

THE TECHNOLOGY,
MEDIA AND
TELECOMMUNICATIONS
REVIEW

EIGHTH EDITION

Editor
John P Janka

THE LAWREVIEWS

THE

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MEDIA AND
TELECOMMUNICATIONS
REVIEW

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PREFACE

This fully updated eighth edition of *The Technology, Media and Telecommunications Review* provides an overview of evolving legal constructs in 26 jurisdictions around the world. It is intended as a business-focused framework for both start-ups and established companies, as well as an overview for those interested in examining evolving law and policy in the rapidly changing TMT sector.

Broadband connectivity and wireless services continue to drive law and policy in this sector. The disruptive effect of new technologies and new ways of communicating creates challenges around the world as regulators seek to facilitate the deployment of state-of-the-art communications infrastructure to all citizens and also to use the limited radio spectrum more efficiently than before. At the same time, technological innovation makes it commercially practical to use large segments of ‘higher’ parts of the radio spectrum for the first time. Moreover, the global nature of TMT companies compels them to address these issues in different ways than before.

A host of new demands, such as the developing internet of things, the need for broadband service to aeroplanes, vessels, motor vehicles and trains, and the general desire for faster and better mobile broadband service no matter where we go, create pressures on the existing spectrum environment. Regulators are being forced to both ‘reform’ existing spectrum bands, so that new services and technologies can access spectrum previously set aside for businesses that either never developed or no longer have the same spectrum needs; and facilitate spectrum sharing between different services in ways previously not contemplated. Many important issues are being studied as part of the preparation for the next World Radio-communication Conference to be held in 2019. No doubt, this Conference will lead to changes in long-standing radio spectrum allocations that have not kept up with advances in technology, and it should also address the flexible ways that new technologies allow many different services to co-exist in the same segment of spectrum.

Legacy terrestrial telecommunications networks designed primarily for voice are being upgraded to support the broadband applications of tomorrow that will extend economic benefits, educational opportunities and medical services throughout the world. As a result, many governments are investing in or subsidising broadband networks to ensure that their citizens can participate in the global economy, and have universal access to the vital information, entertainment and educational services now delivered over broadband. Many governments are re-evaluating how to regulate broadband providers, whose networks have become essential to almost every citizen. Convergence, vertical integration and consolidation also lead to increased focus on competition and, in some cases, to changes in the government bodies responsible for monitoring and managing competition in the TMT sector. Similarly,

many global companies now are able to focus their regulatory activities outside their traditional home, and in jurisdictions that provide the most accommodating terms and conditions.

Changes in the TMT ecosystem, including increased opportunities to distribute video content over broadband networks, have led to policy focuses on issues such as ‘network neutrality’ – the goal of providing some type of stability for the provision of the important communications services on which almost everyone relies, while also addressing the opportunities for mischief that can arise when market forces work unchecked. While the stated goals of that policy focus are laudable, the way in which resulting law and regulation are implemented has profound effects on the balance of power in the sector, and also raises important questions about who should bear the burden of expanding broadband networks to accommodate the capacity strains created by content providers and to facilitate their new businesses.

The following chapters describe these types of developments around the world, as well as the developing liberalisation of foreign ownership restrictions, efforts to ensure consumer privacy and data protection, and measures to ensure national security and facilitate law enforcement. Many tensions exist among the policy goals that underlie the resulting changes in the law. Moreover, cultural and political considerations often drive different responses at the national and the regional level, even though the global TMT marketplace creates a common set of issues.

I would like to take the opportunity to thank all of the contributors for their insightful contributions to this publication, and I hope you will find this global survey a useful starting point in your review and analysis of these fascinating developments in the TMT sector.

John P Janka
Latham & Watkins LLP
Washington, DC
October 2017

NIGERIA

Olajumoke Lambo and Godson Oghenechuko¹

I OVERVIEW

The TMT industry in Nigeria has grown over the past two decades, but the telecommunications sector has made the most impact: from a previous era of very little activity and presence, this sector has grown into a major industry. While the sector contributed 0.62 per cent to Nigeria's GDP in 2001, the contribution increased to 8.68 per cent in 2014, and data published by the National Bureau of Statistics indicate that despite the serious impact of the recent recession in the Nigerian economy between 2015 and 2017, the sector's contribution in Q1 2017 rose further to 9.1 per cent.²

Prior to 1992, the telecommunications sector of Nigeria consisted of a monopoly provider, Nigerian Telecommunications Ltd (NITEL), which was previously owned by the government. NITEL was the primary provider of both fixed wire and mobile cellular services, and was regulated by the Ministry of Communications. When the government headed by General Olusegun Obasanjo came into power in 1999, it announced that a new national policy on telecommunications was to be formulated. The Ministry of Communications published the policy in May 2000 to lay the basis for a new telecommunications sector regulatory regime. In particular, the policy sought to strengthen the existing regime by increasing certainty and transparency, removing arbitrary restrictions, reducing the largely unfettered discretion of the Nigerian Communication Commission (NCC), rationalising decision-making, and providing a framework within which it would be possible to foster rapid growth in the telecommunications sector and enable substantial improvement in access to telecommunications services. The policy formed the basis for two separate legislative initiatives that led to the promulgation of the Nigerian Communications Act (Communications Act),³ which became the root for the liberalisation of the sector, major reforms and licensing.

Since 2001, subscriber numbers have grown upwards, leading to a significant increase in teledensity. While there were 41,975,275 active lines in 2007, the number of active lines recorded by the NCC as at July 2017 was 139,144,705 out of an estimated population of over 183 million people.⁴ Data from the NCC also show an increase in the number of internet subscribers from 67,459,892 as at May 2014 to 91,419,943 subscribers as at July 2017.

1 Olajumoke Lambo is a partner and Godson Oghenechuko is a senior associate at Udo Udoma & Belo-Osagie.

2 According to the data released by the National Bureau of Statistics: <http://technologytimes.ng/nigeria-telecoms-contributed-9-1-gdp-in-q4-2016>.

3 Chapter N97, Laws of the Federation of Nigeria 2004.

4 <http://population.gov.ng>.

In 2011, the previous administration set up a committee to harmonise the various policies for the different sectors in the information and technology industry. This resulted in the publication of a draft national information communication technology (ICT) policy in 2012. One of the objectives of the policy was to enact a new ICT Act 'that ensures a competitive and converged industry as well as provide an appropriate legal framework', but no formal steps have been taken to adopt this policy. The telecommunications and broadcasting sectors therefore continue to be regulated separately.

In view of the challenges that TMT stakeholders have faced over the past few years and the dwindling fortunes of several providers, the regulators are increasingly focusing on, *inter alia*, the management and operations of the licensees, establishing governance principles, quality of service, competition practices and consumer protection.

II REGULATION

i The regulators

The telecommunications sector is regulated by the NCC, established by the Nigerian Communications Act (Communications Act,⁵ the principal legislation that governs telecommunications services). The NCC is supervised by the Federal Ministry of Communications Technology. On the other hand, the National Broadcasting Commission (NBC) regulates the broadcasting sector and is supervised by the Federal Ministry of Information. The NBC was established by the National Broadcasting Commission Act (NBC Act).⁶

The other statute that is relevant to the TMT industry is the Wireless Telegraphy Act,⁷ which authorises the NCC and NBC to grant radio frequency licences.

Powers of the NCC

The Communications Act empowers the NCC to, *inter alia*, grant and renew licences for communications services, facilitate investments into the Nigerian market for the provision and supply of communications services, equipment and facilities, as well as protect and promote the interests of consumers against unfair practices (including but not limited to matters relating to tariffs and charges for and the availability and quality of communications services, equipment and facilities). The NCC is also authorised to make and enforce regulations, administer frequency spectrum for the communications sector, and carry out its functions and duties and exercise its powers efficiently and effectively in a non-discriminatory and transparent manner.

Powers of the NBC

The NBC Act authorises the NBC to advise the Federal Government of Nigeria (FGN) on the implementation of the national mass communication policy on broadcasting, process applications for the establishment or operation of radio and television stations, recommend the grant of broadcast licences to the President, and regulate ethical standards and technical excellence in public, private and commercial broadcast stations in Nigeria. The NBC's powers

5 Chapter N97, LFN 2004.

6 Chapter N11, LFN 2004.

7 Chapter W5, Laws of the Federation of Nigeria, 2004.

also include the establishment of a national broadcasting code, setting of standards regarding the content and quality of materials for broadcast, and promoting Nigerian indigenous cultures and moral and community life through broadcasting.

ii Regulated activities

Anyone who wishes to provide a telecommunications or media or broadcasting service in Nigeria must do so through a body corporate and be licensed by the NCC or NBC, respectively.

The Communications Act requires that licensees should be specifically licensed to provide each category of telecommunications service and prohibits a licensee from engaging in any activity that is not specifically licensed. There is a specified licence application process stipulated by the Communications Act and the NCC for two categories of licences: a class licence and an individual licence. A class licence is a broad authorisation granted by the NCC in respect of certain general services, including the sale and installation of terminal equipment, repairs and maintenance of telecommunications facilities, and telecentre, cybercafe, cabling and public payphone services. The same general terms and conditions and obligations apply to class licences. An individual licence, on the other hand, is a specific authorisation to provide a major telecommunications service. The terms, conditions and obligations, scope and limitations of an individual licence are specific to the service that the licensee wishes to provide in Nigeria.

An application must be made to the NCC for the specific licence sought by the applicant. The completed application form should be submitted with a copy of the applicant's certificate of incorporation, a certified true copy of the memorandum and articles of association, a passport-sized photograph of the applicant's authorised representative, a copy of the applicant's current tax clearance certificate and a feasibility report on the proposed service. If the application is successful, the applicant is required to pay the licence fee plus value added tax. The provisions of the Communications Act stipulate that an applicant for a licence should receive a response from the NCC within 90 days of the submission of the application.

Each licence granted by the NCC authorises the licensee to carry out a specific number of activities. The standard terms and conditions of licences can be viewed on the NCC's website.⁸ The validity period of most of the licences range between five and 20 years. For example, UAS licensees are authorised to offer a collection of both fixed and mobile services for a period of 10 years (renewable subsequently for five years) subject to any geographical limitations stipulated by the licence. The UAS licence permits eligible operators to provide both fixed and wireless voice telephony, as well as data services, digital mobile services, internet services, value-added services, international gateway services and other authorised telecommunications services on their networks.

With regard to the media industry, the NBC can only make recommendations to the President for the issuance of broadcast licences, as the power to issue licences is vested in the President. The process for obtaining a licence depends on the type of licence that is being sought, but generally an application is made to the Director General of the NBC requesting approval to purchase an application form. If approval is given, the completed form should be submitted to the NBC together with a copy of the applicant's certificate of incorporation,

8 www.ncc.gov.ng.

a certified true copy of the memorandum and articles of association, an engineering design of the system (that includes a feasibility study), a letter of undertaking and a reference letter from the applicant's bankers.

A licence granted by the NCC is personal to the licensee and cannot be operated by, assigned, sub-licensed or transferred to any other party without the prior approval of the NCC. Licences granted by the NBC cannot be assigned.

iii Ownership and market access restrictions

There are no restrictions on foreign ownership of telecommunications companies. Subject to meeting the requirement that a Nigerian company must have a minimum of two shareholders, a foreign investor can own the entire equity of a telecommunications company.

In the broadcasting sector, neither the NBC Act nor the National Broadcasting Code (5th edition) 2012 published by the NBC (Code) (the two principal regulations that govern the Nigerian broadcasting sector) specify a minimum threshold for foreign ownership of shares in a broadcasting licensee. The Code, however, provides that to be able to satisfy the main objective of the broadcasting regulation, which is that broadcasting should play a pivotal role in the social, cultural, technological, economic and political lives of the people of Nigeria, the NBC must ensure that any broadcasting entity in Nigeria is substantially owned and operated by Nigerians. The Code requires an applicant to demonstrate that it is not representing any foreign interests, and the NBC is given the sole and absolute discretion to determine whether to recommend the grant of a new licence to any applicant by the President, or to approve the acquisition of the equity of a broadcasting licensee by a foreigner.

In both sectors, in addition to obtaining the appropriate licence for each service to be provided, a licensee that has foreign shareholders is also required to obtain the foreign investment authorisations required to do business in Nigeria.

iv Transfers of control and assignments

The NCC's Competition Practices Regulations 2007 and the provisions of various communications licences issued by the NCC require a licensee, subsequent to the issue of a licence, to pre-notify the NCC of any proposed changes in its shareholding that will result in a transfer of at least 10 per cent of the total shareholding, of any other transaction that results in a change of control of the licensee, and of any transaction that results in the direct or indirect transfer or acquisition of any individual licence granted by the NCC. Such notification must be given at least 60 days prior to the completion date for the proposed transaction, while the NCC is required to respond to such notification within 30 days after receipt of the application accompanied by all additional information requested by the NCC.

The Code requires a licensee to obtain the prior approval of the NBC in respect of any act, agreement or transaction that will directly or indirectly result in a change of the effective control of its undertaking. In relation to licence transfers, broadcast licences are not assignable, but the NBC has, in the past, indicated a willingness to approve the transfer of a licence from a licensee to its subsidiary. Failure to obtain the prior approval of the NBC is a ground for revocation of the licence. The NBC has absolute discretion of whether to approve an application for a change of control. The timing for the approval is also at the NBC's absolute discretion.

III TELECOMMUNICATIONS AND INTERNET ACCESS

i Internet and internet protocol regulation

It is difficult to create a clear distinction between telecoms and internet infrastructure in Nigeria. The telecoms and internet infrastructure sectors are treated, and are usually referred to and dealt with, in the same manner. As is the case with mobile telephony, the NCC regulates ISPs, and the provisions of the Communications Act and the NCC's Guidelines for the Provision of Internet Services are the principal applicable regulations. The Guidelines for the Provision of Internet Services contain no restrictions or limitations on an ISP's freedom to prioritise the type or source of data it delivers, but they impose liabilities on ISPs in their role as content intermediaries where the ISPs may be acting as mere conduits, or caching or hosting.

ii Universal service

There are no USOs on existing licensees, but the Communications Act established a universal service provision fund (USP fund) to promote the widespread availability and usage of network services and applications services in Nigeria. The USP fund is financed by monies that may be specifically appropriated to the USP fund by the National Assembly; contributions from the NCC based on a portion of the annual levies paid to the NCC by licensees; and gifts, loans, aid and such other assets that may specifically accrue to the USP fund.

In 2014, the NCC began the implementation of a strategy for a nationwide broadband network deployment described as the 'next generation broadband network' on the basis of an 'open access model', and announced that it would licence seven regionally based infrastructure companies (InfraCos) that will enable the deployment of critical ICT infrastructure in the six geopolitical zones of Nigeria. The first phase of the licensing process has been completed, with two licences issued in respect of the Lagos and North-Central zones.

It is proposed that the InfraCos will be offered a one-off subsidy based on the particularities of their business models, and the geographical coverage that will provide access to remote areas and thereby enable the NCC to achieve its universal coverage objectives.

iii Restrictions on the provision of service

Retail tariffs and charges for telecommunications services provided on the basis of an individual licence must be pre-approved by the NCC – such approval being in the nature of a price cap – and licensees may not exceed such rates and charges without the NCC's prior approval. The NCC may intervene in such manner as it deems appropriate in determining and setting tariff rates for non-competitive services provided by such licensees. Tariff rates must be based on the principles established by the NCC from time to time, including the principles of fair and non-discriminatory pricing, cost orientation and an absence of non-competitive discounts.

The Communications Act requires network facilities and network service providers to grant other providers, who so request in writing, non-discriminatory access to their facilities or network, while the internet services licence issued to ISPs prohibits a licensee from showing undue preference to or discrimination against any person in respect of the provision of a service under the licence or the connection of any equipment approved by the NCC.

To protect subscribers from unsolicited phone calls, notifications and text messages, the NCC recently released a new short code and directed telecoms operators to activate a do-not-disturb facility.

iv Security

Section 37 of the Nigerian Constitution guarantees and protects the privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications, but by Sections 147 and 148 of the Communications Act, the NCC may determine that a licensee or class of licensees should implement the capability to allow authorised interception of communications. Such determination may specify the technical requirements for the authorised interception capability. This means that where the encrypted information passes through a network in Nigeria, the law enforcement authorities could ask the network service provider to intercept the information.

The Terrorism Prevention Act 2011 (as amended) (TPA) provides for intelligence gathering through the lawful interception of communications. Under the TPA, law enforcement agencies, with the approval of the Attorney-General and the National Security Adviser, have the power to apply for a court order to compel communication service providers to intercept specified communications. A judge can also, by order, require a communication service provider to intercept and retain specified communication received or transmitted by that service provider, or authorise the relevant law enforcement agency to enter any premises and install and subsequently remove any device with which a communication or communications of a specified description may be intercepted retained, or both, for the purposes of intelligence gathering.

In addition to the TPA, the Cybercrimes (Prohibition, Prevention, etc.) Act 2015 (Cybercrimes Act) provides that where there are reasonable grounds to suspect that the content of any electronic communication is reasonably required for the purpose of a criminal investigation or proceedings, a judge may, on the basis of a statement on oath, require a service provider to 'intercept, collect, record, permit or assist competent authorities with the collection or recording of content data and/or traffic data associated with specified communications transmitted by means of a computer system'. The judge may also authorise a law enforcement agent to collect or record electronic communications.

A service provider is also required by Section 40 of the Cybercrimes Act to comply with a judge's order to 'intercept, collect, record, permit or assist competent authorities with the collection or recording of content data and/or traffic data associated with specified communications transmitted by means of a computer system', and to generally assist with the identification, apprehension and prosecution of offenders. The Cybercrime Act was enacted in 2015 to provide measures for national cybersecurity and for the prevention, detection, response and prosecution of cybercrimes and other related matters.

III SPECTRUM POLICY

With respect to any RF licences required for the provision of a service, interested parties are required to obtain the relevant frequency licences from the NCC or NBC. Based on the Commercial Frequency Management Policy, Administrative Procedures and Technical Guidelines (Guidelines) issued by the NCC in January 2007, RF may be assigned by one or a combination of several methods ranging from 'first come, first served' (where there is a surplus and low demand) through auctions (where there is scarcity and high demand) to automatic assignment (where there is unlimited sharing capability, as with microwave frequency).

We understand that some changes to the spectrum policy are being contemplated by the regulators, but there has been no official confirmation of this yet. The NCC's Executive

Vice-Chair was, however, reported to have confirmed that the NCC has commenced moves to develop a clear-cut framework and guidelines that will usher in a secondary market for spectrum trading in the country. Currently, the grant of an RF spectrum licence is personal to the licensee, and can only be traded, shared or transferred with the prior approval of the NCC. The Guidelines also prohibit the trading, transfer to or sharing of RF with a third party, including a licensee's subsidiary or associated companies, without the prior approval of the NCC.

The 5.25–5.35GHz and 5.725–5.875GHz bands have been declared licence-exempt by the NCC, but some of the conditions for use include that all sites deploying licence-exempt bands must be registered with the NCC, the average time of occupancy on any frequency should not be greater than 0.4 seconds within a 30-second period, and for frequencies greater than 10MHz above or below the bed, the level must be greater than -27dBm/MHz.

The NCC's Frequency Spectrum (Fees and Pricing, etc.) Regulations, published in 2004, state that the price of a frequency spectrum shall be directly proportional to the size of the frequency spectrum assigned.

V MEDIA

i Restrictions on the provision of service

The service obligations of radio and television broadcast licensees are set out in the Broadcasting Code and the licence agreements between licensees and the NBC. The National Film and Video Censors Board (Censors Board) and the NBC are both statutorily empowered to prevent or restrict the distribution of content that is deemed to be against public policy such as violence, pornography, homosexuality and (foul) language. In particular, the Censors Board is required to ensure that any film or video work that it approves for exhibition in Nigeria has an educational or entertainment value and promotes the Nigerian culture, unity and interest. In addition, such film or video work must not be likely to, *inter alia*, undermine national security, induce or reinforce the corruption of private or public morality, encourage or glorify the use of violence, encourage illegal or criminal acts, or encourage racial, religious or ethnic discrimination or conflict. It is also a criminal offence under the Cybercrimes Act to distribute content that reflects child pornography in Nigeria.

Every video work to be distributed or exhibited in Nigeria must be registered with and classified by the Censors Board. The Censors Board may refuse an application for registration of a film that it considers to be (or which depicts any matter that is) indecent, obscene or likely to be injurious to morality, withhold the censorship certificate that should have been issued in respect of the affected film, or both. Films that are considered to incite or likely to encourage public disorder or crimes, or that are not in the public interest, will also not be registered for viewing or distribution in Nigeria.

ii Internet-delivered video content

There has not yet been any significant move from broadcast video distribution to internet video distribution, but there is growing interest in VOD services. In view of the increasing number of internet users in Nigeria and the competition among ISPs, it is hoped that consumers will not be too adversely affected by a shift to internet video distribution, but some network service providers have already complained about the impact of OTT services on their networks.

VI THE YEAR IN REVIEW

Notable events that occurred during the year include:

- a* the establishment of a Code of Corporate Governance for telecommunications companies;
- b* the departure of Etisalat from Emerging Markets Telecommunication Services Limited (Etisalat Nigeria) and the change of name of the entity to 9Mobile;
- c* increased publicity of and focus on cybercrimes and cybersecurity regulations;
- d* attempts to resolve multiple taxation issues; and
- e* increasing enforcement of data protection regulations.

The NCC has published a Code of Corporate Governance that is designed to guide the governance of telecommunications companies. The Code of Corporate Governance contains provisions regarding, *inter alia*, the composition and responsibilities of the board of directors, board leadership and ethics, roles of the board, membership of board committees, the board appointment process, remuneration and performance evaluation. There are also sanctions for non-compliance.

The Code of Corporate Governance, which was initially published in July 2014 and made effective in November 2016, does not apply to all service providers. It serves as a guide to operators who fall outside its purview, but is mandatory for the telecoms providers that meet the stipulated criteria.

With respect to cybersecurity, the NCC has increased its public awareness efforts against the background of an increase in illegal cyber activity in Nigeria. Other than awareness of the cyberthreats and actions that should be taken to prevent them, the NCC and other stakeholders have also sought to educate the public on the provisions of the Cybercrimes Act. The Cybercrimes Act criminalises several illegal activities, including hacking, phishing, spamming, system interference, unlawful interceptions, computer-related forgery, issuance of fake electronic or verbal messages by the staff or agent of a financial institution, denial-of-service attacks, identity theft and fraud, electronic theft, and unlawful interference with critical national information infrastructure. The Cybercrimes Act also imposes obligations on service providers, financial institutions and other corporate entities.

VII CONCLUSIONS AND OUTLOOK

Key players in the industry have already indicated their focus on the following.

i Increased broadband penetration

The NCC has renewed its commitment to meet its 30 per cent target of broadband penetration by 2018 as contained in the national broadband implementation plan. The regulator has announced its intention to commence the second phase of licensing of additional infrastructure companies that will enable the deployment of critical information and communication technology infrastructure in five geopolitical zones of Nigeria. The NCC is also meeting with state governments to facilitate the approvals required for the deployment of broadband infrastructure.

ii Digital switch-over

Although previous targets were missed, the FGN has declared the commencement of a phased migration from analogue to digital broadcasting. The Minister of Information has been reported to have confirmed that the migration has already been carried out in Jos, Plateau State and Abuja, and that another six states would follow.⁹

iii Passage of the Electronic Transactions Bill 2017

The Electronic Transactions Bill, when signed into law, will provide a regulatory framework for conducting transactions using electronic or related media, protection of consumer rights in electronic transactions and services, as well as the protection of personal data. Nigeria does not currently have any specific or comprehensive data privacy or protection statute.

iv Enforcement of the Code of Corporate Governance

As previously mentioned, the NCC has indicated its readiness to begin enforcement of compliance with the Code of Corporate Governance.

⁹ <https://www.premiumtimesng.com/news/more-news/233810-nigerian-govt-to-roll-out-digital-broadcasting-in-six-states-in-one-month.html>.

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