a causal relationship between a firm's structure and the particular competition issue raised during the merger review process.²⁶⁶ Structural remedies are the preferred choice in unilateral effects cases, resulting from a horizontal merger that eliminates competition between competing firms,²⁶⁷ and are normally imposed to lessen the market power of the post-merger firm.

Examples of structural remedies are; the divestment of assets or a specific business in order to remove entirely or substantially, the horizontal overlaps (*i.e.* markets in which the merging firms were competitors prior to the merger) in the activities of the merging firm.²⁶⁸ This remedy has been applied in telecommunications mergers such as Case M. 1430 *Vodafone/Airtouch*, where the EC approved the acquisition of AirTouch by Vodafone, subject to Vodafone's commitment to sell its entire shareholding in E-Plus, thereby eliminating any overlap between the parties in the German mobile telecommunications market, *T-Mobile/Orange* (*supra*) where the merging parties were required by the EC to divest to competitors 15MHz of spectrum in the 1800MHz band, COMP/M.1439 *Telia/Telenor* where the merging parties were required by the EC to divest their telecoms subsidiary in the other country, *T-Mobile Austria/tele.ring* (*supra*) where T-Mobile was required by the EC to divest UMTS frequency blocks to two competitors together with mobile network transmission sites (masts, relay, cable infrastructure, microwave frequencies and associated equipment) and preferential collocation arrangements, Case No IV/M.1551 *AT&T/MediaOne* where MediaOne was required by the EC to sell its interests in Telewest, and MCI-WorldCom merger where the DoJ required MCI to sell its internet business.²⁶⁹

In M.7758 *Hutchison 3G Italy/Wind/JV*, a proposed joint venture between Hutchison and VimpelCom in the mobile telecommunications sector in Italy, the EC after an in-depth investigation of the transaction concluded that it raised serious

<http://www.justice.gov/sites/default/files/atr/legacy/2011/06/17/272350.pdf> (visited 2012, May 3), p. 6.

²⁶³ *Ibid.*

²⁶⁴ *Ibid.*, p.6.

²⁶⁵ U.S. Department of Justice. (2008). 'Competition and Monopoly: Single-Firm Conduct under Section 2 of the Sherman Act' (Withdrawn) [WWW document] URL

<http://www.justice.gov/atr/public/reports/236681.pdf> (visited 2012, September 9), p. 149.

²⁶⁶ *Ibid.*

²⁶⁷ Alistair Lindsay, *supra*, p. 566.

²⁶⁸ Laurent Garzaniti & Matthew O' Regan, *supra*, p. 713.

²⁶⁹ See, http://www.justice.gov/archive/atr/public/press_releases/1998/1829.htm

competition issues in the Italian mobile market.²⁷⁰ The competition issues identified by the EC are, firstly, the transaction would have eliminated competition between Hutchison and WIND (*unilateral effects*).²⁷¹ The EC reasoned that as Hutchison is the latest entrant into the Italian mobile market and an important driver of competition, the transaction would have reduced the incentives of the joint venture to compete, as well as those of its competitors;²⁷² secondly, the transaction according to the EC would have changed the market structure by creating three similar sized competitors which could have made it easier and more likely that the remaining three operators would coordinate their behaviour in the relevant market (*coordinated effects*).²⁷³ This according to the EC would likely have led to further price increases for consumers;²⁷⁴ thirdly, the EC found that the transaction would have reduced the number of MNOs willing to host MVNOs on their networks, thus further eliminating and/or constraining the choice of mobile services to consumers.²⁷⁵

To require the EC to approve the proposed transaction, the parties proposed an effective structural remedy by committing to divest sufficient radio spectrum and mobile base station sites to Iliad, a French MNO, to allow for the creation of a new competition and to provide retail mobile services to consumers and offer wholesale access services to MVNOs.²⁷⁶

Other types of structural remedies are the termination of joint-ventures, changes to long-term contracts and joint-ventures.²⁷⁷

2. Conduct/behavioural remedies;

Conduct remedies impose regulatory obligations that monitor the ongoing conduct of the post-merger firm, after the consummation of the merger.²⁷⁸ Conduct remedies are appropriate for dealing with vertical effects issues resulting from vertical mergers.²⁷⁹ Conduct remedies may also be applied in unilateral effects cases resulting from horizontal mergers.²⁸⁰ Conduct remedies include the following;

- i. Non-discrimination provisions:** Non-discrimination obligations in the context of access to networks and infrastructure ensures that the post –merger firm will apply similar conditions in similar circumstances to an unaffiliated third-party providing similar services, and to provide communications services and/or

²⁷⁰ European Commission. (2016, September 1). 'Statement by Commissioner Vestager on Commission decision to approve Hutchison/VimpelCom joint venture in Italy, subject to conditions' [WWW document] URL http://europa.eu/rapid/press-release_STATEMENT-16-2934_en.htm?locale=en (visited 2016, September 1).

²⁷¹ *Ibid.*

²⁷² *Ibid.*

²⁷³ *Ibid.*

²⁷⁴ *Ibid.*

²⁷⁵ *Ibid.*

²⁷⁶ *Ibid.*

²⁷⁷ Garzaniti & Matthew O' Regan, *supra*, p. 714.

²⁷⁸ ABA Section of Antitrust Law, *Telecoms Antitrust Handbook, supra*, p. 120.

²⁷⁹ U. S. Department of Justice Antitrust Division. (2011, June), *supra*, p. 12.

²⁸⁰ *Ibid.*

information to other operators under the same conditions and of the same quality as it provides its own services or those of the group of companies or partners.²⁸¹ For instance in Case COMP/M. 1795 *Vodafone Airtouch/Mannesmann*, the EC found the merging firms would be able to provide a seamless pan-European mobile telecommunications services difficult to replicate in the short to medium term. In order to prevent the merging firms from acquiring market power in this service, the EC required that they provide other operators access, to their integrated network including roaming agreements and wholesale arrangements on a non-discriminatory basis in terms of pricing and quality of services, thereby allowing other mobile operators the possibility of providing a pan-European mobile telecommunications services to their own customers by using the integrated network of the merging firms.

Non-discrimination provisions may also be in relation to key technology, including patents, knowhow or other intellectual property rights, and essential inputs.²⁸²

ii. Firewall provisions that seek to prevent access to confidential or commercially sensitive information by a vertically integrated company.²⁸³ For example, where a dominant upstream firm acquires a firm operating in the downstream market, the acquisition may give the acquired downstream firm access to competitive sensitive and proprietary information of its competitors that the dominant upstream firm obtains through its position as a provider of an upstream input to competitors of its downstream firm.²⁸⁴ In this instance, firewall provisions will restrict the flow of confidential information within the post-merger firm.²⁸⁵

For example in Case COMP/M.3817 *Wegener/PCM/JV*, the EC in resolving its concerns about possible coordination between the joint venture's parent, accepted commitments from the parties to the transaction, that the joint venture would appoint a supervisory board, which would not share certain information with its shareholders.

iii. Prohibition on certain restrictive commercial practices: The merged firm may be required to refrain from engaging in certain commercial practices that are restrictive such as; requiring customers to enter into long-term and/or exclusive contracts;²⁸⁶ creating switching costs for customers through, for example, volume

²⁸¹ See, Regulation 10 (1) (b) of the Telecommunications Networks Interconnection Regulations 2007 (the Interconnection Regulations).

²⁸² See, Frédéric Louis. (2008, October 24). 'New EU Commission Notice on Remedies in Merger Cases' [WWW document] URL <https://www.wilmerhale.com/pages/publicationsandnewsdetail.aspx?NewsPubId=92920> (visited 2015, October 3).

²⁸³ *Ibid.*, pp. 13 – 14.

²⁸⁴ See generally, Chukwuyere Ebere Izuogu, *supra*.

²⁸⁵ See, *Ibid.*

²⁸⁶ ICN Merger Working Group: Analytical Framework Subgroup (2005, June), *supra*, p. 11.

discounts, contractual penalties or requiring complex switching procedures;²⁸⁷ bundling or tying the sale of particular products;²⁸⁸ and selective discounting or predation.²⁸⁹

In prohibiting these restrictive commercial practices, the competition regulator seeks to constrain the ability of the post-merger firm to block competitors' access to a vital or an essential input, or impede a new entrant's entry into the market, as result of its dominant position.²⁹⁰

iv. Transparency provisions: Transparency provisions are used to mitigate the anti-competitive effect of a vertical merger.²⁹¹ As the name suggests, transparency provisions require the post-merger firm to make available certain types of information to the competition regulator.²⁹² For instance in *United States v. MCI Communications Corporation* 1994-2 Trade Cas. Paragraph 70, 730 (D.D.C. 1994) where the DoJ challenged the proposed joint venture between MCI Communications (MCI) and British Telecommunications (BT) to provide enhanced international telecommunications services. In approving the transaction despite anti-competitive concerns, the DoJ required MCI to disclose various data, including prices, terms, and conditions of telecommunications services, volumes of telecommunications services traffic, and average time between order and delivery of circuits between certain entities.

The imposition of transparency provisions seeks to prevent the post-merger firm from circumventing rate regulation by charging monopoly prices and/or by engaging in price discrimination for services not rate regulated.²⁹³

v. Anti-retaliatory provisions: Anti-retaliation provision prohibits the post-merger firm from taking retaliatory actions against a customer who deals with the competitors' of the post-merger firm, or a firm that provides information to the regulator about the post-merger firm's non-compliance with a regulatory obligation.²⁹⁴ The purpose of anti-retaliation provisions is to make it possible for complaints about the activities of the post-merger firm, to be made by potential complainants without fear of retaliation by the post-merger firm.²⁹⁵

c) Deny approval of the proposed transaction²⁹⁶

²⁸⁷ *Ibid.*

²⁸⁸ *Ibid.*

²⁸⁹ *Ibid.*

²⁹⁰ OECD Policy Roundtable. (2012, July 30). 'Remedies in Merger Cases' [WWW document] URL <http://www.oecd.org/daf/competition/RemediesinMergerCases2011.pdf> (visited 2015, September 22), p. 225.

²⁹¹ U. S. Department of Justice Antitrust Division. (2011, June), *supra*, p. 16.

²⁹² *Ibid.*

²⁹³ *Ibid.*

²⁹⁴ *Ibid.*, pp. 16 – 17.

²⁹⁵ *Ibid.*, p. 17.

²⁹⁶ Regulation 30 (c).

The Commission is likely to take this action where an appropriate remedy to prevent or compensate for any substantial lessening of competition resulting from the proposed merger, is unavailable.²⁹⁷ For instance in 2009, the Commission and the Bureau of Public Enterprises (BPE), the Nigerian agency charged with the privatisation and sale of government assets, in objecting to MTN, Glo, Zain and Etisalat bidding for the purchase of M-Tel, the mobile communications arm of NITEL (the government owned telecommunications service provider), stated that such purchase would give rise to competition issues.²⁹⁸

In a similar manner, the EC in M.7612 *Hutchinson 3G UK/Telefónica UK* prohibited the proposed acquisition of Telefónica UK's 02 by Hutchison in UK's mobile telecommunications market in 2016, because the remedies proposed by Hutchison failed to adequately address the competition concerns raised by the acquisition.²⁹⁹ The EC after undertaking an in-depth investigation into the proposed acquisition, concluded that; the acquisition would have eliminated competition between the parties who were regarded by the EC as two strong players in UK's mobile telecommunications market; as a result of both merging parties been part of mobile broadband network limited (MBNL) and Beacon's network sharing arrangements, they would have had a full overview of the network plans of both Vodafone and everything everywhere (EE), their remaining competitors, which would have further weakened EE and Vodafone and hampered the future development of mobile infrastructure in the UK, for example with respect to the rollout of next generation technology (5G), to the detriment of UK consumers and businesses, and; the acquisition would have reduced the number of MNOs willing to host MVNOs, who rely on access to mobile network infrastructure to provide mobile telecommunications services to consumers, and this would have resulted in existing MVNOs having a weakened negotiating position in obtaining a favourable wholesale access condition, to the detriment of consumers.³⁰⁰

According to the EC, the proposed remedies did not resolve the structural problems created by the disruption to the current network sharing agreements in the UK.³⁰¹ They were also not capable of replacing the weakened competition in the retail and wholesale mobile telecoms markets as a result of the takeover.³⁰² Furthermore, the largely behavioural measures raised significant uncertainty as regards their effective implementation and monitoring, also because they were difficult to define precisely and

²⁹⁷ See, U. S. Department of Justice Antitrust Division. (2011, June), *supra*, p. 3.

²⁹⁸ Vanguard. (2009, October 16). 'FG bars MTN, Zain, Glo from buying M-Tel' [WWW document] URL <http://www.vanguardngr.com/2009/10/fg-bars-mtn-zain-glo-from-buying-m-tel/> (visited 2016, August 9). Although the nature of these competition issues were not clarified, nor did the Commission or BPE state, whether any of these Licensees proposed any remedy to mitigate the anti-competitive effect of the proposed acquisition.

²⁹⁹ European Commission. (2016, May 11). 'Press Release Mergers: Commission prohibits Hutchison's proposed acquisition of Telefónica UK' [WWW document] URL http://europa.eu/rapid/press-release_IP-16-1704_en.htm (visited 2016, August 6).

³⁰⁰ *Ibid.*

³⁰¹ *Ibid.*

³⁰² *Ibid.*

some depended on the agreement of others,³⁰³ as a result of which the EC blocked the acquisition.

- d) Issue a notice initiating an inquiry or public proceeding, regarding the proposed transaction, and following such proceeding, the Commission may take one of the actions described in sub-paragraphs (a), (b) or (c) above.³⁰⁴

The objectives of the Commission's public inquiry include the following; ensure that the Commission has investigated the necessary aspects the proposed merger and stakeholders and the general public are adequately informed of the issues surrounding it;³⁰⁵ acquire substantive information and knowledge from stakeholders, regulatory and industry professionals on the proposed merger;³⁰⁶ obtain input, information and feedback from persons affected by the proposed decision, other stakeholders and the public;³⁰⁷ ensure that stakeholders and the general public are given the opportunity to express their views;³⁰⁸ ensure regulatory transparency and objectivity,³⁰⁹ ensure adequate and accurate information is shared between stakeholders and the Commission;³¹⁰ make informed decisions and also ensure that every aspect of the proposed merger has been considered,³¹¹ protection of public interest and the consumers,³¹² and to strengthen consumer understanding, participation and confidence in the regulatory processes.³¹³

The Commission in subjecting a proposed merger to public inquiry will solicit comments from the public at large, including market participants. These market participants are normally the; customers (of the merging firms); competitors and merging parties. However, it is important that information provided by a competitor be properly evaluated, because the competitor will in most cases be concerned with the effect of a proposed merger on its commercial interests rather than its effect on customers and competition, or its negative impact on the general conditions of competition.³¹⁴ As the Court noted in *Alberta Gas Chems. Ltd v. E.I. du Pont de Nemours & Co.*, 826 F.2d 1235 (3d Cir. 1987), "*Courts have carefully scrutinized enforcement efforts by competitors because their interests are not necessarily congruent with the consumer's stake in competition. Mergers that promote efficiency and lower prices in the marketplace, for example, may cause economic loss to competitors*".³¹⁵ Similarly, the Court in

³⁰³ *Ibid.*

³⁰⁴ Regulation 30 (d).

³⁰⁵ Paragraph 4 (a) of the Consultation Guidelines of the Nigerian Communications Commission 2007 (the Guidelines on Consultation).

³⁰⁶ Paragraph 4 (b) of the Guidelines on Consultation.

³⁰⁷ Paragraph 4 (c) of the Guidelines on Consultation.

³⁰⁸ Paragraph 4 (d) of the Guidelines on Consultation.

³⁰⁹ Paragraph 4 (e) of the Guidelines on Consultation.

³¹⁰ Paragraph 4 (f) of the Guidelines on Consultation.

³¹¹ Paragraph 4 (g) of the Guidelines on Consultation.

³¹² Paragraph 4 (h) of the Guidelines on Consultation.

³¹³ Paragraph 4 (i) of the Guidelines on Consultation.

³¹⁴ ABA Section of Antitrust Law, *Mergers and Acquisitions: Understanding the Antitrust Issues*, *supra*, pp. 363 – 364.

³¹⁵ Paragraph 1239.

Community Publishers, Inc. v. Donrey Corp., 892 F. Supp. 1146 (W.D. Ark. 1995), observed that;

*“Many mergers have valuable procompetitive effects, and a rival has every incentive to challenge such procompetitive mergers simply because they are procompetitive. Competitors are threatened by legitimate competition, and thus have an incentive to believe that rivals are violating antitrust laws and to use an antitrust suit to delay or moderate competition”.*³¹⁶

II. Merger remedies under ISA

The ISA authorises SEC after considering a qualifying merger transaction to either;

a) Approve the merger;³¹⁷

SEC will approve the merger in the following circumstance;

- i. where the merger, whether directly or indirectly, of the whole or any part of the equity or other share capital or of the assets of another company, is not likely to cause substantial restraint of competition or tend to create monopoly in any line of business enterprise;³¹⁸
- ii. where the use of such shares by voting or granting proxies or otherwise shall not cause substantial restraint of competition or tend to create monopoly in any line of business enterprise;³¹⁹ or
- iii. though the contemplated merger is likely to restrain competition, one of the parties to the merger has proved that it is failing.³²⁰

b) Approve the merger subject to any conditions;³²¹

According to Dr. Dimgba (now Honourable Justice Dr. Dimgba), the phrase “subject to any conditions” as used in this context, authorises SEC to impose various remedies in order to resolve whatever competition concerns that a merger may have.³²² These remedies may either be behavioural in nature, such as price freeze to address consumers concerns, requirement to grant competitors access to infrastructure, intellectual property assets, research and Development (R&D) facilities, production facilities, and key technology, or structural by way of requiring a divestiture by the enterprise of a part of the enterprise to enable new entry or to strengthen some other competitors.³²³

³¹⁶ Paragraph 1166.

³¹⁷ Sections 122 (5) (b) (i), 125 (1) (a) and 126 (b) (i).

³¹⁸ Regulation 423 (2) (a) SEC Rules.

³¹⁹ Regulation 423 (2) (b) SEC Rules.

³²⁰ Regulation 423 (2) (c) SEC Rules.

³²¹ Sections 122 (5) (b) (ii), 125 (1) (b) and 126 (b) (ii).

³²² Nnamdi Dimgba. (2013, March 12), *supra*.

³²³ *Ibid*.

- c) Prohibit the merger;³²⁴
- d) Make a declaration prohibiting the merger, if it is already implemented³²⁵
- e) The ISA also authorise SEC to revoke its own decision approving (or conditionally approving) a merger transaction.³²⁶ However, SEC will only exercise this power in the following circumstances; where the decision approving the merger was based on incorrect information for which a party to the merger is responsible;³²⁷ the approval was obtained by deceit;³²⁸ or where a company concerned in the merger has breached an obligation attached to the merger approval.³²⁹ Nonetheless the decision of SEC to revoke a merger, it may still prohibit the merger even though the time limit prescribed for considering the merger has elapsed.³³⁰

³²⁴ Sections 122 (5) (b) (iii), 125 (1) (c) and 126 (b) (iii).

³²⁵ Section 122 (5) (b) (iv). Applicable to only small mergers.

³²⁶ Section 127 (1).

³²⁷ Section 127 (1) (a) ISA.

³²⁸ Section 127 (1) (b) ISA.

³²⁹ Section 127 (1) (c) ISA.

³³⁰ Section 127 (2) ISA.

CHAPTER 8

ENFORCEMENT AND REMEDIES

Introduction

This chapter is primarily concerned with the enforcement of the competition provisions of the Act and the Competition Regulations. As will be shown in this chapter, enforcement can be commenced by the Commission either *suo moto* (on its own initiative), or on the application of an *interested person* or a private individual (including consumers and Licensees) at the Federal High Court. Of particular importance in this chapter, will be the range of remedies available to both Licensees and consumers, in order to remedy or compensate for an anti-competitive conduct occurring in Nigeria's communications market, and the various fora in which these remedies may be obtained.

Lastly, this chapter will set out the procedural steps for commencing a proceeding on the application of an *interested person* under the Competition Regulations.

General principles guiding the enforcement power of the Commission

In taking enforcement action against any Licensee, the Nigerian Communications (Enforcement Processes, Etc.) Regulations 2005 (the Enforcement Regulations) requires that the Commission be guided by the following principles and considerations;

- a) transparency, fairness and non-discrimination;¹
- b) the need to provide modern, qualitative, affordable and readily available communication services in all parts of Nigeria;²
- c) the need to promote fair competition and investment in the communications industry;³
- d) the proportionality of the enforcement sanctions with the contravention taking into account the factors specified in regulation 14(2) of these Regulations;⁴ and
- e) such other principles and considerations as the Commission may, from time to time, consider necessary in the national interest.⁵

¹ Regulations 3 (a).

² Regulations 3 (b).

³ Regulations 3 (c).

⁴ Regulations 3 (d).

⁵ Regulations 3 (e).

Regulation 14 (2) of the Enforcement Regulations requires that in imposing administrative fines as sanctions, the Commission shall be generally guided by the following factors and considerations;

- a) the severity of the contravention and the need to impose such fine or the amount thereof so as to act as deterrent both to the person who committed such contravention and other persons;⁶
- b) non-discriminatory and transparency in the imposition of sanctions generally including but not limited to sanctions on different persons for similar contraventions committed in identical circumstances;⁷
- c) the prevalence of the contravention in the industry generally and the likelihood of repetition by the person who committed the contravention or other persons;⁸
- d) the duration of the contravention;⁹
- e) the circumstances of the contravention and in particular, but not limited to, a consideration of whether or not the contravention was deliberately or recklessly or negligently committed by the person who committed the contravention;¹⁰
- f) the record of previous or similar contravention by the person who committed the contravention or other persons;¹¹
- g) attitude and conduct of the person who committed the contravention prior to and leading up to the act of contravention and consequent upon the contravention;¹²
- h) the danger to life and property consequent upon the contravention;¹³
- i) the effect of contravention on relevant service provision generally;¹⁴
- j) any gain (financial or otherwise) made by the person who committed the contravention directly or indirectly arising from such contravention;¹⁵
- k) the degree of harm, injury, discomfort or the incremental cost caused or occasioned by such contravention to consumers or other stakeholders in the communications sector;¹⁶

⁶ Regulation 14 (2) (a).

⁷ Regulation 14 (2) (b).

⁸ Regulation 14 (2) (c).

⁹ Regulation 14 (2) (d).

¹⁰ Regulation 14 (2) (e).

¹¹ Regulation 14 (2) (f).

¹² Regulation 14 (2) (g).

¹³ Regulation 14 (2) (h).

¹⁴ Regulation 14 (2) (i).

¹⁵ Regulation 14 (2) (j).

- l) the size of the annual turnover of the person who committed the contravention;¹⁷
- m) the extent to which any contravention was caused by a third party or any relevant circumstances beyond the control of the person who committed the contravention;¹⁸
- n) the absence, ineffectiveness or repeated failure of internal mechanisms or procedures required to prevent contravention by the person who committed the contravention;¹⁹
- o) the possible mitigating circumstances including but not limited to;²⁰
 - i. whether or not the contravention was of a minor nature and the consequences and effect thereof were equally minor in nature ;²¹
 - ii. whether or not the person who committed the contravention took immediate steps to remedy the contravention soon after having knowledge of the contravention;²²
- p) such other factors as the Commission may, from time to time, determine.²³

Public enforcement by the Commission

The public enforcement of the Act and the Competition Regulations is one of the major mandates of the Commission, which derives from Sections 4 (1) (i)²⁴ and 90²⁵ of the Act.

I. Enforcement under the Act

Section 94 (1) of the Act provides that the Commission, (or a person) may seek an interim or interlocutory injunction against any conduct prohibited in this Part. The conducts expressly prohibited in this Part are; rate fixing;²⁶ market sharing;²⁷ boycott of another competitor;²⁸ boycott of a supplier of apparatus or equipment;²⁹ boycott of any

¹⁶ Regulation 14 (2) (k).

¹⁷ Regulation 14 (2) (l).

¹⁸ Regulation 14 (2) (m).

¹⁹ Regulation 14 (2) (n).

²⁰ Regulation 14 (2) (o).

²¹ Regulation 14 (2) (n) (i).

²² Regulation 14 (2) (n) (ii).

²³ Regulation 14 (2) (p).

²⁴ This Section provides that the Commission has the function of “*making and enforcement of such regulations as may be necessary under this Act to give full force and effect to the provisions of this Act*”,

²⁵ This section provides that “*Notwithstanding the provisions of any other written law, the Commission shall have exclusive competence to determine, pronounce upon, administer, monitor and enforce compliance of all persons with competition laws and regulations, whether of a general or specific nature, as it relates to the Nigerian communications market*”.

²⁶ Section 93 (3) (a).

²⁷ Section 93 (3) (b).

²⁸ Section 93 (3) (c).

²⁹ Section 93 (3) (d).

other Licensee;³⁰ and making 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 also required to acquire or not to acquire any other product or service either from himself or from another person.³¹ In addition, conducts not “expressly” prohibited in this Part but nevertheless have the purpose or effect of substantially lessening competition may still come inside the ambit of the phrase “*any conduct*” in Section 91 (1) of the Act, which prohibits a Licensee from engaging in “...*any conduct which has the purpose or effect of substantially lessening competition in any aspect of the Nigerian communications market*”, thus making them liable to an application for an interim or interlocutory injunction pursuant to Section 94 (1) of the Act.

Interim injunction: An interim injunction is granted to preserve the *status quo* until a named date or until a further order or until an application on notice for an interlocutory injunction can be heard by the court.³² It is granted in a situation of real urgency, to preserve and protect the rights of the parties before it from destruction by either of the parties.³³ The grant of an interim injunction merely leaves matter in *status quo*, and the court in granting it does not have to decide any contentious issues.³⁴ An interim injunction is granted to avoid irretrievable mischief of damage when, due to the pressure of the business of the court or through no fault of the applicant, it is impossible to hear and determine the application on notice for interlocutory injunction.³⁵

Interlocutory injunction: An interlocutory injunction is one made pending the determination of the substantive suit, and after all parties have been heard.³⁶ It is granted to protect the Plaintiff against injury by the violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial.³⁷ As a general rule, an interlocutory injunction pending the determination of a suit or appeal must be based on the substantive action before the court.³⁸ An interlocutory injunction will issue to enjoin the party against whom it is directed to refrain from doing certain specified acts stated in the order,³⁹ however it will not issue to restrain a completed act.⁴⁰

In an application for an interlocutory injunction, the court must consider the following factors; that the applicant must show a serious question to be tried *i.e.* that the applicant

³⁰ Section 93 (3) (e).

³¹ Section 93 (4).

³² *Kotoye v. C.B.N* (1989) 1 N.W.L.R (Pt. 98) S.C 419.

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ *Ushie v. Edet* (2010) 6 N.W.L.R (Pt. 1190) C.A 386.

³⁶ *Kotoye v. C.B.N* (supra).

³⁷ *Obeya Memorial Specialist Hospital & Anor v. Attorney-General of the Federation & Anor* (1987) 3 N.W.L.R (Pt. 60) S.C 325.

³⁸ *Ladoke v. Olabayo* (1992) 8 N.W.L.R (Pt. 261) C.A 605.

³⁹ *Ohakim v. Agabaso* (2010) 19 N.W.L.R (Pt. 1226) 172 S.C.

⁴⁰ *Colito (Nig) Ltd v. Daibu* (2010) 2 NWLR (Pt. 1178).

has a real possibility of, not probability of success;⁴¹ that the applicant must show that the balance of convenience is on his side, that is more justice will result in granting the application than in refusing it;⁴² that the applicant must show that damages cannot be an adequate compensation for his damage or injury, if he succeeds (irreparable injury);⁴³ and that the applicant must show that his conduct is not reprehensible for example that he is not guilty of any delay, because such delay in bringing the application will defeat it postulates that there is no urgency in the matter and destroys the very basis for a prompt relief by way of interlocutory injunction.⁴⁴

No order for an interlocutory injunction will be made on notice unless the applicant has given a satisfactory undertaking as to damages save in recognised exceptions.⁴⁵ Where the court of first instance fails to extract an undertaking as to damages, an appellant court ought normally to discharge the order of injunction on appeal.⁴⁶

It is clear from the above that both interim and interlocutory injunctions are granted during the pendency of the substantive case, however, the Act is silent as to what particular remedy (or remedies), a Plaintiff seeking to enforce this Part in the Court, is entitled to upon the conclusion of trial. In this regard, it is noted that Section 94 (2) of the Act provides that “A person shall obtain a certificate from the Commission for leave to proceed to the court for enforcement of the provisions of this Part except in the case of an injunction”. By virtue of this provision, where a person seeks a remedy other than an injunction in the private enforcement of the provisions of this Part, the person will be required to obtain a certificate to this effect, from the Commission.⁴⁷ Conversely, where a person seeks as a remedy, an injunction for the enforcement of the provisions of this Part, the person is not required to obtain a certificate from the Commission. Consequently, the implication of the broad language of this provision is that injunctions, for example a perpetual injunction to permanently restrain a Licensee from engaging in a conduct prohibited in this Part, is also available to the Commission (or a person).⁴⁸ However, for practical purpose the Commission need not apply for an order of a perpetual injunction as it is already authorised by Section 94 (4) of the Act, and Regulation 34 (a) (i) of Competition Regulations to issue a cease-and-desist order to

⁴¹ *Obeya Memorial Specialist Hospital & Anor v. Attorney-General of the Federation & Anor* (supra).

⁴² *Missini v. Balogun* (1968) 1 All N.L.R.

⁴³ *Kotoye v. C.B.N* (supra). In the context of an application for an injunctive relief to enjoin a proposed (anti-competitive) merger, courts in the US often recite the difficulty inherent in attempting to “unscramble the eggs” once a merger has been consummated, as irreparable harm to support the grant of a preliminary injunction. For instance, in *Chemetron Corp. v. Crane Co.*, 1977 – 2 Trade Cas. (CCH) 61, 717 at 72,932 (N.D.III. 1997), the Court granted a preliminary injunction to enjoin the challenged merger because of “the difficulty, if not the impossibility”, of divestiture if the merger is consummated.

⁴⁴ *Kotoye v. C.B.N* (supra).

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

⁴⁷ However, in the author’s view, the Commission is unlikely to grant this certificate in view of the various dispute resolution mechanisms available under the Act and under the various Regulations/Guidelines made by the Commission pursuant to its powers under the Act, for resolving disputes involving a Licensee.

⁴⁸ It should be noted that other types of injunctions exist, apart from a perpetual injunction.

prohibit (or restrain) a Licensee from engaging in a conduct, which has or may have the effect of substantially lessening competition in any particular communications market. A cease-and-desist order has the same effect as a perpetual injunction.

A person is entitled to the grant of a perpetual injunction where that person's legal right has been infringed or invaded, there is a continual invasion or threat of continuance of such invasion, and the legal rights of the parties have been determined in a final judgement.⁴⁹ Thus, a perpetual injunction will be granted upon the final determination of the right of the parties and it is intended to permanently prevent the infringement of those rights and obviate the necessity of initiating action after action in respect of such infringement.⁵⁰ Where the substantive right has not been established, no injunction would be granted.⁵¹

The principles guiding the grant of a perpetual injunction are the same in interim and interlocutory injunctions, except for the requirement of extreme urgency and undertaking as to damages in the case of an interim/interlocutory injunction. These principles are;

- a) **Legal right:** In an application for an injunction, the court must consider whether the applicant has a legal right, which he seeks to protect, and that he has a good chance of success in the relief he is seeking,⁵² because it is a fundamental rule of law that the court will grant an injunction only to support or protect a legal right.⁵³ The application will not be granted if it is not shown that the alleged act of the Defendant constitutes an infringement of a legal enforceable right of the Plaintiff.⁵⁴ Thus, where the applicant has no legal right recognisable in law to be protected, the court will not grant an injunction.⁵⁵ In this context, the Commission in applying for an injunction will rely on its statutory authority to enforce both the competition provisions of the Act and the Competition Regulations, as a legal basis for the grant of an injunction, or must be able to show to the court that he is afforded protection under the Act and/or Competition Regulations, from conducts that substantially lessens competition in a relevant communications market, where the applicant is a private individual.
- b) **Substantial issue to be tried:** The applicant for an injunction needs to show that he has a real possibility, not just a probability, of success at the trial that is there is a serious question to be tried.⁵⁶ Thus, every applicant seeking an injunction must show a probability of success and not just a strong or *prima facie* case.⁵⁷

⁴⁹ *Ho v. Abubakar* (2011) 12 N.W.L.R (2011) (Pt. 1261) C.A 323.

⁵⁰ *Anyanwu v. Uzowuaka* (2009) 13 N.W.L.R (Pt. 1159) S.C. 445.

⁵¹ *Muniyas (Nig.) Ltd v. Ashafa* (2011) 6 N.W.L.R (Pt. 1242).

⁵² *African Continental Bank Limited & Anor v. A. O. Awogboro & Anor* (1990) LPELR-15155(CA).

⁵³ *Benjamin Oladipo Kupoluyi & Anor v. Chief E.O. Phillips & Anor* (1994) LPELR 13919(CA).

⁵⁴ *Ibid.*

⁵⁵ *Akapo v. Hakeem-Habeeb* (1992) 6 N.W.L.R (Pt.247) 266.

⁵⁶ *Obeya Memorial Specialist Hospital & Anor v. Attorney-General of the Federation & Anor* (supra).

⁵⁷ *Universal Trust Bank Limited & Ors v. Dolmetsch Pharmacy (Nigeria) Limited* (2002) 8 N.W.L.R (Pt. 770) 726.

- c) **Balance of convenience:** The determination of the balance of convenience in an application for an injunctive relief requires a consideration of the competing rights of the parties.⁵⁸ That is that more justice will result in granting the application than in refusing it.⁵⁹ The onus of proving that the balance of convenience is on his side is that of the applicant.⁶⁰
- d) **Irreparable damage or injury:** The applicant must show that irreparable harm will be occasioned to him, if a perpetual injunction is not granted.⁶¹ Irreparable injury means injury which an order of a court in the terms of his writ could not cure.⁶²
- e) **Conduct of the parties:** For an example, a Plaintiff who is also in substantial breach of a contract cannot himself get an order of injunction against a Defendant alleged to be in breach.⁶³

II. Enforcement under the provisions of the Competition Regulations

In addition to the enforcement authority of the Commission pursuant to Sections 4 (1) (i) and 90 of the Act, Regulation 34 of the Competition Regulations authorises the Commission to give directions where it determines that in a particular case, or in a number of cases, the actions or activities of a Licensee constitute an abuse of its dominant position or an anti-competitive practice, within the meaning of the Act or the Competition Regulations, in addition to any other action or remedy provided for under the Act. As an enforcement measure, the Commission may issue a direction to:

- (a) require one or more persons named in the direction, to take one or more of the following actions;⁶⁴
- i. cease the actions or activities, specified in the direction immediately, or at a time prescribed in the direction, and subject to such conditions as are prescribed in the direction;⁶⁵ For instance, in November 2012, the Commission exercised this power by issuing a press release⁶⁶ directing Globacom, MTN, Intercellular Nigeria Plc, Visafone Communications, Etisalat, Airtel Networks and Multilinks to cease immediately, their promotions and lotteries, which were at tariffs below the regulatory prescribed interconnection rate, and thereby were predatory;⁶⁷ or

⁵⁸ *I.T.N.A. P.P.E. v. P.C.N* (2012) 2 N.W.L.R (Pt. 1284) C.A. 262.

⁵⁹ *Kotoye v. C.B.N* (supra).

⁶⁰ *Ibid.*

⁶¹ *Rector, Kwarapoly v. Adefila* (2007) 15 N.W.L.R (Pt. 1056) 42 C.A.

⁶² *Adiatu Ladunni v. Oludoyin Adekunle Kukoyi & Ors* (1972) All N.L.R 136; (1972) 3 S.C. 30.

⁶³ *Kotoye v. C.B.N* (supra).

⁶⁴ Regulation 34 (a).

⁶⁵ Regulation 34 (a) (i).

⁶⁶ Nigerian Communications Commission (NCC) press release available at http://www.ncc.gov.ng/index.php?option=com_content&view=article&id=1105:ban-of-all-promotions-and-lotteries-by-telecommunications-operators&catid=73:cat-web-publicnotices&Itemid=92 (visited 2012, November 27).

⁶⁷ It is noted that each of these operators have market power in the market for terminating a mobile call on their network, and were thus abusing their (individual) market power in this market by engaging in predatory pricing practices.

- ii. make identified changes, in actions or activities specified in the direction, as a means of eliminating or reducing the abusive or anti-competitive impact;⁶⁸
- (b) require the Licensee involved in the abusive actions or anti-competitive practices, and the persons affected by such actions, activities or practices, to meet and attempt to determine remedies to prevent, eliminate or compensate for such actions, activities or practices, and to resolve any remaining dispute;⁶⁹
- (c) require the Licensee, to pay compensation to persons affected by its abusive actions or anti-competitive practices;⁷⁰ The compensation is to both deter a Licensee from engaging in an anti-competitive conduct, and helps to put the person(s) affected by the anti-competitive conduct, to the position they would have been in the absence of the unlawful conduct.⁷¹ It is conceivable that the compensation would be for the specific harm suffered because of the anti-competitive conduct of the Licensee. Lost profits, decreased market share and payment of overcharges are some of the ways an anti-competitive conduct can harm an individual and/or a firm.⁷² As at the time of this writing, the Commission has not yet worked out the precise formula for assessing the appropriate compensation under this provision.
- (d) require the Licensee responsible for the abusive actions or anti-competitive practices specified in the direction, to publish an acknowledgment and apology, for such actions or practices, in one or more newspapers of general circulation, in such a form, at such times and otherwise, as the Commission specifies in the direction;⁷³ and
- (e) require the Licensee, to provide periodic reports to the Commission, to assist in determining, whether the actions or practices are continuing and to determine their impact on communications markets, competing Licensees and consumers.⁷⁴

It should be noted that the reference to “may” in Regulation 34 is not mandatory, rather it should be construed as permissive (or discretionary).⁷⁵ In the light of this, where a duty imposed by a statutory provision leaves a discretion in whom it is imposed as to the

⁶⁸ Regulation 34 (a) (ii).

⁶⁹ Regulation 34 (b).

⁷⁰ Regulation 34 (c).

⁷¹ See, U.S. Department of Justice. (2008). ‘Competition and Monopoly: Single-Firm Conduct under Section 2 of the Sherman Act’ (Withdrawn) [WWW document] URL <http://www.justice.gov/atr/public/reports/236681.pdf> (visited 2012, September 9), p. 159.

⁷² See, ABA Section of Antitrust Law, *Telecoms Antitrust Handbook* (first edition, ABA Publishing, 2005) p. 333.

⁷³ Regulation 34 (d).

⁷⁴ Regulation 34 (e).

⁷⁵ Because the Commission has the option, of issuing any of the directions set out under Regulation 34. See, *Amaefule v. State* Part 75 (1988) 2 N.W.L.R., at 158 where the Supreme Court interpreted “may” in Section 18 (ee) of the *Criminal Procedure (Miscellaneous Provisions) Law 1974* of Imo State as permissive in the context in which it was used since it conferred on a law officer the option of taking any of the statutory functions imposed on him. Thus, according to the Court, the law officer’s discretion remained unfettered.

mode of performance, an order of *mandamus* will not issue to compel performance of that duty in a specific way.⁷⁶ Thus, the Commission is not statutorily obligated to take any of the foregoing enforcement action, nor can an order of *mandamus* lie against the Commission to compel it to take a particular enforcement action, or to exercise its discretion in a particular manner.⁷⁷

In addition, the authority of the Commission to sanction anti-competitive practices under its Regulation 34 power will not bar the Commission from exercising its power to take enforcement measures against erring Licensees pursuant to the provisions of the Enforcement Regulations. For example, in 2014, the Commission after an investigation, found MTN to have abused its position of dominance in the mobile voice market by engaging in a predatory pricing practice through charging subscribers on its Ipulse plan, a tariff below the approved mobile termination rate (MTR) of N4.40.⁷⁸ As a result of which, the Commission commenced enforcement proceedings against MTN pursuant to its powers under the Act and the Enforcement Regulations,⁷⁹ and subsequently fined MTN in the sum of Five Million Naira (N5, 000,000:00) for non-compliance with the MTR regarding its I Pulse tariff plan.⁸⁰

In this regard, it is also pertinent to note that failure of a Licensee to comply with a direction validly issued by the Commission, constitutes a contravention or non-compliance under the Enforcement Regulations that renders the Licensee liable to the payment of an administrative fine of the sum of N5, 000,000:00,⁸¹ and a further sum of Five Hundred Thousand Naira (N500, 000:00) per day after expiration of the notice for as long as the failure persists.⁸² Any administrative fine imposed by the Commission pursuant to the Act, any Regulations made there under, or any License shall become due and payable by the person who committed the contravention within 14 days from the date of the receipt, by the person who committed the contravention, of the notification document issued by the Commission.⁸³ The payment of an administrative fine by a person who committed the contravention shall not be construed as a limitation or

⁷⁶ See, *Bashir Alade Shitta-Bey v. Federal Public Service Commission* (1981) 1 SC (Reprint) 26; (1981) LPELR 3056.

⁷⁷ See, *Atta v. COP & Kogi State* (2003) LPELR – 10367(CA) where the Court of Appeal stated that:

“Courts, tribunals and administrative bodies, in general, have a duty to exercise their statutory discretions one way or the other when the circumstances calling for the exercise of those discretions arise but are not normally under any duty to determine that matter or exercise such discretion in a particular way, and mandamus will not therefore issue for such purpose”.

⁷⁸ Nigerian Communications Commission (2014). ‘Summary of the Commission’s Compliance Monitoring and Enforcement Activities for Quarter Four (4), 2014’ [WWW document] URL [⁷⁹ *Ibid.*](http://www.ncc.gov.ng/index.php?option=com_docman&task=doc_download&gid=554&Itemid= (visited 2015, June 26), p. 2.</p>
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⁸⁰ Nigerian Communications Commission (2014). ‘Summary of the Commission’s Compliance Monitoring and Enforcement Activities for Quarter 2 (2), 2015’ [WWW document] URL [⁸¹ Second Schedule to the Enforcement Regulations, Part A, 12.](http://www.ncc.gov.ng/index.php?option=com_content&view=category&id=66&Itemid=80 (visited 2015, October 6), p. 2.</p>
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⁸² *Ibid.*

⁸³ Regulation 15 (2) of the Enforcement Regulations.

foreclosure of the power of the Commission to impose any other enforcement sanctions under the Act, any regulations made there under or in any License.⁸⁴

Lastly, in imposing an administrative fine, the Commission is required to take into consideration the factors and considerations under Regulation 14 (2) of the Enforcement Regulations, (which have been listed above).

Judicial review of the competition enforcement authority of the Commission

Judicial review is a judicial procedure for challenging the action or decision of an inferior court, tribunal or an administrative body. Black's Law Dictionary (9th Edition) defines judicial review as a court's power to review the actions of other branches or levels of government, especially the court's power to invalidate legislative and executive actions as been unconstitutional.⁸⁵ In a judicial review, the Court is usually concerned with the legality and not the merit of the proceedings, decisions or acts of the affected inferior court, tribunal or administrative body.⁸⁶ The various States High Courts and the Federal High Court in Nigeria have supervisory jurisdiction over decisions of administrative bodies, which jurisdiction is normally exercised by way of judicial review.⁸⁷ The remedies available in a judicial review are the prerogative orders of *mandamus*, prohibition or *certiorari*.

Order of *mandamus*: *Mandamus* derived from the Latin word "Mandare" meaning to enjoin, is an extraordinary writ issued by a court of competent jurisdiction to an inferior tribunal, a public official, an administrative agency, a corporation, or any person compelling the performance of an act usually only when there is a duty under the law to perform an act, the plaintiff has a clear right to such performance, and there is no other adequate remedy available.⁸⁸ Generally, an order of *mandamus* is a prerogative order granted by a court to compel performance of a particular act by a lower court or a governmental officer or body, to correct a prior action or failure to act.⁸⁹ It is a command to do what ought to have been done by the government agency.⁹⁰ An order of *mandamus* will only issue to a person, body of persons or corporation requiring him or them to do some particular thing therein specified which pertains to his or their office and is in the nature of a public duty.⁹¹

According to the Supreme Court in *Chief Gani Fawehinmi v. Col. Halilu Akilu and Anor.* (1987) 4 N.W.L.R (Pt. 67) 797 - 876, a "court may refuse to make an order of *mandamus*: (i) unless it has been shown that a distinct demand for performance of the

⁸⁴ Regulation 15 (3) of the Enforcement Regulations.

⁸⁵ Page 924.

⁸⁶ *Zenith Bank PLC v. Dr. Solomon Omorodion & Ors* (2013) LPELR-20755 (CA), p. 28, paragraphs A – F.

⁸⁷ *See, Ibid.*

⁸⁸ *Associated Discount House Limited v. the Hon. Minister of the Federal Capital Territory & Anor* (2013) LPELR-20088(SC).

⁸⁹ *See, Bashir Alade Shitta-Bey v. Federal Public Service Commission* (supra).

⁹⁰ *See, Mr. Effiok Archibong v. Ita Nkan* (2010) LPELR – 3802.

⁹¹ *See, Bashir Alade Shitta-Bey v. Federal Public Service Commission* (supra).

duty has been made and that the demand has deliberately not been complied with...” In order words, an Applicant for an order of *mandamus* must show that he has demanded performance, and that performance has been refused by the person or body enjoined by law to carry out the duty.

Order of prohibition: An order of prohibition will apply to restrain or prohibit a proceeding of an inferior court or administrative tribunal in circumstances, where it has no jurisdiction or exceeds its jurisdiction.⁹² An order of prohibition is used to challenge an anticipated act, or an act currently in occurrence.⁹³

Order of *certiorari*: *Certiorari* is one of the prerogative writs whose main function is to ensure that inferior courts or anybody entrusted with performance of judicial or *quasi judicial* functions keep within the limits of the jurisdiction conferred upon them by statute which create them.⁹⁴ An order of *certiorari* will lie against anybody or person having a legal duty to determine questions affecting the rights of subjects whenever the duty implies at least that that body or person should act fairly or in accordance with a statutory provision.⁹⁵ An order of *certiorari* will thus issue to quash the decision of on inferior court where it is established that; the inferior court has acted in excess of its jurisdiction; there is a breach of the rules of natural justice and/or there is an error of law on the face of the plaint filed in the inferior court containing the claim or charge.⁹⁶ In *Queen v. District Officer* (1961) 1 All N.L.R. 51, the Court held that the judicial relief of *certiorari* will lie in any of the following circumstances; lack of excess or want of jurisdiction or power; breach of the rules of natural justice; and error of law on the face of the records. Unlike an order of prohibition, an order of *certiorari* challenges a completed act.⁹⁷

Wednesbury unreasonableness: A fourth criterion has been developed in the case of *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 KB 223. According to *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* (supra), a reasoning or decision is Wednesbury unreasonable (or irrational) if it is so unreasonable that no reasonable person acting reasonably could have made it. This fourth criterion became widely known as the Wednesbury principle or Wednesbury unreasonableness and was subsequently articulated by Lord Diplock in the case of *Council of Civil Service Unions v. Minister for the Civil Service* (1985) AC 374, as applying to a decision which is “so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it”.

⁹² See, *Nwaoboshi v. MILAD, Delta* (2003) 11 N.W.L.R (Pt. 831), pp. 305 – 326, at p. 311.

⁹³ See, *Joseph Ajali & Anor v. E.C.P. Okuri-Eze & Ors* (2013) LPELR-22592 (CA).

⁹⁴ *Judicial Service Commission of Cross River State & Anor. v. Dr. (Mrs). Asari Young* (2013) LPELR-20592 (SC).

⁹⁵ *Mrs. Ekpoanwan Itam v. Mrs. Nkoyo Orok Okon Effiong* (2013) LPELR-20417 (CA), p. 34, paragraphs F – G.

⁹⁶ *Ibid.*

⁹⁷ See, *Joseph Ajali & Anor v. E.C.P. Okuri-Eze & Ors* (supra).

Right to judicial review under the Act

The Act in Section 88 (1) provides that "... , *an aggrieved person may appeal to the Court for a judicial review of the Commission's decision or other action*". The word "Court" in the context of the Act refers to the Federal High Court.⁹⁸ Thus, the Federal High Court is the proper Court vested with original jurisdiction in the judicial review of any decision made by the Commission. In addition, pursuant to Section 88 (3) of the Act, a person shall not apply to the Court for a judicial review unless that person has first exhausted all other remedies provided under the Act. These remedies are the two (2)-stage process set out under Sections 86 – 88 of the Act.

Firstly, a person who is aggrieved or whose interest is adversely affected by any decision made by the Commission, pursuant to the exercise of its powers and functions under the Act or any subsidiary legislation, may request in writing to the Commission for a statement of the reasons for the decision.⁹⁹ The Commission shall, upon such written request by the aggrieved person, provide a copy of a statement of reasons for the decision and any relevant information taken into account in making the decision.¹⁰⁰ However, the Commission is not required to publish, or to disclose to the aggrieved person, a statement of reasons or a part of a statement of reasons if the publication or disclosure would; disclose a matter that is, in the opinion of the Commission, of a confidential character;¹⁰¹ be likely to prejudice the fair trial of a person;¹⁰² or involve the unreasonable disclosure of personal information about any individual (including a deceased person).¹⁰³

Secondly, the aggrieved person may at any time within but not later than 30 days after the date of receipt of the Commission's statement of reasons, request the Commission in writing, for a review of its decision and specify therein the reasons and basis for his request.¹⁰⁴ Upon receipt of the aggrieved person's written submissions, the Commission shall meet to review its decision taking into consideration the submissions.¹⁰⁵ However, it should be noted that the Commission has a period of 60 days within which it is required by the Act to conclude its review of its decision and inform the aggrieved person in writing of its final decision thereon and the reasons therefore.¹⁰⁶

Failure to comply with this 2-stage process is very fatal to an application, seeking for a judicial review of the decision of the Commission, and will oust the Court of its jurisdiction to hear the case.¹⁰⁷ In *NCC v. MTN Appeal No. CA/A/25/ 2004*

⁹⁸ Section 138.

⁹⁹ Section 86 (1) of the Act.

¹⁰⁰ Section 86 (2) of the Act.

¹⁰¹ Section 86 (3) (a) of the Act.

¹⁰² Section 86 (3) (b) of the Act.

¹⁰³ Section 86 (3) (c) of the Act.

¹⁰⁴ Section 87 (1) of the Act.

¹⁰⁵ Section 87 (2) of the Act.

¹⁰⁶ Section 87 (4).

¹⁰⁷ See, *Madukolu v. Nkeditim* (1962) 2 SCNLR 341, where the Supreme Court held that;
"[a] case comes before the court initiated by due process of law, and upon fulfilment of any condition precedent to the exercise of jurisdiction. Any defect in competence is fatal, for the

(unreported), MTN the Plaintiff/Respondent applied to the Federal High Court for a review of the Interconnect Rate Determination carried out by the Commission. The Commission entered a preliminary objection in the matter, contending that the Plaintiff was obligated to explore the pre-action conditions stipulated in Sections 86 – 88 of the Act. The trial court declined to rule on this objection, hence the Commission appealed specifically on this ground. MTN also filed a cross-appeal. On appeal (the subject matter of this case), the Court of Appeal held that it is essential that the Plaintiff meet the pre-condition stipulated in Sections 86 – 88 of the Act, requiring a review of the decision by the Commission, before going to court.

Similarly, in *Orakul Resources Ltd & Anor v. NCC & Ors* (2007) 16 N.W.L.R. (Pt. 1060) where the Appellants (as Plaintiffs) commenced a suit at the Federal High Court, seeking declaratory and injunctive reliefs against the Respondent (the Commission) for failing to comply with the regulatory requirement of issuing a public notice inviting stakeholders to a public inquiry as a pre-condition to the enactment of a Regulation. In response, the Commission contended that the Appellants had not complied with the provision of the Act, requesting a statement of reasons from the Commission in making the decision. In its ruling, the Federal High Court struck out the case as being premature and incompetent. On appeal to the Court of Appeal (the subject matter of this suit), the Court of Appeal in dismissing the appeal held that “*the remedies in Section 86 – 88 of the Act must be exhausted as a condition precedent before the court’s jurisdiction can be invoked*”.

Private enforcement

Section 94 (1) of the Act empowers “a person”¹⁰⁸ to institute proceedings seeking an interim and interlocutory injunction to prevent or restrain the conducts prohibited in this Part. Section 94 (2) of the Act further provides that “*A person shall obtain a certificate from the Commission for leave to proceed to the court for enforcement of the provisions of this Part except in the case of an injunction*”. As explained above, where a person seeks a remedy other than an injunction in the private enforcement of the provisions of this Part, the person will be required to obtain a certificate from the Commission. Despite the broad remedial language of these statutory provisions, the common law doctrine of *locus standi* otherwise known as standing requirement will significantly restrict the ability of a person other than the Commission to sue for a breach of the competition provisions of the Act or the Competition Regulations.

This standing requirement has been articulated by the Supreme Court as “*the Plaintiff’s capacity to sue; and goes to the competence of a Plaintiff to institute an action to be adjudicated upon by a court*”.¹⁰⁹ *Locus standi* is a condition precedent to the

proceedings are a nullity however well conducted and decided: the defect is extrinsic to the adjudication”.

¹⁰⁸ As a general principle of law, only natural persons, that is, human beings and juristic or artificial persons such as a body corporate are competent to sue, see *Ataguba & Company v. Gura Nigeria Limited* (2005) 6 N.W.L.R (Pt. 927) 429.

¹⁰⁹ *Adetona v. Zenith International Bank Plc* (2011) 18 N.W.L.R (Pt. 1279) S.C 627.

determination of a suit on its merits and unequivocally a threshold issue.¹¹⁰ A Plaintiff satisfies the court that he has *locus standi* if he is able to show that his civil rights and obligations have been or, are in danger of being infringed.¹¹¹ In other words, there must be a nexus between the Plaintiff and the disclosed cause of action concerning his rights or obligations.¹¹² The person must also show that he has sufficient legal interest in seeking redress in a court of law.¹¹³ A person has an interest in a thing when he has rights, advantages, duties, liabilities, losses or the like connected with the thing.¹¹⁴ The question as to whether a Plaintiff has *locus standi* to sue is determinable from the totality of averments in his statement of claim.¹¹⁵ In order to achieve the status of *locus standi*, the statement of claim of the Plaintiff must; reveal a legal or justiciable right; show sufficient or special interest adversely affected; and show a justiciable cause of action.¹¹⁶ Once the *locus standi* of a Plaintiff cannot be established from his statement of claim, that Plaintiff's action is liable to be dismissed.¹¹⁷

Thus, a person may enforce this Part, if he can show that he has suffered or will suffer a harm (or injury) as a result of the prohibited anti-competitive conduct. According to courts in the US, a Plaintiff who is neither a competitor nor a consumer in the relevant market does not suffer antitrust harm, and therefore lacks standing to sue under antitrust laws.¹¹⁸ As explained in Chapter 4, for competition to be substantially lessened in a communications market there must be some "identifiable injury" to competitors and/or consumers.¹¹⁹ An identifiable injury exists where there is evidence that competitors and/or consumers have suffered (or will suffer)¹²⁰ some harm as a result of the anti-competitive conduct. In other words, there must be a causal link between this identifiable injury and the challenged conduct.¹²¹ The identifiable injury includes the various ways in which the challenged conduct impacts; existing competitors in the identified communications markets; and/or the communications consumers in terms of the availability and pricing of the products or service.

¹¹⁰ *B.M Ltd. v. Woermann-Line* (2009) 13 N.W.L.R (Pt. 1157) S.C 149.

¹¹¹ *Taiwo v. Adegboro* (2011) 11 N.W.L.R (Pt. 1259) S.C 562.

¹¹² *Ibid.*

¹¹³ *Adetona v. Zenith International Bank Plc* (supra).

¹¹⁴ *Ibid.*

¹¹⁵ *B.M Ltd. v. Woermann-Line* (supra).

¹¹⁶ *Ibid.*

¹¹⁷ *Adetona v. Zenith International Bank Plc* (supra).

¹¹⁸ *Vinci v. Waste Mgmt., Inc.*, 80 F.3d 1372, 1376 (9th Cir. 1996); *Dick Geothermal Corp. v. Thermogenics, Inc.*, 890 F.2d 139 (9th Cir. 1989).

¹¹⁹ *Report of the Public Inquiry on Competition Practices Regulations* (Nigerian Communications Commission, 2006), the Commission's response to 10th comment.

¹²⁰ It is pertinent to note that where a Plaintiff seeks to enjoin a proposed communications merger, where the substantive standard for assessing the merger is "may, result in a substantial lessening of competition", the Plaintiff need not show actual or apparent injury since the threat to competition resulting from the merger is still in its incipiency. This threatened injury requirement requires a lower threshold for standing in contrast to the actual injury requirement of an abuse of a dominant position which requires proof of injury that has occurred, and therefore a higher threshold for standing, see generally, Herbert Hovenkamp, *Federal Antitrust Policy: The Law of Competition and Its Practices* (Thompson/West, 2005), pp. 605 - 612.

¹²¹ See generally, *Joined Cases C-295/04 to C-298/04, Manfredi & others* [2006] ECR I-6619, paragraphs 61-63, *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 475 n.11 (1982).

Thus, where a private Plaintiff is unable to establish from his statement of claim that he has suffered a harm or about to suffer a harm resulting from the Defendant's conduct, Nigerian courts will likely hold that the Plaintiff lacks *locus standi* and will not entertain the suit. In other words, any person other than the Commission may enforce both the competition provisions of the Act or the Competition Regulations once standing requirement has been satisfied. In this regard, two principal categories of private parties threatened with harm or harmed by a conduct prohibited by the competition provisions of the Act or the Competition Regulations, have *locus standi* to challenge the conduct.

In the first category are competitors who have suffered a harm, or likely to suffer an anti-competitive harm caused by the prohibited conduct, resulting in their foreclosure from the relevant market.¹²² Economic analysis indicate that the foreclosure of competitors by the anti-competitive conduct of a dominant firm will give rise to either or both of the following harms:¹²³

- i. increased costs (where costs include both cash cost items, such as input goods, and other more general items, such as the cost of financing the business);¹²⁴
- ii. reduced revenue (where the infringing conduct affects the price and/or sales volumes).¹²⁵

It is important to note that the effect of increased costs and reduced revenue is a reduction in profit (or an increase in loss).¹²⁶ For instance, competitors foreclosed from the relevant communications market as a result of the predatory pricing practice of a dominant Licensee, may challenge the conduct under the Act or the Competition Regulations as a result of a loss of profit (or conversely, an increase in loss) they have suffered. In the second category are consumers who have been harmed or likely to be harmed by the anti-competitive conduct of a Licensee.¹²⁷ For instance, consumers who have been overcharged or may be overcharged as a result of the rate fixing practices of Licensees, may also challenge this conduct under the Act or the Competition Regulations.

I. Enforcement under the Act

Injunction: A private party (or person) may seek for an injunctive relief pursuant to Section 94 (1) and (2) of the Act, under the same standards that apply to the Commission.¹²⁸

¹²² Herbert Hovenkamp, *supra*, p. 614.

¹²³ Assimakis Komminos, *et al.*, (2009, December). 'Quantifying antitrust damages Towards non-binding guidance for courts' [WWW document] URL http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_study.pdf (visited 2015, September 9), p. 22.

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*

¹²⁷ *See*, Herbert Hovenkamp, *supra*.

¹²⁸ *See*, paragraphs above on these standards.

Damages: Damages is an amount of money claimed by or ordered to be paid (by a court) to a person as compensation for loss or injury.¹²⁹ It equally connotes the sum of money which a person wronged is entitled to receive from the wrong doer as compensation for the wrong.¹³⁰ Contemporary competition (or Antitrust) law also allows a private party to recover damages for the harm suffered as a result of an anti-competitive conduct.¹³¹ Although the Act is silent as to whether a private party can recover “damages” for a breach of its competition provisions, it is however arguable that damages (and other applicable remedies) are available by virtue of the provision of Section 94 (2). Thus, once a person has been able to obtain a certificate from the Commission, he can proceed to the court seeking for a remedy other than an injunction including damages.

The application and award of damages for a breach of the competition provision of the Act and/or the Competition Regulations, would in principle be governed by damages in Nigerian tort law, which is guided by the latin maxim *restitutio in integrum*,¹³² that is in so far as the damages are not too remote, the Plaintiff shall be restored, as far as money can do it, into the position in which he would have been if the breach had not occurred.¹³³

i. Damages for loss of profit: The case law in Nigeria show that a claim for loss of profit is a claim for special damages, which must be strictly proved.¹³⁴ Special damages are damages, which the law does not infer from the nature of an act but which are exceptional in character.¹³⁵ It is the damages alleged to have been sustained in the circumstances of a particular wrong.¹³⁶ Special damages must be pleaded with distinct particularity and strictly proved because a court is not entitled to make an award of special damages based on conjecture or some fluid and speculative estimate of alleged loss sustained by a Plaintiff.¹³⁷

Therefore, the Plaintiff must set out in his pleadings the various items giving rise to any lost profits and the amount of any special damages sought from the Defendant. Special damages must also be strictly proved with sufficient and

¹²⁹ *Engineer Samuel Egbiedina Akinbiyi v. Lagos Island Local Government Council & Ors* (2012) LPELR-19839 (CA).

¹³⁰ *Ibid.*

¹³¹ See generally, Georg Berrisch, Eve Jordan, Rocio Salvador Roldan, ‘E.U. Competition and Private Actions for Damages, The Symposium on European Competition Law’ *Northwestern Journal of International Law & Business*, Volume 24, Issue 3 Spring (2004), pp. 585 – 600, Roger D. Blair, Christine A. Piette, ‘Antitrust Injury and Standing in Foreclosure Cases’ *Journal of Corporation Law*, (2006) pp. 401 – 419, pp. 405 – 406.

¹³² See generally, *Oando Nigeria Plc v. Adijere West Africa Limited* (2013) LPELR-20591 (SC); *MTN Nigeria Communications Limited v. Mr. Ganiyu Sadiku* (2013) LPELR-21105 (CA).

¹³³ *Ativie v. Kabelmetal Nig. Ltd.* (2008) 10 N.W.L.R (Pt. 1095) 399; *Oando Nigeria Plc v. Adijere West Africa Limited* (supra).

¹³⁴ *Air Liquid Nig. Plc v. Nnam* (2011) 9 N.W.L.R (Pt. 1251) C.A 41; *Engineer Samuel Egbiedina Akinbiyi v. Lagos Island Local Government Council & Ors* (supra).

¹³⁵ *U.B.N. Plc v. Ajabule* (2011) 18 N.W.L.R (Pt. 1276) 422 S.C.

¹³⁶ *Ibid.*

¹³⁷ *Ibid.*

credible evidence.¹³⁸ To strictly prove special damages means no more than providing proof, which would readily lend itself to quantification or assessment.¹³⁹ Thus, evidence must be led before an award for special damages is granted by a court.¹⁴⁰ Such evidence must be compelling and the sum claimed reasonable to the court.¹⁴¹

Proof of damages for loss of profit resulting from an anti-competitive conduct, would identify the profit that would have been made in the absence of the anti-competitive harm suffered,¹⁴² provided that there are no extenuating circumstances or *novus actus interveniens* that breaks the chain of causation and thus relieves the Defendant from liability.¹⁴³ Thus, where it is established that the loss of profit is attributable to other factors such as incompetence, lack of resources, luck, or external conjectural-economic factors, the Plaintiff is unlikely to succeed in his claim for (special) damages.¹⁴⁴ For example, no damages for lost profits was established where an anti-competitive conspiracy to manipulate the market in copper future was shown not to be the cause of changes in price of scrap copper and the subsequent decline in the business of the Plaintiff, when other factors affected that price.¹⁴⁵

While it is noted that there are no case laws in Nigeria in which evidence has been led to establish the loss of profit in the context of a competition related claim, however the primary damage models used by the EC and US courts for assessing lost profits in competition (or Antitrust) related claims are; the “yardstick” and the “before-and-after” models.¹⁴⁶

In the “yardstick” model, a comparison is made between the Plaintiff’s profits during the injury period with that earned by a comparable business operating in a non-injury scenario.¹⁴⁷ In *Fishman v. Estate of Wirtz*, 807 F.2d 520, 551 (7th Cir. 1986), the US Court of Appeals for the 7th Circuit in approving the “yardstick” model for quantifying damages stated that the concept of a “yardstick” model of damages, that is linking the Plaintiff’s experience in a hypothetical free market to the experience of a comparable firm in an actual free market, is also well accepted.

¹³⁸ *Ajagbe v. Idowu* (2011) 17 N.W.L.R (Pt. 1276) S.C 422.

¹³⁹ *Aloysius Nwokediaso & Ors v. Mrs Christiana Onuoha & Anor* (2000) LPELR-12004 (CA).

¹⁴⁰ *N.N.P.C v. Klifco (Nig.) Ltd.* (2011) 10 N.W.L.R (Pt. 1255) S.C 209.

¹⁴¹ *Ibid.*

¹⁴² Herbert Hovenkamp, *Antitrust* (West Publishing Co., 2011), p. 366.

¹⁴³ Assimakis Komninos, *et al.*, p. 20.

¹⁴⁴ *Ibid.*, p. 21.

¹⁴⁵ *Loeb Industries v. Sumitomo Corporation*, 306 F.3d 469 (7th Cir. 2002).

¹⁴⁶ European Commission, ‘Practical Guide on Quantifying Harm in Actions for Damages Based on Breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union’, (2011), p. 19; Herbert Hovenkamp, *supra*, p. 680.

¹⁴⁷ Emily Clark, Mat Hughes, David Wirth. (2004, August 31). ‘Study on the Conditions of Claims for Damages in Case of Infringement of EC Competition Rules Analysis of Economic Models for the Calculation of Damages’ [WWW document] URL http://ec.europa.eu/competition/antitrust/actionsdamages/economic_clean_en.pdf (visited 2016, January 20), p. 19; Herbert Hovenkamp, *supra*, p. 682.

Under the “before-and-after” model, the Plaintiff calculates the appropriate damages by comparing his profits prior to the period of the infringement, during the infringement and/or after the infringement.¹⁴⁸ In *Blue Cross & Blue Shield United v. Marshfield Clinic*, 152 F. 3d 588, 592 (7th Cir. 1998), the US Court of Appeals for the 7th Circuit in applying the “before-and-after” model, held that the “usual way to measure damages in such a case would be to compare the prices that Marshfield Clinic [the Defendant] charged Blue Cross [the Plaintiff] before and during the [market sharing] conspiracy”.¹⁴⁹ However the “before- and-after” model is often used when the injured firm has a sufficient operating history to use as a basis for estimating revenues and profits.¹⁵⁰

It is important to bear in mind that according to the case law in Nigeria, in claiming for the loss of profit resulting from the Defendant's conduct, the onus is on the Plaintiff to establish the accuracy of the projected gross profit in proof of his claim.¹⁵¹ Any judgment on a claim for loss of profit, and award of such special damages must be predicated on legal evidence of the highest probative value and weight.¹⁵² Thus, if the evidence, which will help the trial court to assess the accuracy of the projected profit, is inadequate, lacking or not convincing, the Plaintiff will fail in his claim for anticipated profits.¹⁵³ However, as a general rule, a court can validly rely on the mere *ipse dixit* of the Plaintiff who is not an expert to assess damages when the evidence is unchallenged and uncontradicted, provided that the evidence adduced by the Plaintiff which asserts his claim against the Defendant is oral and in the terms of his writ.¹⁵⁴

In addition, the Plaintiff is under a legal obligation to mitigate losses arising from the damages.¹⁵⁵ Under the common law doctrine of mitigation of damages, the law imposes a duty on the Plaintiff to take steps to avoid any losses, which are avoidable.¹⁵⁶ According to the court, persons against whom wrongs have been committed are not entitled to sit back and suffer loss, which could be avoided by reasonable efforts, or to continue an activity unreasonably so as to increase the loss.¹⁵⁷ The question of what is reasonable for a Plaintiff to do in mitigation of his damages is however a question of fact, and not of law, in the circumstances of each case and the burden is on the Defendant to show that the Plaintiff failed to mitigate his loss.¹⁵⁸ A failure of the Plaintiff to mitigate his loss is a bar to his claim for damages.¹⁵⁹

¹⁴⁸ European Commission, *supra*, p. 17; Herbert Hovenkamp, *supra*, p. 682.

¹⁴⁹ At paragraph 592.

¹⁵⁰ ABA Section of Antitrust Law, *Telecoms Antitrust Handbook*, *supra*, p. 335.

¹⁵¹ *A.G Oyo State v. Fairlakes Hotels* (No.2) (1998) 5 N.W.L.R (Pt. 121) S.C 255.

¹⁵² *Engineer Samuel Egbedina Akinbiyi v. Lagos Island Local Government Council & Ors* (*supra*).

¹⁵³ *A.G Oyo State v. Fairlakes Hotels* (*supra*).

¹⁵⁴ *Ibid.*

¹⁵⁵ *Onwuka v. Omogui* (1992) 3 N.W.L.R (Pt. 230) S.C 393 at p. 401.

¹⁵⁶ *Engineer Samuel Egbedina Akinbiyi v. Lagos Island Local Government Council & Ors* (*supra*).

¹⁵⁷ *Ibid.*

¹⁵⁸ *MS. B. A. Benson v. Microcred Microfinance Bank Nigeria Limited* (2014) LPELR – 23478 (CA).

¹⁵⁹ *Ibid*; *Obasuyi v. Business Ventures Ltd* (2000) 5 N.W.L.R (Pt. 658).

Thus, in a claim for 262 days of loss of use of a vehicle arising from a vehicular collision caused by the negligence of the Defendants, the Supreme Court of Nigeria in refusing the damages claimed by the Plaintiff, as unreasonable and unjustified, held that “*It is incumbent upon [the Plaintiff] to get such damaged vehicle repaired at the earliest opportunity*”.¹⁶⁰ And further that;

“*To allow a party that is a victim of negligence time almost in perpetuity to leave his damaged object unrepaired and expect damages to be calculated against years rather than few days is giving a blank cheque to rake in undeserved compensation. The [Plaintiff] had got many vehicles, sixteen of them, there was no evidence that these vehicles were not running at profit or that the company had no access to bank to raise money for prompt repairs so as to mitigate loss.*”¹⁶¹

As at the time of this writing, there is no specific pronouncement by a court in Nigeria on the application of the doctrine of mitigation of damages in an antitrust setting. However, in the US, there exists a clear obligation upon the victim of an antitrust offence to mitigate his damages. For instance, in *Triebwasser & Katz v. AT&T & Ors*, 535 F.2d 1356, 1360 (2d Cir. 1976), where the Plaintiffs *inter alia* sought a preliminary mandatory injunction against the Defendants, as a result of their refusal to publish the Plaintiffs’ advertisement in the Yellow Pages, conduct which the Plaintiffs alleged constituted a conspiracy to restrain competition in violation of the Sherman Act. The US Court of Appeals 2nd Circuit in reversing the order of the trial court granting the injunctive relief, stated clearly at paragraph 1360 that “*the plaintiffs have an obligation to mitigate their damages*”. The Court reasoned that in antitrust cases, an applicant for a preliminary injunction must make a clear showing “*that the danger of irreparable loss or damage is immediate*”, and therefore the Yellow Pages are not the only advertising media available to the Plaintiffs, so as for the Defendants’ conduct to constitute an irreparable loss which would be “*quite difficult to compute in terms of money damages*”. This principle of mitigation of damages has also been reaffirmed by US courts in a long line of cases such as *Malcolm v. Marathon Oil Co.*, 642 F.2d 845, 863 (5th Cir. Unit B Apr. 1981), *Pierce v. Ramsey Winch Co.*, 753 F.2d 416, 436 (5th Cir. 1985) and *Fishman v. Estate of Wirtz* (supra).

ii. Damages for overcharges: Overcharge is the harm suffered by consumers when they pay a monopoly price for the product or service sold by a dominant firm, or an illegal price fixing cartel.¹⁶² As at the time of this writing, there are no case laws from Nigeria that gives guidance on how damages for overcharges should be quantified in the context of a competition claim. However, it is pertinent to note that the same methodology for quantifying damages for lost profits adopted by the EC and US courts (the “yardstick” and “before-and-after” models),

¹⁶⁰ *Obasuyi v. Business Ventures Ltd* (supra).

¹⁶¹ *Ibid.*

¹⁶² European Commission, *supra*, p. 41; Herbert Hovenkamp, *supra*, p. 670.

also applies to the quantification of damages for overcharges in competition claims in the EU and US respectively.¹⁶³

Similar to the application of the “yardstick” model in assessing damages in the case of lost profit, in assessing the applicable damages for overcharge under the “yardstick” model, the Plaintiff compares the prices in the market where the overcharge is alleged to have occurred, with a similar (geographic) market where the overcharge is not present.¹⁶⁴ For example, in *Greenhaw v. Lubbock County Beverage Association* 721 F.2d 1019, 1026 (5th Cir. 1983), the US Court of Appeals of the 5th Circuit accepted the evidence of the Plaintiff's expert which compared prices in Lubbock County, (the market in which the price fixing conspiracy among liquor retailers in Lubbock County prevailed), with those of Dallas another competitive market. From this comparison, the expert was able to estimate that the cartel overcharged purchasers by about 7.74%.

In the “before-and-after” model, the Plaintiff estimates the overcharge by comparing the price charged prior to the period of the infringement, during the infringement and/or after the infringement.¹⁶⁵ This comparison works on the assumption that the prices prevailing during the overcharge provide a reasonable approximation of price levels in the absence of the overcharge.¹⁶⁶

It is important to note that damages for an overcharge also applies where the Defendant is a monopsonist or exercises market power as a buyer, and the “overcharge” may indeed be an “undercharge” – that is, the monopsonist will buy at a lower price, than would have prevailed in a competitive market.¹⁶⁷ In this case, the Plaintiff is entitled to the difference between the price that would have prevailed in a competitive market, and the price that he was forced to sell as a result of the anti-competitive conduct of the monopsonist.¹⁶⁸

II. Enforcement under the Competition Provisions

Commencing a proceeding under the Competition Regulations by an interested person

1. An interested party, that is, a Complainant that wants the Commission to investigate a competition related complaint or to take related action against a Licensee shall;¹⁶⁹

¹⁶³ Claire M. Korenblit, ‘Quantifying Antitrust Damages—Convergence of Methods Recognized by U.S. Courts and the European Commission’, *CPI Antitrust Chronicle*, (2012), pp. 4 – 6.

¹⁶⁴ Emily Clark, Mat Hughes, David Wirth, *supra*, p. 19; Herbert Hovenkamp, *supra*, p. 674.

¹⁶⁵ Emily Clark, Mat Hughes, David Wirth, *supra*, p. 17; Claire M. Korenblit, *supra*, pp. 4 – 5.

¹⁶⁶ Emily Clark, Mat Hughes, David Wirth, *supra*.

¹⁶⁷ Herbert Hovenkamp, (2011), *supra*.

¹⁶⁸ *Ibid*.

¹⁶⁹ Paragraph 1 of the Schedule to the Competition Regulations (Hereinafter referred to as “the Schedule”).

- a) submit a written request (a “Request for Investigation”) to the Commission and the Complainant shall deliver a copy of the Request for Investigation to the other party (the “Responding Party”) on the same day that the request is submitted to the Commission;¹⁷⁰
 - b) in its Request for Investigation, the Complainant shall summarise the nature of the complaint and the desired outcome, including a summary of all relevant events or circumstances and any related correspondence or other supporting materials.¹⁷¹
2. The Responding Party shall have ten (10) days, from the day on which the Request for Investigation is delivered by the Complainant, to provide its comments if any, on why the Commission should not investigate or otherwise respond to the complaint (“Comments”) and the Responding Party shall deliver a copy of the Comments to the Complainant, on the same day that the comments are submitted to the Commission.¹⁷²
3. The Commission shall;¹⁷³
 - a) consider whether, it will undertake an investigation or take any other action in response to the complaint;¹⁷⁴
 - b) within thirty (30) days of submission of the Request for Investigation, issue a written notice to the parties, identifying whether it will take action, the specific action to be taken and the basis for its decision.¹⁷⁵
 4. Where the Commission receives more than one Request for Investigation in connection with substantially the same conduct or circumstances, it may consolidate the request into a single proceeding.¹⁷⁶
 5. Within 10 days of notification by the Commission that it will undertake an investigation– the Complainant shall make its formal written submissions, regarding the complaint and the submissions (Complaint Submissions) shall set out a full statement of the circumstances and arguments the Complainant relies on in support of its position and the desired outcome, including any specific breaches of the Act, any regulation, rule, direction, license condition or other right or obligation, committed by the responding party and the consequences of those breaches for the Complainant; the Complaint Submissions shall include, any documentary or other evidence relied on by the

¹⁷⁰ Paragraph 1 (a) of the Schedule.

¹⁷¹ Paragraph 1 (b) of the Schedule.

¹⁷² Paragraph 2 of the Schedule.

¹⁷³ Paragraph 3 of the Schedule.

¹⁷⁴ Paragraph 3 (a) of the Schedule.

¹⁷⁵ Paragraph 3 (b) of the Schedule.

¹⁷⁶ Paragraph 4 of the Schedule.

Complainant in support of its position and desired outcome and a copy of the Complaint Submissions shall be delivered to the Responding Party, on the same day that they are submitted to the Commission.¹⁷⁷

6. The Responding Party shall have fifteen (15) days, from the day on which the Complaint Submissions are delivered by the Complainant, to submit a written response to the submissions (Response) and a copy of the Response shall be delivered to the Complainant, on the same day that the Response is delivered to the Commission.¹⁷⁸
7. The response shall identify, any circumstances or arguments included in the Complaint Submissions that the Responding Party admits or agrees with and for each circumstance or argument relied on by the Complainant in the Complaint Submissions that the Responding Party rejects or disagrees with, the Responding Party shall, provide a clear statement of how its position differs from that of the Complainant and the circumstances and evidence in support of its position and desired outcome.¹⁷⁹
8. In appropriate cases, the Commission may, provide the Complainant an opportunity to reply in writing, to the Response and in such cases, the Commission shall, allow the Responding Party an opportunity, to submit a final written response, addressing any new submissions or evidence raised in the Complainant's reply.¹⁸⁰
9. Each party shall, submit its further submissions or evidence, within the time period specified by the Commission, or if no time period is specified, then within fifteen (15) days of being informed by the Commission, that it may make the further submissions.¹⁸¹
10. The Commission will, generally complete proceedings under these Regulations, and issue either a decision resolving the issues or a notice specifying any other actions to be taken in connection with the proceeding, within sixty (60) days of receiving all necessary information and the Commission may, by written notice to the parties, at any time during the relevant proceeding, extend the time for the Commission to issue its decision.¹⁸²
11. On completion of a proceeding under these Regulations, the Commission may:¹⁸³

¹⁷⁷ Paragraph 5 of the Schedule.

¹⁷⁸ Paragraph 6 of the Schedule.

¹⁷⁹ Paragraph 7 of the Schedule.

¹⁸⁰ Paragraph 8 of the Schedule.

¹⁸¹ Paragraph 9 of the Schedule.

¹⁸² Paragraph 16 of the Schedule.

¹⁸³ Paragraph 17 of the Schedule.

- a) issue a direction, requiring the responding party or any other person, to undertake specific actions or to cease specific actions or to resolve any conduct, contrary to the Act or any Regulation, rule, direction, licence condition or related right or obligation;¹⁸⁴
 - b) issue a direction, making specific determinations, regarding specific circumstances or issues relevant to the proceeding, including the payment of any applicable compensation;¹⁸⁵
 - c) exercise its rights under the Act or the Enforcement Processes Regulations, 2005, to impose specific monetary or other penalties for identified misconduct;¹⁸⁶
 - d) refer any outstanding matters, to the Federal High Court or other identified authority that is competent to resolve the outstanding matters;¹⁸⁷ or
 - e) where the proceeding raises questions of general interest or application to the communications sector, the Commission may, initiate a further public consultation or inquiry that permits submissions from other interested parties and make resolution of the earlier proceeding subject to the conclusion of that consultation or inquiry.¹⁸⁸
12. Without interfering with a party's ability to seek interim or emergency relief from a court of competent jurisdiction, the Commission shall, be entitled to make interim determinations, including, issuing interim directions, pending completion of a proceeding.¹⁸⁹
13. Any decision by the Commission on completion of a proceeding shall, be in writing and shall include, a statement of reasons for the decision.¹⁹⁰
14. Except as specifically directed otherwise by the Commission, as part of any final decision in a proceeding, the parties shall bear their own costs of participating in the proceeding.¹⁹¹
15. The Commission may, in the course of completing any proceeding, enlist the services of an appropriately qualified expert, to assess any issues or circumstances raised by a party, that should be considered with the benefit of specialist knowledge.¹⁹²

¹⁸⁴ Paragraph 17 (a) of the Schedule.

¹⁸⁵ Paragraph 17 (b) of the Schedule.

¹⁸⁶ Paragraph 17 (c) of the Schedule.

¹⁸⁷ Paragraph 17 (d) of the Schedule.

¹⁸⁸ Paragraph 17 (e) of the Schedule.

¹⁸⁹ Paragraph 18 (1) of the Schedule.

¹⁹⁰ Paragraph 18 (2) of the Schedule.

¹⁹¹ Paragraph 18 (3) of the Schedule.

¹⁹² Paragraph 18 (4) of the Schedule.

As at the time of this writing, only one Complaint has been made under this procedure. On October 16, 2012, a consumer advocacy group, the Consumer Empowerment Organisation of Nigeria (CEON) brought a Complaint pursuant to paragraph 1 of the Schedule to the Competition Regulations.¹⁹³ In making the Complaint, CEON formulated two questions for the Commission's determination. These questions are;

- I. *Whether Airtel, Glomobile and MTN (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.*

According to CEON, their interest in the matter was based on their 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 the need for the Commission's intervention.

Although, CEON later abandoned the Complaint and thus the Commission was not able to make any determination in respect of the Complaint. However, in that case CEON defined the relevant market as follows;

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

According to CEON, 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.¹⁹⁴ MCSPs also need to be able to connect or access a mobile operator's network and ultimately its mobile subscribers.¹⁹⁵ 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.¹⁹⁶ 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.¹⁹⁷

In addition, 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

¹⁹³ The author at that time provided *pro bono* legal services to CEON and commenced this matter on their behalf before the Commission.

¹⁹⁴ Paragraph 2.7.

¹⁹⁵ *Ibid.*

¹⁹⁶ *Ibid.*

¹⁹⁷ *Ibid.*

innovative multimedia content applications services to subscribers.¹⁹⁸ These mobile multimedia services arise from the convergence of computing, communications and established media, and delivered via mobile communications networks.¹⁹⁹ Such services will be a total integration of voice, data and video images, in two-way (interactive) communication mode.²⁰⁰

In this regard, access to 2G and 2.5G mobile network infrastructure is a relevant market within the meaning of the Competition Regulations and if MNOs decided to increase significantly the price of accessing 2G and 2.5G network infrastructure, due to the absence of a cost effective substitute, 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.²⁰¹

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

According to CEON, 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.²⁰² CSC functions through subscribers, MNOs, connection/content aggregators, application providers and MCSPs.²⁰³ 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.²⁰⁴ 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.²⁰⁵ All short code services are also mobile value added services and holders of a value added service license issued by the Commission.²⁰⁶ MCSPs providing their service through short codes are normally connected to a mobile network through its short message service center (SMSC).²⁰⁷ According to CEON, because 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 Competition Regulations.²⁰⁸

¹⁹⁸ Paragraph 2.8.

¹⁹⁹ *Ibid.*

²⁰⁰ *Ibid.*

²⁰¹ Paragraph 2.9.

²⁰² Paragraph 2.11.

²⁰³ *Ibid.*

²⁰⁴ *Ibid.*

²⁰⁵ Paragraph 2.12

²⁰⁶ *Ibid.*

²⁰⁷ *Ibid.*

²⁰⁸ Paragraph 2.13.

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

According to CEON, 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.²⁰⁹

Thus, with respect to these downstream markets, CEON referred to them collectively as Mobile Content Service (MCS) for the purpose of the Complaint.²¹⁰

Geographic market

CEON defined the relevant geographic market as within the geographic territory of the Federal Republic of Nigeria.²¹¹

²⁰⁹ Paragraph 2.15.

²¹⁰ Paragraph 2.16.

²¹¹ Paragraph 2.18.

CHAPTER 9

A REVIEW OF A BILL FOR AN ACT TO ESTABLISH THE FEDERAL COMPETITION COMMISSION AND FOR PURPOSES CONNECTED THEREWITH

Introduction

This chapter reviews “A Bill for an Act to Establish the Federal Competition Commission and for Purposes Connected Therewith” (HB. 01 or the Bill) which is sponsored by Honourable Yakubu Dogara, the present Speaker of the House of Representatives. The primary aim of this review is to identify the relevance of the Bill to holders of a communications license, and in particular, how the Bill affects the regulatory oversight functions of the Commission, if eventually enacted in its present form.

Lastly, this chapter presents the main conclusions and findings of this review.

Legislative history and overview of the Bill

The long title of the Bill is A Bill for an Act to Establish the Federal Competition Commission and for Other Matters Connected Therewith (HB. 01). The Bill is sponsored by Honourable Yakubu Dogara (the present Speaker of the House of Representatives, representing *Bogor/Dass/Tafawa Balewa* Federal Constituency of Bauchi State), and was read for the first time on Tuesday, July 28, 2015. On Tuesday, December 15, 2015, the Bill went through second reading and was subsequently referred to the House Committee on Commerce. On May 31, 2016, the House Committee on Commerce organised a public hearing on the Bill, whilst the report of the Committee on the Bill was laid before the House on October 6, 2016. It should however be noted that the Bill appears to be of high importance to the Speaker, having sponsored an exact copy of the same instrument as a member of the House of Representative in the last legislative session (7th Legislative Assembly), which was titled HB. 44.

The purpose of the Bill is set out in Clause 50, which is to promote and maintain competition in Nigeria in order to *inter alia* control or eliminate restrictive agreements or arrangements among enterprises or mergers or acquisitions or abuse of dominant positions of power, which limit access to markets or otherwise unduly restrain competition. The Bill seeks to create the Federal Competition Commission (the FCC),¹ which is charged with the statutory responsibility of regulating competition in all sectors of the Nigerian economy. In this regard, the Bill seeks to regulate anti-competitive practices in all sectors of the economy including in the communications sector. In achieving this aim, the Bill will create the FCC as Nigeria’s primary competition enforcement agency. The powers of the FCC, as set out in Clause 1 (16) of the Bill, are:

¹ See, Clause 1 (1).

- a) making enquiries and investigations on its own initiative or upon receiving complaints;
- b) taking necessary decisions, including the imposition or recommendation of sanctions as it may deem appropriate having regard to the circumstances of the case;
- c) assisting in the preparation, amendment and review of legislation on restrictive trade practices or on a related area of regulation and competition policy;
- d) making and issuing regulations for the regulation of competition, the pre-notification and approval of mergers and acquisitions that are to take effect in Nigeria;
- e) monitoring the growth and development of the industries and commerce in the country;
- f) controlling the abuse or use of or acquisition and abuse of dominant positions of market power by any means whatsoever;
- g) overseeing the procedure for eliminating traditionally held Government monopolies ;
- h) introducing adequate measures to discourage collaborative practices tending directly or indirectly to prevent, restrict or distort normal competition within Nigeria;
- i) monitoring and cooperating with the various agencies regulating competition within and outside Nigeria;
- j) prescribing regulations and rules for the competitive conduct of trade in goods and services and for the control of mergers and acquisition within the Nigerian market; and
- k) promoting and supporting competition advocacy activities of public and private agencies, professional bodies, the organised private sector and consumer groups.

Relevance of the Bill to Licensees

Part II – Agreements

Which is referred to in the Bill as a Part II prohibition,² prohibits agreements between undertakings, decisions by association of undertakings and concerted or collaborative practices tending directly or indirectly to prevent, restrict or distort normal competition within the Economic Community.³ The Bill did not define the meaning of “Economic Community,” however, it would seem that the meaning contemplates Nigeria in view of the fact that Clause 50 expressly refers to Nigeria as the territorial scope of the Bill’s

² Clause 2(2).

³ Clause 2 (1).

application.⁴ Also unless stated otherwise, any reference to “an agreement” should be read as a reference to an agreement between undertakings, decisions by a group of undertakings or to a concerted collaborative practice.⁵

It is important to state that a Part II prohibition under the Bill is substantially similar to Chapter I prohibition: Agreements etc. preventing, restricting or distorting competition under the Competition Act 1998 (CA) currently in force in UK. Chapter I prohibition under the CA is based on Article 101 of the TFEU.

The “agreement” requirement

An agreement as defined under Clause 55 means *arrangement or contract whether overt or covert, written, oral or implied, whether required by statute or not*. For a violation of a Part II prohibition, the challenged conduct *must* result from an agreement entered into between undertakings. It is doubtful that a unilateral conduct of an undertaking (or a Licensee) would constitute a Part II prohibition. An agreement under a Part II prohibition will include agreements whether legally enforceable or not, written or oral; it includes so-called gentlemen’s agreements. There does not have to be a physical meeting of the parties for the contract to be concluded: an exchange of letters or telephone calls may suffice.

The fact that a party may have played only a limited role in the formation of an agreement, or may not be fully committed to its implementation, or may have participated only under pressure from other parties in our opinion, does not mean that s/he is not a party to the agreement.

Undertakings

The term undertaking is not defined in the Bill, neither was it defined in the CA or the TFEU, however its meaning has been set out in CJEU case laws. It covers any natural or legal person engaged in economic activity, regardless of its legal status and the way in which it is financed.⁶ It includes companies, firms, businesses, partnerships, individuals operating as sole traders, agricultural co-operatives, associations of undertakings (e.g. trade associations), non profit-making organisations and (in some circumstances) public entities that offer goods or services on a given market. The key consideration in assessing whether an entity is an undertaking for the application of Article 101 and/or the Chapter I prohibition is whether it is engaged in economic activity. In the author’s view, this consideration would also apply in a Part II prohibition and a Licensee would come within the meaning of an undertaking under the Bill.

Article 101 and the Chapter I prohibition do not apply to agreements where there is only one undertaking: that is, between entities which form a single economic unit. In particular, an agreement between a parent and its subsidiary company, or between two

⁴ For the purpose of this analysis any reference to Economic Community is a reference to Nigeria and *vice versa*.

⁵ Clause 2 (3).

⁶ See, Case C-41/90 *Höfner and Elser v. Macrotron* [1991] ECR I-1979, [1993] 4 CMLR 306 and Case T-319/99 *Fenin v. Commission*, [2003] ECR IT-357.

companies which are under the control of a third, will not be agreements between undertakings if the subsidiary has no real freedom to determine its course of action on the market and, although having a separate legal personality, enjoys no economic independence.⁷ Consistent with CJEU case laws, the author is of the opinion that an agreement entered between a parent company and its subsidiary cannot be said to come within the scope of a Part II prohibition.

Decisions by association of undertakings

Part II prohibition also covers decisions by associations of undertakings. Trade associations operating in the communications sector like Association of Telecommunication Companies of Nigeria (ATCON) and Association of Licensed Telecommunication Companies in Nigeria (ALTCN) are types of association of undertakings, but the provisions are not limited to any particular type of association. A decision by a trade association may include, for example, the constitution or rules of an association of undertakings or its recommendations or other activities.⁸ In addition, resolutions, binding decisions of the association also constitute "decisions" of the association. The focus on inquiry is whether the decision, whatever form it takes, is likely to directly or indirectly influence the conduct or coordinate the activity of members of the association. A trade association's co-ordination of its members' conduct in accordance with its constitution may also be a decision even if its recommendations are not binding on its members, and may not have been fully complied with. It will be a question of fact in each particular case whether an association of undertakings is itself a party to an agreement.

Concerted practices

Under the Bill, a Part II prohibition will also apply to concerted practices as well as to agreements. The key difference is that a concerted practice may exist where there is informal co-operation without any formal agreement or decision.

For instance, the Competition and Markets Authority (CMA), the present competition enforcement agency in the UK, in considering the existence of a concerted practice, will normally follow the relevant decisional practices of the EC established under Article 101.⁹ The CMA will need to establish that the parties, even if they did not enter into an agreement, knowingly substituted cooperation between them for the risks of competition.¹⁰

The following are examples of factors which the CMA may consider in establishing if a concerted practice exists:¹¹ whether the parties knowingly entered into practical co-

⁷ See Case 22/71 *Bequelin Import v. GL Import Export* [1971] ECR 949, [1972] CMLR 81

⁸ See *Re National Sulphuric Acid Association Ltd* OJ L260, 3.10.80, p24, [1980] 3 CMLR 429.

⁹ Office of Fair Trading, *Agreement and Concerted Practices: Understanding Competition Law Series* (December 2004), p. 7. It should be noted that at the time of this writing, UK voted to exit the EU, and will thus, no longer bound to follow the decisional practices of the EC, nor to apply or transpose any aspect of EU community law.

¹⁰ Office of Fair Trading, *Agreement and Concerted Practices: Understanding Competition Law Series*, *supra*.

¹¹ *Ibid.*

operation;¹² whether behaviour in the market is influenced as a result of direct or indirect contact between undertakings;¹³ whether parallel behaviour is a result of contact between undertakings leading to conditions of competition which do not correspond to normal conditions of the market;¹⁴ the structure of the relevant market and the nature of the product involved;¹⁵ and the number of undertakings in the market and, where there are only a few undertakings, whether they have similar cost structures and outputs.¹⁶

Tending “*directly or indirectly to prevent, restrict or distort normal competition*” requirement

A Part II prohibition under the Bill will prohibit every agreements however, only agreements tending *directly* or *indirectly* to prevent, restrict or distort normal competition in any part of Nigeria are prohibited. This standard for finding illegality under a Part II prohibition is not different in substantive application, from the *substantial lessening of competition* standard applied in Section 91 (1) of the Act.

The words tending *directly* or *indirectly* should be read disjunctively. Where an agreement *directly* infringes a Part II prohibition, it is presumed to be outrightly illegal and will likely be condemned without an elaborate investigation into its anti-competitive effect. This presumption is based on the serious nature of the restriction and on experience from other competition jurisdictions showing that the direct restrictions of competition is likely to produce negative effects on the market and undermine the broad objectives of the competitive regime.

Examples of agreements which if implemented will *directly* infringe a Part II prohibition are set out in Clause 2 (1) a – f. These agreements are; directly or indirectly fixing prices and fixing trading conditions;¹⁷ limiting or controlling production or investment;¹⁸ sharing markets;¹⁹ collective boycott;²⁰ refusal to grant access to essential facilities or discriminating in granting access to essential facilities;²¹ and tying and bundling.²² These examples are non-exhaustive and FCC can also find an agreement to be restricting competition even if it is not listed under Clause 2 (1). It is also noted that these types of agreement as above and the presumption of their illegality under the Bill is consistent with Section 91 (2) of the Act and Regulations 11 and 12 (2) of the Competition Regulations.

In the case of agreements *indirectly* restricting competition, the author is of the opinion that only in such cases should the effects of the agreements in the market or on

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ Clause 2 (1) a.

¹⁸ Clause 2 (1) b.

¹⁹ Clause 2 (1) c.

²⁰ Clause 2 (1) d.

²¹ Clause 2 (1) e.

²² Clause 2 (1) f.

competition be analysed. This method of competition analysis requires the determination of the relevant market and the assessment of the competitive (or efficiency) effect of the offending practice. This requirement though lacking in the Bill is however provided for in Regulations 6 and 15 of the Competition Regulations where; (a) the definition of the relevant market or markets in accordance with the methodology under Part IV (of the Competition Regulations); (b) impact of the conduct on existing competitors in the identified markets; (c) impact of the conduct on market entry; (d) impact of the conduct on consumers; and (e) degree of interference with competition that injures competitors or consumers are taken into consideration.

It is also noteworthy to mention that an agreement that is prohibited by the Bill may also be in breach of a license condition. For example, condition 7 of both the Digital Mobile License (DML) and Unified Access Service License (UASL) prohibits any form of anti-competitive conduct. Therefore, Licensees in these license categories must ensure that they do not breach the license condition prohibiting anti-competitive conducts and a Part II prohibition of the Bill.

In essence, a Part II prohibition would prohibit an undertaking from entering into any form of agreement tending directly or indirectly to prevent, restrict or distort normal competition in any part of Nigeria.

Agreements exempted under Part II

The FCC under Clause 3 of the Bill may on the notification of parties approve specialisation agreements, joint buying or joint selling agreements in respect of particular products only if it finds that; such specialisation or such joint buying or selling will make for a substantial improvement in the production or distribution of those products;²³ the agreement in question is essential in order to achieve these results and is no more restrictive than is necessary for that purpose;²⁴ and the agreement is not liable to give the persons concerned the power to determine the prices, or to control or restrict the production or marketing, of a substantial part of the products in question in Nigeria, or to shield them against effective competition from other persons within Nigeria.²⁵

Basically, for a Clause 3 exemption to apply, the agreement must satisfy three (3) cumulative requirements which are; the agreement must result in efficiencies; the efficiency claimed must be specific to either the joint buying or joint selling agreement; and the agreement will not potentially create or enhance the market power of either or both parties to the agreement. A typical example of such an agreement in the communications sector would be a marketing joint venture entered into between MNOs whereby a party takes advantage of the other's brand name and marketing skills, and *vice versa* or to create a larger subscriber base for both parties. Other forms of agreements meeting the requirements of Clause 3 shall also be exempted from the

²³ Clause 3 (1).

²⁴ Clause 3 (2).

²⁵ Clause 3 (3).

application of a Part II prohibition by the FCC,²⁶ however such agreements shall be revoked or modified by FCC if it finds that as a result of a change in circumstances the agreement no longer meets these requirements, or that the actual results of the agreement or of the notification thereof are contrary to the requirements for its approval.²⁷

All agreements coming within the scope of a Part II prohibition (and not exempted by Clause 3) shall be declared void and cannot be relied upon before any court or tribunal in Nigeria.²⁸ Lastly agreements entered before the Bill is enacted to an Act, shall be registered with FCC within three (3) months of enactment.²⁹ Such agreements that are registered shall remain provisionally in force until a decision has been taken by the FCC.³⁰

Part III – Abuse of Dominant Position

Referred to in the Bill as a Part III prohibition,³¹ it prohibits conduct by one or more enterprises which amounts to the abuse of dominant position in the Nigerian market particularly where an enterprise, either by itself or acting together with a few other enterprises, position itself by acting together with a view to controlling the relevant market for a particular good or service, or groups of goods or services³² or where the acts or behavior of a dominant enterprise limit access to the relevant market or otherwise unduly restrain competition³³ or where the purpose of the conduct is not for the attainment of a legitimate commercial objective such as quality, or safety or adequate distribution of the service.³⁴

Part III prohibition would prohibit conduct by one or more enterprises (or undertakings) which amounts to the abuse of a dominant position in a market in Nigeria. As explained in Chapter 6, the case law of CJEU has defined a dominant position as:³⁵

“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”

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. As explained in previous

²⁶ Clause 4 (1).

²⁷ Clause 4 (3).

²⁸ Clause 3 (6).

²⁹ Clause 8 (10).

³⁰ *Ibid.*

³¹ Clause 8 (3).

³² Clause 8 (1) a.

³³ Clause 8 (1) b.

³⁴ Clause 8 (1) c.

³⁵ Case C27/76 *United Brands v. Commission*, [1978] ECR 207, [1978] 1 CMLR 429.

chapters, the Commission has stated the following criteria contained in the Competition Regulations should be used for evaluating the potential for individual dominance in a service market.³⁶ They are; market share, relative size, control of essential facilities, negotiating position of customers, ease of market entry, and rate of technological change. Collective dominance may also exist when two or more undertakings are linked in such a way that they adopt the same conduct in the market. Light was shed on the meaning of collective dominance by the ECJ in the case of *Compagnie Maritime Belge Transport v. Commission*.³⁷ The ECJ stated that a dominant position may be held by two or more economic entities legally independent of each other if, from an economic point of view, they present themselves or act together on a market as a collective entity.

Consistent with the legal literature and precedents from the EU in respect of the evaluation of potential joint or collective dominance in the market for mobile telecommunications services, the Commission has summarised³⁸ entry barriers, frequent interaction among firms, low levels of innovation, symmetry among providers, structural links and cooperation agreements among firms, and fast demand growth as the main factors that support the emergence of collective dominance in a market.

A Part III prohibition would prohibit an undertaking holding a dominant position (either individually or collectively with other enterprises) in the relevant market from abusing such position of dominance. Like Part II prohibition, Part III prohibition is substantially similar to a Chapter II prohibition under the CA. Chapter II prohibition is based on Article 102 of the TFEU. It should be noted that the *holding* of a dominant position is not prohibited but rather it is the *abuse* of a dominant position that is prohibited.

Clause 8 (2) a – f sets out particular practices which would constitute an abuse of a dominant position. Some of these practices are; unfair trading conditions for purposes of eliminating competition,³⁹ output restriction,⁴⁰ resale price maintenance⁴¹ and tying and bundling.⁴² As with Part II prohibition these examples are non exhaustive and an enterprise or enterprises could still be found to have infringed a Part III prohibition even though the particular practice is not listed under Clause 8 (2). Unlike the Act and Competition Regulations, the Bill does not give any guidance on the criteria used for evaluating dominance in the relevant market which requires the identification of the relevant market and competition issues raised by the abusive practice, neither does a Part III prohibition take into consideration practices of minor significance.

A conduct may be in breach of a Part III prohibition and or a communications license condition. For instance, *dissimilar conditions to equivalent transactions* under Clause 8(2) e of the Bill would also be breaching the license condition prohibiting *undue*

³⁶ Nigerian Communications Commission, *Determination of Dominance in Selected Communications Market in Nigeria* (March 26 2010), pp. 7- 9.

³⁷ Joined Case C-395/95 P.

³⁸ Nigerian Communications Commission (March 26 2010), *supra*, p. 18.

³⁹ Clause 8 (2) a.

⁴⁰ Clause 8 (2) b.

⁴¹ Clause 8 (2) c.

⁴² Clause 8 (2) f.

discrimination under condition 5 of the UASL. Where a practice has not been absolutely prohibited by a Part III prohibition, the FCC may authorise or exempt such practices in accordance with Clause 15 which requires that the parties concerned make an application to FCC requesting it to examine and authorise and or exempt the particular practice.⁴³

Part IV – Mergers, Takeovers and Acquisitions

Referred to in the Bill as a Part IV prohibition,⁴⁴ it prohibits every merger, takeover, joint venture, or other business combination including interconnected directorships of a horizontal, vertical or conglomerate nature where; such transaction will enable enterprises acting alone or in concert to maintain profitable prices at an uncompetitive level for a significant period of time,⁴⁵ where the resultant market share in the relevant market will create a dominant position or a substantial reduction of trade in the market.⁴⁶ Thus, the substantive test for assessing a merger under the Bill is the test of dominance. A strict application of this provision in the communications sector will require that all mergers, takeovers and acquisition contemplated between Licensees (or between a Licensee and another party) would come under the scrutiny of the Bill and the FCC.

Pursuant to a Part IV prohibition, an undertaking is also prohibited from engaging in any form of business combination where the merged or resultant entity (or entities) is capable of maintaining prices at an uncompetitive level over a significant period of time or would have market power or is capable of substantial reduction of trade. In this context, the substantive test for determining whether a business combination will infringe a Part IV prohibition is whether there will be a *substantial reduction of trade*.

All such mergers, takeovers, joint ventures or other acquisition of control whether of a horizontal, vertical or conglomerate nature are required to be notified to the FCC in cases where at least one of the enterprises is incorporated in Nigeria and the resultant market share in the relevant market will create a dominant position.⁴⁷ By virtue of this provision, an undertaking incorporated in Nigeria (including Licensees) would be required to inform the FCC of any business combination that it intends to take part in where the resultant entity will hold a dominant position in the relevant market. As previously noted above, the Bill has not provided any guidance on how the identification of the relevant market is to be carried out and the criteria used for evaluating dominance in that market. Mergers and acquisition not absolutely prohibited may also be authorised or excluded if notified under Clause 15 of the Bill.⁴⁸ Mergers and acquisitions executed prior to enacting the Bill are required to be registered with the FCC within three months of enacting the Bill into an Act.⁴⁹

⁴³ Clause 8 (9).

⁴⁴ Clause 13 (2).

⁴⁵ Clause 11 (1) (a).

⁴⁶ Clause 11 (1) (b).

⁴⁷ Clause 12 (1).

⁴⁸ Clause 13 (1).

⁴⁹ Clause 14.

Lastly it is noted that agreements implementing business combinations may still be caught by Part II prohibition if it is capable of directly or indirectly restricting competition.

The effect of the Bill on the regulatory oversight function of the Commission

The Bill seeks to regulate anti-competitive practices in all sectors of the economy including in the communications sector. In achieving this objective, the Bill will create FCC as Nigeria's primary competition enforcement agency. The powers of FCC are set out in Clause 1 (16) of the Bill. On the other hand, the Act provides the Commission with the broad authority to regulate the communications sector in Nigeria including the promotion of competition in that sector.⁵⁰ Clause 48 of the Bill grants the Commission (as the communications sector regulator) the power to exercise and apply the provisions of Part II – Part IV prohibitions⁵¹ of the Bill in the communications sector. In granting this power to the Commission, the Bill in Clause 7 (3) 1 of Schedule 1 seeks to repeal and re-enact the competition provisions of the Nigerian Communications (Amendment) Decree of 1998 (Decree or the Decree).⁵²

In the event of such concurrent application of the provisions of the Bill in the communications sector, any reference to the FCC shall be deemed to mean a reference to the Commission, provided however that appeals against the decisions of the Commission shall lie straight to the Appeal Tribunal in accordance with Part VII of the Bill,⁵³ in other words the powers and function of FCC under the Bill will now be ascribed to the Commission for the purpose of regulating competition in the communications sector. However, it is unclear how FCC and other sector specific regulators (including the Commission) will be able to exercise these functions and power (of the FCC) concurrently and co-ordinate the performance of these functions.

The enforcement powers created under the Bill are similar to those in existence in the UK where the CMA is vested with general powers of enforcement of the CA and the UK Enterprise Act,⁵⁴ and the Office of Communications (OFCOM) is vested with the powers of the CMA in the communications sector in the UK.⁵⁵ The key to the success of such an arrangement, as it is being practiced in the UK, is in the author's opinion, a consensus

⁵⁰ See generally Section 4.

⁵¹ These provisions respectively prohibits; agreements between undertakings, decisions by association of undertakings and concerted or collaborative practices tending directly or indirectly to prevent, restrict or distort normal competition; abuse of a dominant position; and every merger, takeover, joint venture, or other business combination including interconnected directorships of a horizontal, vertical or conglomerate nature where such transaction will enable enterprises acting alone or in concert to maintain profitable prices at an uncompetitive level for a significant period of time, where the resultant market share in the relevant market will create a dominant position or a substantial reduction of trade in the market.

⁵² It should be noted that this Decree has already been repealed by the Act.
Section 48 (1) 3.

⁵⁴ These are the primary sources of competition law in the UK.

⁵⁵ Of note here is the fact that neither the CMA nor OFCOM were established under the CA. While both CMA and OFCOM derive regulatory powers from the UK Communications Act 2003, the former is a product of the Enterprise and Regulatory Reform Act 2013 while the later was created by the Office of Communications Act 2002.

between these regulatory agencies whereby concessions are made as to hierarchy with respect to powers of enforcement in the relevant sector. It is therefore important to note here that it may be more practicable for there to be some sort of arrangement between the FCC and the Commission as to the enforcement of the provisions of the Bill in relation to the communications sector in order to prevent clashes between the two agencies especially as there is no provision in relation to hierarchy for exercising the powers created under the Bill.

However, it is also noted that firstly, the Decree has already been repealed by the Act,⁵⁶ and may not be repealed again. Secondly, it is unclear what the purpose of re-enacting the Decree is meant to serve. The Act already contains powers of the Commission to make regulations with regards to competition issues and pursuant to this power, the Competition Regulations has been made. Thirdly and more importantly, the provision as currently drafted is somewhat ambiguous and unclear as to its meaning. It is likely that the provision would be amended to reflect the proper intent of the Bill. While it is possible that the Bill will have actually intended for the repeal of the Act instead of the Decree, it is arguable that absent legislative intent to the contrary, the repeal and reenactment of the Decree in the Bill will not bar the Commission from applying the competition provision of Act should the Bill eventually come into force. At that stage, where any provisions of the Act conflicts with any provision of the Bill (if finally enacted), the courts consistent with the common law rule of statutory interpretation are likely to hold that the provision of the Bill will prevail over the Act being later in time. Consequently, the Bill if passed in its present form, will only allow the Commission to be able to exercise the powers and functions of FCC and also to apply the provisions of Part II – Part IV prohibitions to the communications sector.⁵⁷

Conclusion

Licensees, come within the meaning of an undertaking under the Bill. The Bill *inter alia* also seeks to control and eliminate restrictive agreements or arrangements among enterprises, which limit access to markets or otherwise unduly restrain competition as well as establish rules for the protection and promotion of competition in Nigeria.

However, the Bill exemplifies poor legislative draftmanship, for instance, the Bill in paragraph 7 of Schedule 1 seeks to repeal and re-enact the Nigerian Communications Commission (Amendment) Decree 1998, which law is no longer in force in the light of the present legal regime applicable to Nigeria's communications sector. In this regard, if the Bill is eventually enacted in this form, it is likely to be faced with practical challenges and regulatory uncertainty in its implementation. This in turn may undermine its principal objective of regulating anti-competitive practices in Nigeria.

Another exemplification of the poor legislative draftmanship of the Bill is the conflict in the requirement of registering agreements and mergers within a certain period following

⁵⁶ See Section 150 (1) b.

⁵⁷ And any other incidental powers that flow from the application of these provisions.

enactment pursuant to Clauses 10⁵⁸ and 14⁵⁹ on one part, and Clause 52 (1) on another part, which clause provides that “*Agreements made before the Bill comes into force, but which would be subject to this Act thereafter may continue in force for not more than 1 year before being notified to the [FCC]*”. In this regard, it is unclear which is the proper operative grace period (3 months or 1 year?) or the prevailing transitional provision that regulates the proper coming into operation of the Bill.

It is unlikely that the Bill is will be enacted into law in its present form without material amendments to its provisions as there exist ambiguities such as it contains several references to repealed laws and is inconsistent in its use of several terms and phrases and also in chronological indication which will need to be addressed before enactment into law.

⁵⁸ Clause 10 of the House Bill provides that “*Agreements in existence prior to the promulgation of this [Bill] must be registered with the Commission ... within three months of the passing into law of this [Bill]*”

⁵⁹ Clause 14 of the House Bill “*Merger and acquisitions in existence prior to the promulgation of this [Bill] must be registered with the Commission ... within three months of the passing into law of this [Bill]*”

Index

- abuse 9, 10, 42, 43, 45, 49, 52, 72, 83, 85, 90, 98, 102, 103, 110, 111, 129, 137, 138, 145, 148, 153, 154, 155, 156, 157, 162, 165, 166, 193, 197, 223, 230, 243, 244, 249, 250, 252
- abuse of a dominant position 9, 45, 52, 72, 83, 85, 90, 111, 129, 137, 138, 145, 148, 153, 154, 155, 162, 165, 193, 197, 230, 249, 250, 252
- access to, and use of 64, 111, 137, 155, 156, 157, 159, 160, 161, 162, 163, 165, 166, 167, 183
- specific network facilities
- accounting separation 64, 111, 137, 155, 156, 157, 159, 160, 161, 162, 163, 165, 166, 167, 183
- agreement 7, 9, 27, 28, 31, 49, 52, 68, 69, 81, 82, 83, 85, 86, 87, 89, 113, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 148, 149, 150, 151, 167, 171, 178, 197, 214, 245, 246, 247, 248
- anti-competitive agreement 9, 42, 115, 119, 121, 134
- anti-competitive conduct 42, 46, 51, 77, 78, 79, 80, 83, 102, 122, 154, 155, 156, 160, 163, 166, 217, 224, 230, 231, 232, 233, 236, 248
- anti-competitive effect 42, 69, 109, 121, 131, 140, 141, 155, 165, 172, 173, 179, 180, 189, 194, 205, 208, 212, 213, 247
- anti-competitive foreclosure 72, 74, 75, 76, 129
- anti-competitive practice 9, 10, 44, 85, 91, 105, 113, 114, 223, 224, 225, 243, 252, 253
- antitrust 43, 45, 46, 72, 122, 124, 127, 129, 131, 142, 144, 160, 179, 183, 186, 215, 230, 231, 233, 235
- arrangement 33, 49, 52, 69, 73, 74, 78, 96, 97, 100, 102, 111, 115, 116, 117, 118, 119, 120, 123, 124, 129, 130, 149, 177, 183, 245, 252
- barriers to entry 47, 59, 68, 77, 146, 162, 163, 164, 185, 188, 190, 192, 200
- behavioural remedies 210
- bid rigging 132
- boycott 42, 118, 127, 128, 219, 247
- bundled discounting 100
- bundling 41, 43, 97, 99, 100, 101, 102, 155, 212, 247, 250
- buyer power 142, 145, 199
- cartel 69, 83, 115, 116, 118, 134, 137, 138, 204, 235, 236
- collective dominance 149, 150, 151, 152, 153, 194, 197, 250
- collusive 115, 116, 132, 133, 174, 180
- communications markets 7, 9, 52, 60, 84, 134, 162, 163, 171, 177, 181, 224, 230
- competition 1, 2, 3, 4, 9, 22, 41, 42, 43, 44, 45, 46, 47, 49, 50, 51, 52, 53, 54, 55, 57, 59, 60, 61, 67, 68, 69, 70, 71, 72, 73, 74, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 96, 97, 98, 99, 100, 101, 102, 103, 105, 106, 107, 108, 109, 110, 111, 112, 114, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 134, 137, 138, 139, 140, 141, 142, 144, 145, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 171, 173, 174, 175, 177, 179, 180, 181, 182, 183, 184, 185, 187, 188, 189, 190, 191, 192, 193, 194, 195, 197, 198, 199, 200, 201, 202, 203, 204, 206, 207, 208, 209, 210, 212, 213, 214, 215, 217, 219, 220, 222, 226, 229, 230, 231, 232, 233, 235, 236, 240, 243, 244, 245, 246, 247, 248, 249, 250, 252, 253
- conduct 42, 69, 71, 72, 73, 75, 76, 79, 129, 130, 138, 144, 154, 157, 164, 187, 194
- contract 77, 116, 117, 118, 119, 122, 123, 124, 133, 134, 135, 223, 245
- controls on a retail market 64, 111, 137, 155, 156, 157, 159, 160, 161, 162, 163, 165, 166, 167, 183

coordinated effects	43, 174, 191, 194, 201, 210
cross-elasticity	54, 55
cross-subsidisation	106, 107, 111, 155, 158
customer churn	92, 145
customer foreclosure	74
damages	72, 220, 221, 222, 231, 232, 233, 234, 235, 236
damages for loss of profit	72, 220, 221, 222, 231, 232, 233, 234, 235, 236
damages for overcharge	72, 220, 221, 222, 231, 232, 233, 234, 235, 236
de minimis	80, 81, 82, 192, 193
defence	172, 202, 206, 207
demand-side substitutability	52, 53, 55, 56, 57
discrimination	4, 77, 89, 90, 91, 93, 94, 95, 96, 158, 159, 165, 166, 167, 186, 210, 211 217, 251
doctrine	83, 87, 88, 89, 112, 113, 164, 247, 250
dominance	9, 43, 52, 64, 83, 85, 92, 101, 105, 111, 119, 137, 138, 139, 140, 141, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 161, 162, 165, 166, 167, 171, 179, 180, 181, 185, 193, 194, 195, 196, 197, 199, 225, 250, 251
downstream market	74, 75, 76, 96, 109, 110, 142, 154, 175, 181, 183, 184, 185, 186, 198, 211, 241, 242
ease of market entry	146, 250
economies of scale	44, 74, 76, 144, 148, 164, 188, 197, 198, 203
efficiencies	172, 175, 180, 187, 197, 203, 204, 205, 206, 208, 248
entry barriers	74, 84, 151, 163, 188, 190, 197, 250
essential facilities	83, 87, 88, 89, 112, 113, 164, 247, 250
ex ante	64, 111, 137, 155, 156, 157, 159, 160, 161, 162, 163, 165, 166, 167, 183
ex post	156, 162
excessive pricing	41, 43, 108, 111, 166
exclusionary	42, 69, 71, 72, 73, 75, 76, 79, 129, 130, 138, 144, 154, 157, 164, 187, 194
exclusive dealing	43, 73, 74, 76, 77, 111, 130, 133
exploitative	46, 72, 78, 138, 154, 157, 164
failing firm	172, 202, 206, 207
failing to supply	2, 6, 7, 26, 27, 28, 29, 30, 34, 65, 83, 84, 85, 86, 87, 88, 89, 90, 93, 94, 95, 98, 104, 108, 112, 113, 126, 144, 150, 157, 158, 159, 166, 167, 168, 177, 183, 223
functional separation	64, 111, 137, 155, 156, 157, 159, 160, 161, 162, 163, 165, 166, 167, 183
geographic market	49, 51, 52, 53, 58, 59, 126, 190, 192, 242
horizontal merger	78, 138, 174, 183, 184, 185, 189, 192, 195, 196, 204, 205, 207, 209, 210
horizontal price fixing	123, 131
horizontal rate fixing	123
injunction	130, 219, 220, 221, 222, 223, 229, 232, 235
interconnection	2, 6, 7, 26, 27, 28, 29, 30, 34, 65, 83, 84, 85, 86, 87, 88, 89, 90, 93, 94, 95, 98, 104, 108, 112, 113, 126, 144, 150, 157, 158, 159, 166, 167, 168, 177, 183, 223
internet	10, 13, 19, 30, 31, 32, 37, 38, 45, 62, 63, 86, 114, 180, 181, 186, 199, 209, 242
joint dominance	148
joint venture	124, 178, 186, 198, 209, 210, 211, 212, 248, 251, 252
lo	84, 107, 213
local loop	65, 88, 98, 99, 110, 150, 158
margin squeeze	73, 107, 108, 109, 110, 111, 154, 155, 159, 166
market allocation	81, 132, 133

INDEX

- market definition 49, 50, 51, 52, 53, 58, 60, 82, 162, 182, 183, 193
- market power 9, 43, 44, 45, 46, 47, 49, 50, 51, 57, 63, 64, 70, 73, 76, 78, 80, 82, 83, 91, 105, 108, 109, 111, 122, 124, 129, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 153, 154, 155, 156, 157, 160, 161, 162, 165, 166, 174, 175, 179, 180, 181, 183, 185, 186, 187, 188, 189, 191, 193, 194, 195, 198, 199, 201, 202, 209, 211, 223, 236, 244, 248, 249, 251
- market share 68, 74, 75, 81, 82, 97, 104, 139, 142, 143, 180, 184, 192, 195, 196, 199, 202, 224, 250, 251, 252
- market sharing 118, 126, 127, 133, 219, 234
- mitigation of damages 72, 220, 221, 222, 231, 232, 233, 234, 235, 236
- monopolisation 141
- monopsony 111, 141, 142
- MTN 38, 84, 91, 92, 105, 111, 143, 144, 153, 165, 166, 167, 178, 179, 193, 194, 199, 207, 213, 223, 225, 228, 232, 240
- non-coordinated effects 174, 194
- non-discrimination 64, 111, 137, 155, 156, 157, 159, 160, 161, 162, 163, 165, 166, 167, 183
- non-price discrimination 4, 77, 89, 90, 91, 93, 94, 95, 96, 158, 159, 165, 166, 167, 186, 210, 211, 217, 251
- output restriction 250
- overcharges 224, 235
- per se 42, 69, 121, 122, 124, 125, 127, 128, 129, 131, 132, 205
- potential competitor 71, 75, 76, 77, 81, 103, 146, 188
- practice 42, 69, 71, 72, 73, 75, 76, 79, 129, 130, 138, 144, 154, 157, 164, 187, 194
- predatory pricing 41, 43, 44, 45, 73, 91, 100, 101, 103, 104, 105, 106, 107, 111, 155, 195, 223, 225, 231
- presumption 9, 43, 52, 64, 83, 85, 92, 101, 105, 111, 119, 137, 138, 139, 140, 141, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 161, 162, 165, 166, 167, 171, 179, 180, 181, 185, 193, 194, 195, 196, 197, 199, 225, 250, 251
- price control and cost 64, 111, 137, 155, 156, 157, 159, 160, 161, 162, 163, 165, 166, 167, 183
- accounting obligations
- price discrimination 4, 43, 54, 77, 89, 90, 91, 93, 94, 95, 96, 158, 159, 165, 166, 167, 186, 210, 211, 212, 217, 251
- price fixing 41, 81, 116, 123, 124, 131, 132, 235, 236
- product market 47, 49, 51, 52, 54, 55, 57, 60, 61, 63, 85, 129, 133
- rate fixing 118, 122, 123, 131, 219, 231
- reasonable interchangeability 54
- refusal to deal 43, 87, 88, 89, 112, 128
- relevant geographic market 49, 51, 52, 53, 58, 59, 126, 190, 192, 242
- relevant market 49, 50, 51, 52, 53, 54, 57, 58, 59, 60, 67, 68, 70, 72, 73, 74, 75, 77, 78, 81, 82, 83, 84, 103, 106, 112, 122, 125, 129, 130, 131, 132, 139, 140, 141, 143, 144, 148, 152, 161, 165, 174, 180, 182, 183, 187, 188, 190, 194, 195, 196, 197, 201, 206, 210, 230, 231, 240, 241, 247, 248, 249, 250, 251, 252
- remedies 72, 134, 137, 156, 157, 172, 203, 208, 209, 210, 213, 215, 217, 221, 224, 226, 228, 229, 232
- resale price maintenance 125, 133, 250
- restriction by object 69, 81, 121, 123, 129, 132
- rule of reason 42, 124, 125, 126, 127, 128, 131
- structural remedies 209, 210
- substantial lessening of competition test 67, 68, 70-71, 74, 96, 121, 131, 154, 171, 179-182, 194

sunk cost	103, 146, 151, 190
supply-side substitutability	53, 57, 58
switching cost	57, 145, 199, 211
transparency	4, 23, 27, 33, 64, 111, 137, 150, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 183, 208, 212, 214, 217, 218 41, 43, 69,
tying	73, 78, 91, 96, 97, 99, 100, 101, 111, 129, 130, 212, 247,250
understanding	24, 49, 52, 115, 116, 117, 118, 119, 120, 149, 192, 214
unilateral effects	43, 191, 202, 203, 209, 210
upstream market	73, 96, 100, 109, 154, 175, 181, 185, 240
vertical effects	175, 181, 191, 194, 202, 210
vertical foreclosure	73, 184, 185, 202
vertical integration	74, 173, 175, 202
vertical mergers	76, 174, 175, 184, 186, 190, 210
vertical price fixing	133