



Report of the Public Inquiry on Competition Practices Regulations

INTRODUCTION

The Nigerian Communications Commission ("the Commission) pursuant to the powers conferred on it by Sections 70 and 90 of the Nigerian Communications Act, 2003 ("the Act) developed and issued the draft Competition Practices Regulations on September 19, 2006. The draft Regulations were published on the website for comments from the general public especially, operators and stakeholders.

The notice of public inquiry was also advertised on October 6, 2006 in two National Newspapers. The notice required members of the public to submit their comments and observations on the draft Regulations to the Commission before the close of business on 25th October, 2006.

By the close of the business on the 25th October, 2005, the Commission received submissions and comments from:

- Vee Networks Limited (now Celtel Nigeria Limited)
- MTN Nigeria Communications limited
- Nigerian Mobile Telecommunications Limited (M'tel)
- Sidemans & Co (Nig) Limited
- Punuka Attorneys & Solicitors

THE INQUIRY

The Inquiry was held at the Conference Hall, Nigerian Communications Commission, Abuja on the 3rd day of October, 2006 at 12.20 pm.

The Executive Vice Chairman (EVC) welcomed the operators and stakeholders and thanked them for attending the Public Inquiry. He said that the process of the development of the draft Regulations

started with consultations with the stakeholders. He explained that the views expressed by stakeholders and some operators were considered and incorporated into the draft Regulations.

The Director of Legal Services analyzed and made a presentation on issues raised by the stakeholders who had made submissions on the Competition Practices Regulations as requested by the Commission prior to the holding of the public inquiry.

CONSIDERATION OF COMMENTS

The Commission hereby summarizes all the comments received and the Commission's responses.

1. Comment

Part 1 (3) – The regulations applies to all Licensees, and any other provider of communications services in Nigeria. In addition to compliance with these Regulations, Licensees remain subject to any conditions regarding anti-competitive conduct set out in their license.

The operator commented that it has been in compliance with the provisions of the its License, the Nigerian Communications Act, 2003 with respect to these provisions, as evidenced by the fact that the operator has never been sanctioned for any act capable of lessening competition or anti-competitive activities.

Response

The Commission commends the operator and requests that they continue to abide by their license Conditions and all other relevant laws in the industry.

2. Comment

Part 1 (2) (c), Part 11 (6) (a) and Section 92 (1) of the Act

For the purposes of determining dominant licensees in the respective markets, there is need for clear delineation of the respective markets. The operator is of the opinion that clear delineation will create regulatory certainty and transparency.

Response

Regulation 20 and the procedural provisions of Schedule 1 identify the intended methodology for determining particular markets. These markets will be determined in specific proceedings and on the basis of specific circumstances. It is only in the context of specific circumstances that relevant markets can be determined.

3. Comment

There was a comment that there is a contradiction in the definition of when a Licensee is in Dominant position in the draft regulations and the Telecommunications Networks interconnections regulations & therefore should be streamlined with the draft Federal

Competition Commission Bill which specifies 40%. There is need for consistency in the development of policies and regulations for the industry.

Response

The Commission notes the need to ensure consistency and we would harmonize both the Telecommunications Networks Interconnections regulations which is currently under review and the draft Competition Regulations before finalizing the regulations.

While we note the need to be guided by the draft FCC Bill which specifies 40%, it is instructive to note that as a draft bill it is yet to be finalized and may or may not be passed into law.

4. Comment

There was a comment that regulation 22 is in contradiction with regulation 21 and should be expunged.

Response

Regulations 21 & 22 are not contradictory. Regulation 22 is only applicable where two or more licensees act jointly or collectively irrespective of common ownership. International best practice is to provide for regulatory interventions in situations of joint dominance as well as individual operator dominance.

5. Comment

The 30 day period stipulated in the draft regulations within to the requesting party is very short and therefore not feasible. The period should be extended in accordance with the Telecommunications Network Interconnection Regulations.

Response

While we generally note the need to harmonize to avoid contradictory periods, it is pertinent to note that the 30 day period referred to in regulation 9 (a) presumes that there are no circumstances that justify or excuse the failure to supply interconnection services and opening language of Regulation 9 generally. Sub-section (a) should be read together with the opening language in Regulation 9 which implies that if the parties are reasonable in trying to conclude an interconnection agreement or other provisioning terms, the Commission will not find that failure to supply within 30 days was contrary to Regulation 9 (a).

6. Comment

The 60 day notification period for mergers and acquisitions under regulation 29, Part IV is too long and capable of discouraging/diverting foreign direct investments.

Response

We are of the opinion that 60 days advance notification is not unreasonable or impracticable in the change of ownership transactions, as Commission may need more time to review the impact of the proposed mergers and acquisitions on the industry. The

Commission will however consider and put in place an expedited approval option where a transaction needs to be concluded in an exceptionally short period of time.

7. Comment

Section 1(6) of the Draft FCC Bill stipulates that this Act shall be binding and applicable to everybody corporate or other agency of the Federal Govt, State Govt or any Local Govt in so far as such corporation or other agency engages in trade or commercial activity. By virtue of this portion of the FCC Bill, it would appear that the FCC Bill when enacted would be binding on the Commission.

Response

The FCC Bill has not been passed into law and even if it was passed, the Commission does not engage in trade or commercial activity that would be subject to that section.

8. Comment

Section 8 (1) of the SEC Act states that “notwithstanding anything to the contrary contained in any other enactment, every merger, acquisition or combination between or among companies shall be subject to the prior review and approval of the SEC, S. 8 (4) states that nothing in this section shall apply to transactions duly consummated pursuant to authority given by any federal Government owned agency under any statutory provision vesting such power in such agency.

This clearly vests the responsibility of approving any merger or acquisition in the telecoms sector in the SEC as the Communications Act, 2003 does not vest powers in the NCC to approve mergers and acquisitions.

Response

Regulatory requirement of compliance with the Act or Regulations of two different bodies does not constitute an inconsistency. But notifications and approvals are consistent with, and necessary to the effective exercise of the Commission’s regulatory powers under the Nigerian Communications Act, 2003.

9. Comment

There was a comment that in the event that the Commission is not able to resolve any competition related issue, dispute or complaint there should be provided in the regulations, a clear path for escalation of the matter to the Federal High Court.

Response

This has been taken care of in schedule 1, paragraph 4 (d) (iv).

10. Comment

There was a comment that the Commission reserves the right to examine whether there is a degree of interference with competition that results in some form of “identifiable injury” to competitors or consumers under Regulation 7.

Response

Regulation 7 specifies with clarity that substantial lessening will be interpreted by the Commission as requiring some identifiable injury to competitors or consumers.

Regulation 8 gives elucidation of factors relevant to licensee behaviour. What actually constitutes identifiable injury will be established on the basis of particular circumstances and in the course of particular proceedings under the regulations.

11. Comment

An operator commented that it is commendable that the “de minimis” rule will be applied in Regulations 8 (a) with respect to establishing the degree to which competition is substantially lessened, an objective standard/criteria will serve to bring much certainty in establishing the fine line between the ‘trivial’ and the ‘substantial’

Response

The Commission is of the opinion that the regulations provide a sufficiently clear indication of standards and criteria to be applied. Further elucidation will be possible in the circumstances of particular complaints or proceedings; and the procedural requirements of Schedule 1 will ensure that any affected licensee has full opportunity to understand and respond to any potential findings of conduct that is alleged to result in substantial lessening of competition

12. Comment

It was commented that Regulation 9 (e) appears to penalize every valid and legal acquisition of any scarce facilities and resources including numbering, frequency spectrum and rights of way.

Response

The regulations provide guidance to the Commission and licensee regarding the types of conduct that may be found to constitute substantial lessening of competition. Acquisition of scarce resources per se which are necessary for operators’ operations is not objectionable, rather Regulation 9(e) deems conduct such as the pre-emptive acquisition of scarce resources to be anti-competitive. It is the element of the pre-emption that is objectionable.

13. Comment

There was a comment that Regulation 9 (f) is not clear to whom the communication services are being provided and the ambit of the prices referred to. The import of the provisions would appear to impose a price floor which the Commission has expressly refrained from imposing on the retail market.

Response

It is broadly accepted economic principle that pricing goods or services below long run average incremental costs is a strong sign of predatory pricing. The comment is correct in assessing that regulation 9 (f) is directed against the anti-competitive practice of

predatory pricing. The Commission, consistent with its consultative process may consult with stakeholders before adopting any other cost standard pursuant to regulation 9 (f).

14. Comment

The operator requested that the Commission should insert a new regulation 9 (i) which provides as follows: “withholding monies due on obligatory facilities and access provided and services rendered”. This provision will apply where an operator withholds the payment of a debt owed to another operator thereby limiting the ability of the creditor-operator from carrying out its operations as a result of lack of funds.

Response

The procedure for resolving such issues is contained in the Guidelines for the Procedure for granting Approval to Disconnect Telecommunications Operators.

15. Comment

The cost of providing specific licensed services and the requisite scope of operations should be included as criteria for determining market circumstances and criteria when considering the issue of dominance

Response

The special operating circumstances referred to apply to all licensees and do not, in our opinion, materially change the assessment of market dominance. Licensees are to be encouraged and recognized for the investments they make in the sector and the positive contributions they make to Nigerian society. But we see no need to change the criteria of dominance or methodology anticipated in the regulations to reflect these circumstances.

We also emphasize that the Commission does not take the position that dominance in itself is objectionable, it is only when dominance leads to anti-competitive conduct that the Commission would exercise its regulatory power to address the anti-competitive conduct.

16. Comment

There was a comment that reference to competing licensees appear ambiguous as it is not clear whether this term is restricted to licensees within an identified relevant market or all licensees e.g. would fixed network operators be considered to be competing licensees to mobile operators or would CDMA operators be considered competing licensees to GSM operators given the divergence in license obligations and technical/geographic operations. This divergence also exists within the context of the UASL regime.

Response

Regulation 20 and Schedule 1 describes the methodology and procedures to be applied in identifying markets and evaluating dominance in identified telecommunications markets.

17. Comment

There was a comment that no indication has been given with respect to the period of time during which the listed market circumstances criteria exist or persist. The essence of dominance must be established over a definitive period of time.

Response

Dominance will be assessed in particular circumstances, which will include time elements. Dominance does not have to persist for any particular period of time to merit regulatory consideration. Dominance designations should, however be re-examined from time to time and withdrawn where circumstances no longer support a finding of dominance.

18. Comment

There was a comment that the regulatory controls and interventions often have the effect of preventing market entry, curtailing price increments/changes and other commercial conduct. The extent to which this distorts the clear evaluation of market forces of supply and demand should be duly reflected particularly with reference to regulations 19 (d), (e), 20 (b) and (c).

Response

We are of the opinion that the regulation does not need the suggested changes. Regulation 19 and 20 describe a methodology for evaluating dominance in particular telecommunications market. Commercial conduct can be affected by regulatory intervention, but the regulations being commented on address identification of market dominance, not conduct of a dominant licensee.

19. Comment

There was a comment to the effect that a relevant communications market must have some degree of stability and maturity.

Response

This is similar to the comments regarding the need for a time duration as an element of finding dominance in particular markets. Telecommunications markets are increasingly characterized by rapid changes. The intention is that the regulations remain sufficiently flexible to permit their effective application as circumstances change and develop; and this applies to both the initial exercise of authority by the Commission and the need to update and reconsider exercises of authority from time to time.

20. Comment

Operator was of the opinion that a market share of over 40% is low, particularly where there are several licensees, many of whom will be competing in the respective relevant markets.

Response

A 40% standard is a common and recommended measure in economic principle in presumption of dominance and has been adopted in a number of jurisdictions. The 40% is a presumption that can be rebutted in particular circumstances.

21. Comment

Operator requested for a clarification under Regulation 22, as to what would amount to “acting jointly or collectively”

Response

It is our opinion that the existing language of the regulation is clear in its anticipation of some form of deliberate and coordinated behavior

22. Comment

There was comment that in assessing whether any conduct constitutes substantial lessening of competition under Part 11 regulation 6(d) the Commission is expected to emphasize “the impact of the conduct on consumers, including the availability and pricing of products and service.

Rather than merely monitoring conducts, ex post facto, the Commission should adopt an ex ante position that prevents the launching of products by operators when there is clear evidence that the operator cannot sustain the availability of the product to the consumers’ satisfaction.

Response

The recommendation is noted. Regulations 6, 7, 8 and 9 provide a guide on conducts deemed to be substantial lessening of competition. The Commission will not micro-manage the affairs of the operators but will prefer ex-post assessment.

23. Comment

There was a comment that Part 111 14 (a) – (f) should be strengthened to introduce microeconomic analytic measures in assessing the state of prices in the market in order for the Commission to apply moral suasion to force operators to transfer the benefits of economies of scale inherent in their operations to reduce prices.

Response

It is our opinion that there has not been any failure of tariff regulation by the Commission pursuant to Section 108 to 111 of the Nigerian Communications Act, 2003. We believe that the Commission tariff regulation powers under the Act are sufficient to protect the consumers’ welfare.

24. Comment

There was a comment on Part IV, Regulation 2, to the effect that at this stage of the development in the Nigerian market, '40% of the total gross revenue of all licensees in that market' as a measure of dominant position is high given the level of profits, it should be reduced to 35%.

Response

The Commission has received various comments that the percentage should either be higher or reduced to 35%. We reinstate that 40% is consistent with international best practice.

The presumption of dominance in regulation 21 is not dependent on profitability. Profitability can result from a number of factors, including efficient operations and economies of scale

25. Comment

There was a comment that the Commission should redraft the provisions of regulations which provides as follows "without prejudice to any anti-competition conduct set out in their license

Response

Noted. The regulations will be finalized in consistent with proper legal drafting procedure.

26. Comment

Regulation 7 should be completely rearranged.

The definition of "trivial or de minimis" degree of interference should be included in the regulation

Response

Noted. The regulations will be finalized consistent with proper legal drafting procedure.

On the definition 'de minis' level of interference, it is to be interpreted in particular circumstances.

27. Comment

There was a question as to when licensees are required to submit agreement under Regulation 9 to the Commission for review. Is it 30/60 days after its initial draft, or is it before or after execution?

Response

Regulation 9 is flexible to permit the Commission to intervene and to review any anti-competitive agreements at any time

28. Comment

What constitutes dominant position should be given a wider perspective

Response

We are of the opinion that the standard and criteria of dominance in regulation 19 adequately covers all issues

29. Comment

There is need for Commission to retain experts in specialized field for dispute resolution

Response

In addition to developing expertise in-house the Commission has employed the services of independent panel of Neutrals for dispute resolutions throughout the country to ensure that there is an effective dispute resolution mechanism in the Nigerian telecommunications industry

30. Comment

There was a comment that the word “may” should be substituted with “shall” because “shall” is mandatory in Regulation 27.

Response

Noted. Consistent with standard drafting practice, the Commission will use appropriate legal drafting phrases to give effect to the intentions of the regulations

31. Comment

There was a comment that Regulation 26 should not be under Part V which deals with “abuse of dominance” and gives the impression that it is only operators in dominant position that can abuse dominance, since smaller operators also carry out anti-competitive activities against other smaller operators.

Response

Noted. The necessary amendment will be made

GENERAL COMMENTS

The Commission has taken note of all submissions and has carefully considered the views of stakeholders. Necessary amendments will be included in the final Regulations.

Dated this ...15th...Day of December, 2006

Engr. E. A. Ndukwe (OFR)
Executive Vice-Chairman/CEO