AN EXAMINATION OF EMERGING LEGAL CHALLENGES IN NIGERIAN TELECOMMUNICATIONS LAW

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DECEMBER, 2017

DECLARATION

I declare that this dissertation is a product of my own research work. That to the best of my knowledge, it has not been presented or published by any individual, institution or organization. Finally, that it should be an invaluable contribution to literary research and development.

UMAR MUSAIKHILOR **DATE**
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CERTIFICATION

This dissertation titled "An Examination of Emerging Legal Challenges in Nigerian Telecommunications Law" Umar Musa IKHILOR has been carried out under the close and careful supervision of Dr. K.M. Danladi and Professor D.C. John and has been approved as satisfying the regulations governing the award of the degree of LL.M of Ahmadu Bello University, Zaria. It is approved therefore for its contribution to knowledge and literary development.

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DEDICATION

This project is dedicated to my late father, Mallam Ismail Musa Ikhilor who encouraged me to keep studying until I get to the pinnacle of my profession. I will not let him down.

May Allah forgive his wrongdoings and admit him into Jannatul Firdaus.

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Much appreciation to my soul mateand lovely wifeNimata Umarfor undying loyalty, care and support.

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ABSTRACT

This dissertation seeks to examine the legal framework for the regulation of telecommunications in Nigeria and highlight the various emerging issues and legal challenge therefrom. With the liberalization of the telecommunications sector and the emergence of the Global System for Mobile Communications (GSM) in commercial quantity, the Nigerian telecommunications tempo has changed drastically, with licenses granted to private operators, thus breaking the monopolistic status of the Nigerian Telecommunications Plc (NITEL). A lot of benefits have been recorded over the years in the industry - investment has increased, job opportunities have been created and there has been a general economic growth and consumer benefit. New services have emerged and convergence in services has been a matter of convenience. Despite the huge achievements of telecommunications in the country, however, the sector has been faced with a lot of challenges such as multiple regulation, government interference in telecommunications matters, multiple, high and illegal taxation, cybercrime and security of infrastructure.Other emerging challenges include the challenges of cybersecurity, data protection of cyberusers, lack of a viable competition law, security of telecoms infrastructure, and the thorny issue of interconnectivity and access to network facilities. The sources, scope of application and historical development of Telecommunications Law were examined in chapter two of the research. Then the regulatory framework for the regulation of telecommunications (both local and international) was highlighted. Thereafter the emerging challenges were examined with an indepth analysis leading to far reaching findings and recommendations.

TABLE OF CONTENTS

Title Page …….. ii

Declaration……..... iii

Certification …….....…….iv

Dedication…….....……..v

Acknowledgement …….....……vi

Abstract ……..... vii

Table of Contents …….....…viii

Table of Cases …….....xii

Table of Statutes …….....xiii

CHAPTER ONE- GENERAL INTRODUCTION

1.1: Background to the Study……..…1

1.2: Statement of the Problem……4

1.3: Aim and Objectives…….7

1.4: Scope of the Research……8

1.5: Research Methodology ……...8

1.6: Literature Review……8

1.7: Justification ……...14

1.8: Organisational Structure……...15

CHAPTER TWO

CLARIFICATIONS, SCOPE, SOURCES AND HISTORICAL

DEVELOPMENT OF TELECOMMUNICATION IN NIGERIA

2.1 Introduction…….17

2.2 Clarification of Terms……...…17

2.3 Scope and Sources of Telecommunications Law ……..……..…...20

2.3.1 Scope of Telecommunications Law……..……..…...20

2.3.2 Sources of Telecommunications Law……..……..…...20

2.4 **Historical Developments of Telecommunications in Nigeria.....24**

2.4.1: Pre-Independence Era……...25

2.4.2: Post-Independence Era: Period between 1960 – 1985……..26

2.4.3: Period between 1985 - 1992 (Privatisation of

Telecommunications Sector In Nigeria)……...27

2.4.4: Period between 1992 - 2003 (Deregulation OfThe

Nigerian Telecommunications Sector)…….....29

2.4.5: Period between 2003 - Date……...31

2.5 Conclusion…….....33

CHAPTER THREE

INSTITUTIONAL MECHANISMS AND TELECOMMUNICATIONS UNIONS.

3.1 Introduction…….....35

3.2: **Institutional Mechanisms for Telecommunications Industry in Nigeria 36**

3.2.1: Nigerian Communications Commission (NCC) …….....37

3.2.2: National Frequency Management Council (NFM) …….....40

3.2.3: Universal Service Provision Board ……...41

3.3: **Global Telecommunications Unions**.....43

3.3.1: International Telecommunications Union (ITU) …….....44

3.3.2: African Telecommunications Union (ATU) …… 46

3.3.3: Commonwealth TelcommunicationsOrganisation……48

3.3.4: West African Telecommunications Regulators Association (WATRA) ……..49

3.3.5: Organisation for Economic Co-Operation and Development (OECD) ……55

3.5.: Conclusion…….....57

CHAPTER FOUR

EMERGING CHALLENGES OF TELECOMMUNICATIONS IN NIGERIA

4.1: Introduction……..58

4.2: **Multiple Regulatory Regime and Government Interference**…….....59

4.3 Challenges of Cyber-Security and Data Protection 65

4.3.1: The Challenge of Cyber-Security…...……...65

4.3.2 The Challenge of Security of Telecoms Infrastructure and Terror Attacks on Telecom Facilities……73

4.3.3 The Challenge of Data Protection……...……...81

4.3.4 A Cursory overview of the Nigeria's Cybercrime (Prohibition and Prevention Etc.) Act 2016……...86

4.4 The Challenge of Competition Law……...91

4.5 The Challenge of Interconnectivity and Access to Network Facilities……....108

4.6. Conclusion……...132

CHAPTER FIVE

SUMMARY/CONCLUSION

5.1: Summary……..135

5.2: Findings……..…….....138

5.3: Recommendations……...139

BIBLIOGRAPHY……..……...……144

TABLE OF CASES

Barrister Mike Nkwocha&Ors v. MTN Nigeria Ltd &Ors(2004)
1 TLR, 1, at p4…… 115

Blue-Chip Communications Co Ltd vs. Nigerian Communications Commission (2004) 1 TLR 23……..114,115

Econet Wireless Nigeria Ltd vs N.C.C. (Unreported) Suit No.FHC/ABJ/CS/58/2004 delivered on 20th April, 2004 by His Lordship,
Hon Justice B.F.M. Nyako.……...…....……114

Faloye vs. Omoseni(2001) 9 NWLR (pt. 717) 190 at 200-201; ……..…...……114

Intercellular Nigeria Plc v. MTN Nigeria Communications Limited, *available at* http://www.ncc.gov.ng/Headlines/ncc_decision_in_intercellular_mtn_matter.htm (Mar. 3, 2006)..... 126

Interconnect Clearinghouse Nigeria Limited v MTN Nigeria Communications Limited available at http://www.ncc.gov.ng/Headlines/decision_on_interconnect_mtn.htm (May 9, 2006). 123

Kasunmu vs. Shitta-Bay &Ors(2007) ALLFWLR (pt 356) 741 at 783; …….……...…114

Lawal*vs. Oke*(2001) 1NWLR (pt 711) 88 at 106- 107; ……...…….……114

MTN Nigeria Communications Ltd v. Nigerian Communications Commission (2004) 1 TLR, 15 16……...114

Ojogbede v. Ogundipe(2008) ALLWLR (pt 399) 589 at 599; …….....……114

VGC Communications Ltd v. Nigeria Telecommunications Ltd, *available at* http://www.ncc.gov.ng/Headlines/decision_on_vgc_nitel.htm (Oct. 4, 2006)…….... 126

TABLE OF STATUTES

LOCAL

Central Bank of Nigeria Act, *Cap C4 LFN 2004*……..*97*

Constitution of the Federal Republic of Nigeria 1999 (as amended)……..20, 21

Constitution of the Federal Republic of Nigeria 1999……..… 85, 89, 90, 100, 115

Consumer Protection Council Act, *Cap C25 LFN 2004*…… *37*

Cyber Crime (Prohibition and Prevention Ect.) Act 2015……..80, 86, 87

Environmental Impact Assessment Act, *Cap E12 LFN 2004*……..*63, 64*

Evidence Act 2011……. 88

National Environmental Standards and Regulations

Enforcement Agency (Establishment) Act No 25 of 2007…….…….. 62, 63, 64

National Information Technology Development Agency ((NITDA) Act No. 28 0f 2007……33

Nigerian Communications Act, *Cap N97 LFN 2004*……5, 6, 18, 19, 20, 22, 31, 37, 40, 41, 42, 43, 81, 92, 93, 94, 95, 96, 97, 109, 110, 111, 114, 115,

Nigerian Communications Commissions Act 1992…….29, 31

FOREIGN

United Kingdom Data Protection Act 1998……82

United Kingdom Electronic Communications Act 2000……..……..82

EU-directive 2000/31/EC of the European Parliament of the Council……..82, 118, 119

EU-Directive on Data protection……....82, 86

European Convention on Human Rights……..… 85

UNCITRAL Model Law for Regulating Electronic Commerce……..…….. 85, 86, 118

United Nations Universal Declaration of Human Rights……..……85

CHAPTER ONE

GENERAL INTRODUCTION

1.1 BACKGROUND TO THE STUDY

In the present twenty-first century, economic growth and development have been inextricably linked to information technology as economies have transformed and driven new value from the Industrial Age to the Information or digital Age. Latest statistics which shows that in the last ten years, the country has seen a dramatic growth from 400,000 lines to 226 million lines out of which about 150 million are active.[1]The significance of telecommunication infrastructure was stated by the National Policy on ICT to be a driving tool for socio-economic development[2]. The policy acknowledged the role played by telecom infrastructure in so many aspects of the economy, such as business (e-commerce), law (e-filing), banking (mobile and e-banking) etc. Other positive indicators of ICT progress in Nigeria include the growth in e-banking and e-commerce where new business models are being implemented by companies like Konga, Jumia, Paga, Wakanow, Jobberman – all creating new jobs and stimulating the local economy.

Despite this phenomenal growth however, there has not been a corresponding growth in regulation which has occasioned a legal vacuum that currently constitutes a monumental challenge to operators and stakeholders alike.

[1]Industry statistics published by the Nigerian Communication Commission (www.ncc.gov.ng/index.php?option=com_content&view=article&id..html). Accessed 5th September, 2016.

[2] National Information and Communications Technology (ICT) Policy 2012

Nigerian telecommunications regulations are inadequate to engender an efficient and effective regulation of telecommunications business and electronic commerce; the Nigerian telecommunications environment is faced with fundamental institutional, operational and regulatory challenges; there are issues of multiple regulation and incessant government intervention in telecom's operation raising so much ambiguity and confusion in the sector. Federal, State and Local Government MDAs are jostling issuing levies and notices to telecom operators each claiming legitimate backing fromvarious enabling laws. These MDAs (from the 3 tiers of government) see an opportunity to generate revenue from the operations of telecoms operators through the imposition of Multiple, illegitimate levies and taxes. The failure of the industry to submit to these illegitimate regime and demands often results in disruptive enforcement actions by these MDAs. Network operators continue to witness harassment, forcibly sealing of telecoms sites or removing components of site installations in their bid to compel compliance. These continued interventions in telecoms operations by MDAs results in a disruptive of services, degradation of service quality, a major increase in operating expenses and the general cost of carrying on communications business in Nigeria.

In the area of Cybercrime and Personal Data Protection and Privacy of Subscribers, even though much is being done in this regard, there is need for the strengthening of the current legal mechanisms (especially the Cybercrime Crime (Prohibition and Prevention Ect.) Act of 2015in order to remove ambiguities and further consolidate government's effort towards an efficient and effective tackling of Cybercrime.

In August, 2009, the Nigerian telecommunications regulator, the Nigerian Communications Commission (NCC), in exercise of its regulatory powers under the

Nigerian Communications Act (NCA) 2003, issued a directive which was published in the "Thisday Newspaper of December 31, 2009" to the effect that as from 1st March, 2010 all new "Subscriber Identity Module" (SIM) cards must be registered before activation[3].

This was followed by a subsequent directive for registration of the SIM cards by existing SIM card holders at a later date, failing which such SIM cards would be deactivated and refused data transmission in Nigeria. According to the NCC, the directives were borne out of the need to have a credible database of SIM card holders in Nigeria which will be used to identify (for possible prosecution) criminal actors who perpetrate criminal activities through the use of mobile phones by exploiting the anonymity of an unregistered SIM Card.

Nigerians, in their millions, embarked on the registration of their SIM cards for fear of having their SIM Cards de-activated by their respective telecommunication service providers without realizing the lurking danger of identity theft, unlawful use and disposal of their personal data and breach of their right to privacy.

Even though the current Cybercrime Act contains provisions relating to the protection of personal data of cyber users, it is the considered view of this writer that such provisions are insufficient as they are laced with so much ambiguities and incongruences thereby making the issue of protection of personal data of cyber users still very much of a challenge.

[3]Industry statistics published by the Nigerian Communication Commission (www.ncc.gov.ng/industrystatistics/subscriber-data.html).

This research will examine the current legal regime governing telecommunications activities and highlight the lacunas in these legal regimes with a view to proposing new legal directions.

1.2 STATEMENT OF THE PROBLEM

In spite of the phenomenal growth experienced in Nigerians telecommunications sector, there has not been a corresponding response from regulatory bodies to develop a more comprehensive legal regime to tackle the various challenges thrown up by the growth in the telecoms industry. These challenges are numerous and will be beyond the scope of this research. The research therefore focuses on four (04) major areas that need urgent legal and operational intervention.

These problems and challenges include:

(a) Multiple Regulation of Telecoms operators,

(b) Challenges of Cybercrime and lack of a wholistic Data Protection Law to protect the data of Consumers,

(c) The Challenges of Interconnectivity, Access to Network Facilities and Protection of Telecoms Infrastructure and

(d) The near absence of a Comprehensive Competition Law.

The telecoms industry has witnessed untoward intervention and actions from various Ministries, Departments and Agencies (MDAs) of Governments (at the 3 tiers) who see an opportunity to generate revenue from the operations of telecoms operators through the imposition of Multiple, illegitimate levies and taxes. This has led to inter-agency clashes in some cases as to the sphere and scope of influence each agency has over telecoms operators.

The Nigerian Communications Act[4] provides for certain rights and obligations of consumers in telecommunications industry, and pursuant to the powers conferred upon it, the Nigerian Communications Commission (NCC) made the Consumer Code of Practice Regulations 2007.[5] In spite of the above, there is still a plethora of challenges of awareness amongst subscribers about the existence of these rights and the effectiveness of enforceability.

In Nigeria, there is no direct and specific competition law, yet business combinations are a feature of the economy. Although the law allows merger and business combination, the absence of a competition law clouds the horizon and makes the consumer open to monopolies that will hurt rather than help the economy.[6]

The rise in Internet based transactions over the last few years has resulted in a vast increase inthe amount of personal and financial information being transmitted[7]. This, therefore, necessitates a framework for Right to Privacy and Data Protection. Without a wholistic Data Protection Law, the current consumer data been collected and stored by telecommunications companies might be opened up to abuse.

Communications facilities and services of different licensees of telecommunications must be made available to each other for effective and meaningful interconnectivity and supply of telecommunications services. Access in telecommunications services forms an

[4]Cap N 97, Laws of the Federation of Nigeria 2004

[5] The specific objectives of the Regulations are to confirm and clarify the procedures to be followed by licensees in preparing approved Customer Codes of Practice. See Regulation 2 of the Code.

[6]Owasanoye, B., *Findings from Review of Laws for Social and Economic Development*. Being a Paper Presented at the Working Session of SPIDEL at the Nigerian Bar Association Annual General Conference on Tuesday August 18 2009, at Oceanview Expo Centre, Eko Hotel & Suites, Victoria Island Lagos, Nigeria.

[7]Swindells C. and Henderson K.(1983).'Legal Regulation of Electronic Commerce.'*Journal of Information Law and Technology (JILT)*, , p.3<http://www.2.warwick.ac.uk/fac/soc/law/elj/jilt/1998_3/Swindells/#92> accessed on 26 July, 2014.

indispensable discourse in telecommunications. Provisions of access enable a telecommunications licensee to have access to another licensee's communications facilities and services for the purpose of providing telecommunications services. Such facilities and services include the connection of equipment, access to physical infrastructure such as buildings, ducts and masts. Access is controlled by the Nigerian Communications Act, and subject to any exception as may be determined by the NCC and duly published, network facilities providers and network service providers are bound to provide access to their network facilities or network services listed in the access list[8]to any other network facilities provider, network service provider, applications services provider or content applications service provider, who makes a written request for access to such network facilities provider or network service provider on reasonable terms and conditions.[9]Disputes among telecommunications operators in respect of interconnection usually arise, and when any such dispute arises an attempt is first made to resolve the dispute between the disputing parties through negotiations or other alternative dispute resolution mechanism.[10]

Where no agreement is reached within the specified period, either party may appeal to the commission and the commission shall decide on the case, taking into consideration the interest of both parties. In the absence of specific legal framework for resolving the challenges posed by Access and Interconnections, the challenges occasioned by such

[8] The list of facilities and services which may be included in the access list are network facilities, network service and other facilities and service that facilitates the provision of network services or applications services, including content application services. See Section 102 (1) of the Nigerian Communications Act.

[9]Section 101 (1) of the Nigerian Communications Act.

[10]Such as Arbitration. See Ariyoosu D. A. 'Arbitration as a Dispute Resolution Mechanism in the Telecommunications Industry: An Appraisal of Law and Policy' *Confluence Journal of Jurisprudence and International Law*, (2009) Vol. 2, pp.140-148.

absence have continued to affect the smooth resolution of disputes amongst contending operators.

The area of Competition law in Nigeria remains an area of law that has not been fully tapped. Currently, there is no competition law operating in Nigeria and although there has been a bill, it is yet to be passed to law. The ongoing lack of a competition law regime has quite predictably led to price-fixing, excessive pricing of products , market concentration as well as domination being the order of the day, all to the detriment of the consumer.

1.3 AIM AND OBJECTIVES OF THE STUDY

The main aim of this research is to examine the challenges in the Nigerian telecommunications regulating arising from the lacunas created by the existing legal regime with a view to finding New Legal directions to tackle these challenges.

The objectives of the research are:

(a) To highlight the danger of multiples regulation of telecoms operators and propose the streamlining of regulations regarding telecommunications in Nigeria;

(b) To highlight the need for a review of the Cybercrime Act and propose for a wholistic Data Protection Law in Nigeria to protect personal data of telecom users;

(c) To propose a much more efficient and effect usage of telecoms infrastructure through Infrastructure collocation and sharing;

(d) To examine existing legal provisions regarding Competition and propose a single and more Comprehensive Competition Law for the Telecoms Sector.

1.4 SCOPE OF THE RESEARCH

This Study will be limited to Laws regulating Telecommunications in Nigeria. These Laws will be examined and the various areas uncovered by these Laws will be highlighted. In terms of scope of challenges addressed, these challenges have been limited to those areas that have not seen much research amongst telecom researchers and they have mainly been limited to four (04) in number.

In terms of geographical applicability, Nigeria will be the main area of focus while cursory references will sometimes be made to other jurisdictions such as the United Kingdom, the United States, South Africa and Europe for the purposes of comparative analysis.

1.5 RESEARCH METHODOLOGY

The doctrinal research method will be adopted in this research as it will be necessary to analytically consider statutory provisions(primary sources) as well as scholarly opinions in books, journals, articlesand internet resource relating to the subject (secondary sources).

1.6 LITERATURE REVIEW

Scholars and academics (both local and foreign) have published several works in the field of telecommunications and electronic commerce.These works, though extensive in addressing the aspects of telecommunications law and its challenges, they fall short in tacking several emerging challenges which are either peculiar to Nigeria or recent in nature.

The works of John Angel and Ian Walden[11] and Colin D. Long[12] are standard materials on telecommunications law and policy. These works examine the legal framework for telecommunications and electronic commerce in details. Their limitations however is that their scope was limited to the United States and Europe. The applications of such legal and policy frameworks as they relate to Nigeria were not covered.

Clive Gringras[13] extensively dealt with various aspects of laws as they affect internet or electronic commerce and internet transactions including cybercrimes, data protection, taxation and competition law.

Rodney D. Ryder[14] dealt extensively with the concept and legal determination of cyber space and the law. He examined Information Technology Laws of India and Indian Rules, Regulations and Guidelines on cyber laws and policies, including electronic commerce.

These works like those above were also limited to foreign jurisdictions and did not cover the challenges relating to Nigeria.While their works are standard works, the fact remains that they are all foreign authors and their approach and considerations are based on their respective jurisdictions and this is what will distinguish this research work from their

[11]Angel, J. and Walden, I.(1997).*Telecommunications Law Handbook*,Blackstone Press Limited, London.See also Walden,I., and Angel, J.(Eds.)(2007),*Telecommunications Law and Regulation*,Oxford University Press, New York, USA,.

[12]Long, C.D.(1995).*Telecommunications Law and Practice* (2nd Ed.), Sweet and Maxwell, London

[13]Gringras, C. (2008). *The Law of Internet* (2nd ed.), Butterworth LexisNexis, London.

[14]Rodney D. R, *Guide to Cyber Laws (Information Technology Act 2000, E-commerce, Data Protections & the Internet)* (3rd Ed.), Wadhwa& Company Law Publisher, India (2007).

works. None of them considered the applicability of the regulations of telecommunications and electronic commerce to Nigerian situation.

In Nigeria, Ariyoosu D.A.[15], examined extensively the legal regulations and Taxation of Telecomunications in Nigeria. While the scope of his research was much more extensive, its contents predominantly dwelt on areas that were not necessarily legal in nature.

Ladan M.T.[16], extensively examine the connectivity between ICT, development and the Law. It further analyzed the sources of Law in Nigeria. Chapter two of this work relied on the purview presented by the learned Professor considering that telecommunications law fundamentally derives its efficacy from the same sources.

Adejoke O. O.[17] examines the impacts and challenges of information and communication technology in diverse aspects of commerce, banking and business activities in Nigeria. Against the background of international standards, the paper discusses emerging legal responses aimed at safeguarding the data of online users and telecoms subscribers, the security and integrity of online transactions, and promoting certainty in the outcomes of dealings carried out through the medium. The paper concludes that while ongoing legislative interventions are desirable, the highly fragmented nature of emerging ICT laws and multi-layer regulatory institutions will unnecessarily complicate the legal and institutional landscape, and defeat the purpose of certainty and simplicity. It is observed

[15]Ariyoosu D.A., *An Examination of the Legal Regulations and Taxation of Telecommunications and Electronic Commerce in Nigeria.* (www.unilorin.edu.ng/law). Accessed 24th September, 2014.

[16]Ladan, M.T., *Introduction to Jurisprudence: Classical and Islamic.*Malthouse Press, Nigeria.

[17]Adejoke O.O. "The ICT Revolution and Commercial Sectors in Nigeria: Impacts and Legal Interventions" In: *British Journal of Arts and Social Sciences*, Vol.5 No.2, British Journal Publishing, Inc. 2012. http://www.bjournal.co.uk/BJASS.aspx

that although the author discussed the challenges of data protection of cyber users, a comprehensive proposal was not presented on how to tackle those challenges.

Ladan, M.T[18], in another of his book published in 2015 and titled "Cyberlaw and Policy on Information and Communications Technology in Nigeria and ECOWAS" gives highlights of Cyberlaw in West Africa. Decisions of the United Nations and other world regional bodies on cybercrime are discussed extensively. It is noted that while the work is seminal and extensive, it does not tackle some of the emerging challenges this research intends to cover.

Usoro[19] gave a synoptic guide and legal issues in the implementation of e-commerce in Nigeria and legal and operational framework for Nigeria telecommunications. He further gave a Global reforms in telecoms industry pointing towards new legal directions. He however did not address the peculiar challenges being faced by the Nigerian telecoms Industry.

Okonji's[20] work analyzed the challenges being faced by the Nigeria telecommunications sector, despite the overwhelming achievements telecommunications have recorded within the very shortest period of the commercial roll-out of Global System for Mobile Communication (GSM) in telecommunications industry. He however did not provide exhaustive legal reforms and recommendations to tackle these challenges.

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[18]Ladan, M.T. *Cyberlaw and Policy on Information and Communications Technology in Nigeria and ECOWAS*.ABU Zaria Press, Zaria, Nigeria.

[19]Usoro, P., *'E-commerce in Nigeria: How to Move Forward Legal Framework for the Introduction of Ecommerce'* <www.paulusoro/publication/E-commerce.com> accessed on 24 January 2014; See also, Usoro, P.,*'Telecommunications in Nigeria: Operation and Legal Framework'*, Materials of the 2001 Workshops ALPHAJURIS Continuing Legal Education Series.

[20]Okonji, E.,*'Challenges of Telecoms Sector Despite Achievements'*, <www.allafrica.com/ stories/200909290704.com> accessed on 24 January 2014.

Ndukwe, E., also examined some of the challenges for Telecommunications in Nigeria. However his work was more focused on other challenges such as cybercrime and consumer protection.[21]

Adegbemile[22] provided a chronological development in Nigerian telecommunications and tapped experiences outside the Nigeria jurisdiction.

Nwokoro[23] worked on regulatory framework and general governing principles for interconnection and interconnectivity agreements in Telecommunications Law.

Agbede I.O. wrote extensively on Competition Law even though only a cursory analysis was made on it relates to telecommunications Law.[24]

Dimgba N. also wrote on the need and Challenges of competition Law in Nigeria.[25]

In his work, he suggested that having competition legislation will deter corruption, because where government bodies have tremendous power to affect the competitive process when they issue licenses, permits, franchises and subsidies, when a competition law is adopted, some of these powers will be reduced and as such the responsiveness of government official to bribes in order to facilitate illicit economic gains will be reduced.

This research however goes further than such advantages to examine structure of a

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[21]Ndukwe, E., *Telecommunications Challenges for Nigeria in the 21st Century* <http://www.ncc.gov.ng/speeches-presentation/EVCS%20prsntaion/nici-programmeEVCSpeech.pdf> accessed on 19 March, 2015.

[22]Adegbemile A. A., 'Developments in Telecommunications in Nigeria and its Impact on National Development: Experiences from Around the World',*Asian Journal of Information Technology*, (2007),volume 6, pp. 884-890.

[23]Nwokoro, O.,*Telecommunications Law: Negotiating & Drafting Interconnect Agreements*. Being a Material of the 19th Workshop ALPHAJURIS Continuing Legal Education Series.

[24]Agbede I.O. (2008). 'Reconstruction, Merger and Takeover of Companies: The Transborder Legal Implications' in Fabunmi J.O. (Ed), *Themes on Jurisprudence and International Law*, Total Communications Ventures, Lagos, Nigeria.

[25]Dimgba, N., *The Need and Challenges to the Establishment of Competition Law in Nigeria*.www.globalcompetitionforum.org.html. Accessed 3rd February, 2015

proposed Competition law and how it can be harnessed to effectively address the lacuna created by the lack of a viable Competition Law in the telecoms sector.

Aluko M[26], examined the ways of resolving Interconnectivity Battle in Nigeria and made useful suggestions which has been beneficial to this research.

Ani, L., a Research Fellow, Nigerian Institute of Advanced Legal Studies in her article titled "Cyber Crime and National Security: the Role of the Penal and Procedural Law"[27] argues that law enforcement officials cannot effectively pursue cybercriminals unless they have the legal tools necessary to do so. The author also carries out a comparative analysis and critical review of Jurisdictions such as the USA, UK, India and Nigeria, if the existing Laws are adequate to combat cybercrime and consequently, if amendments need to be put in place. The Author states that lack of cybercrime specific laws and inadequate equipment of law enforcement agencies militate against the fight against cybercrime. In considering relevant laws in fighting cybercrime in Nigeria, the author does not consider the current Cyber Crime Act, 2015 which is Nigeria's effort to key into the international fight against cybercrime.

PricewaterhouseCoopers LLP in the article titled "Cybercrime: protecting against the growing threat"[28] study the impact of cybercrime on organizations, their awareness of the crime and what they are doing to combat the risks. It also studies fraud, the fraudsters and the defrauded-the types of economic crimes committed, how they are detected, who is

[26]Aluko, M., *Resolving the Interconnectivity Battle in Nigeria- Some Suggestions.*<http://www.com./ publication/ aluko/ resolving- interconnectivity.htmkwenu!>accessed on 17 February 2015.

[27]Ani, L. (2011) in "Law and Security in Nigeria", Professor Azinge, E., SAN, et al (eds.) Nigerian Institute of Advanced Legal Studies Press, Lagos, 2011,pp. 197-234.

[28]Global Economic Crime Survey United Kingdom, November, 2011, www.pwc.com/crimesurvey accessed on 6th June, 2017.

committing them and what the repercussions are. The writer observes that though this article gives a great insight on the effect of cybercrime on businesses its scope limited to the United Kingdom.

Bamodu G, in this article " Information and Communications Technology and E-Commerce: Challenges and Opportunities for the Nigerian legal System and Judiciary",[29] examined the various challenges posed by current trends in ICT in Nigeria and gave a synoptic analysis of several of these challenges especially those related to e-commerce and cybersecurity. The author's article did not however cover recent interventions by government in terms of tackling the menace of cybersecurity.

1.7 JUSTIFICATION FOR THE RESEARCH

Telecommunication law is still a fledging area of Law upon which much has not been written. Students who are interested in pursuing Telecommunications Law especially in our new Digital Age will find this research useful in terms of acquainting themselves with the evolutionary curve Telecommunications Law has taken over the years and the new frontiers to be explored in order to have a more comprehensive legal regime for Telecommunication.

It is our firm belief that this research work will be beneficial to the following categories of persons:

(a) Members of the Judiciary who will become informed and equipped to deal with emerging issues of Telecommunications law;

[29] (2004) *The Journal of Information, Law and Technology*, online at http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2004_2/bamodu/, accessed 25th April, 2017

(b) Legal practitioners, Academic writers and students who will become better equipped and informed to advise and represent clients, learn and carry out more research over issues of telecoms law and practice;

(c) Members of the organized private sector, telecom operators and stakeholders, local and international business men and women who will become better informed as to their duties and responsibilities and how to handle issues involving telecommunications especially as it relates to the challenges tackled herein;

(d) Members of the general public who will become better acquainted with international laws regarding the use of computer, the internet and general telecommunications;

(e) Encourage international cooperation in issues such as cybercrime and the protection of personal data of cyber users.

1.8 ORGANISATIONAL STRUCTURE

In the presentation of this study, an integrative buildup was adopted that captures all aspects of the research topic.

Chapter one provides a general introduction to the subject, research methodology, literature review, structure, objective, scope and significance of the Research.

Chapter Two examines a conceptual clarification of key terms, scope, sources and historical development of telecommunications law and policy in Nigeria.

Chapter Three examines the institutional mechanisms for the regulation of telecommunications in Nigeria. The various legal regimes for regulating telecommunications in Nigeria will be examined. References will also be made to

international unions and conventions on telecommunications in this chapter with a view to drawing a comparative analysis between them and that of Nigeria.

Chapter Four looks at emerging issues, challenges and prospects of telecommunications industry in Nigeria and how the present legal regime is inadequately in tackling these emerging challenges. Four crucial challenges are dealt with viz: Multiple Regulation of Telecoms operators, Challenge of Cybercrime and lack of a wholistic Data Protection Law to protect the data of Consumers, The Challenge of Interconnectivity, Access to Network Facilities and Protection of Telecoms Infrastructure and the near absence of a Comprehensive Competition Law.

Chapter Five shall be Summary, which will embrace the findings, observations and recommendations.

CHAPTER TWO

CLARIFICATIONS OF TERMS, SCOPE, SOURCES, AND HISTORICAL DEVELOPMENT OF TELECOMMUNICATION IN NIGERIA

2.1 INTRODUCTION

Since its inception a little over a century ago, Nigeria's telecommunications system has progressed through various stages of development from the primitive communications equipment in its colonial days to the enormous variety of technologies available today. In this chapter, the processes of Nigeria's telecommunications development and its progress, problems, and prospects are examined and discussed from its emergence to the expansion and modernization efforts of the 1990s.

However before delving into its historical development, it would be imperative to at this point clarify certain terminologies associated with the field of Telecommunications for easier appreciation subsequently.

2.2: CLARIFICATION OF TERMS

Some words, terms, concepts and phrases are employed in the course of writing this thesis. These words, terms, concepts and phrases are technical in nature. They are sometimes not ordinarily found in the normal English Language lexicon and where they are even found, they may not have the ordinary meaning as used in the English Language lexicon. They are technical and registered expressions and their meanings, usage and functions form integral parts of the topic of this thesis for the completeness and comprehension of the research.

Resultantly, the objective of this part of the research is to define, explain and describe, where necessary, the meaning and functions of these technical expressions within the purview of this thesis.

2.2.1 Telecommunications Law': The term, 'Telecommunications' often perfectly and acceptably shortened simply as 'telecoms' is defined as transmission between or among points specified by the user of information of the User's Using, without change in the form or content of the information as sent and received.[30] It is the transmission, reception and the switching of signals, such as electronic or optical, by wire, fiber or electromagnetic (i.e. through-the-air) means.[31]

2.2.2 'Communications': It is defined by the Nigerian Communications Act asany communication, whether between persons and persons, things and things, or persons and things, in the form of sound, data, text, visual images, signals or any other form or any combination of those forms.[32]

2.2.3 '**Communications Network':** Communications Networkas a term can be referred to as any form of installation which ensures the transmission of communications signals and the associated exchange of the control and operational information between network termination points.

The National ICT Policy 2012 defined **'Telecommunications'** as any domestic or international transmission of information by wire, radio waves, optical media or other

[30], US Telecommunications Act 1996, Section 3

[31]Newton H. (1999).*Newton's Telecom Dictionary,* Miller TreemanInc, USA, p. 780

[32]Nigerian Communications Act 2003, Section 157

electromagnetic systems, between or among points of user's choosing.[33] While the Nigerian Communications Act, 2003 defined it as any transmission, emission or reception of signs, signals, writing, images, sounds or intelligence of any nature by wire, radio, visual or other electro-magnetic systems ;

Hence the terms**'Telecommunications Network'** and **'Telecommunications Services'**means any form of installations which ensures either the transmission or the transmission and routing of telecommunications signals and theassociated exchange of the control and operational information between network termination points. On the other hand, Telecommunication Services are services whose provision consists wholly or partly in the transmission and routing of signs, signals, texts, images, sounds or data or a combination of these functions on telecommunications networks using telecommunication process.[34]

'Law' is a term which does not have a universally accepted definition, but one definition is that law is a system of rules and guidelines which are enforced through social institutions to govern behavior.[35] Laws can be made by legislatures through legislation, the executive through decrees and regulations, or judges through binding precedents (normally in common law jurisdictions). The formation of laws themselves may be influenced by a constitution (written or unwritten) and the rights encoded therein.

Telecommunications Law therefore can be defined as the system of rules, regulations and guidelines governing Telecommunications. It encompasses regulations governing

[33]National ICT Policy, 2012. P.80

[34]Regulation 19, Telecommunications Networks Interconnection Regulation 2007.

[35] See definitions.uslegal.com/c/law/-Telecommunications Law & Legal Definition.

broadcasting, telephone and telecommunications service, cable television, satellite communications, wireless telecommunications, and the Internet.

2.3 SCOPE AND SOURCES OF TELECOMMUNICATIONS LAW

2.3.1 SCOPE

Telecommunications law encompasses rules and regulations governing all aspects and facets of telecommunications services. Therefore its scope is far-reaching and highly diversified. It comprises of regulations governing broadcasting, telephone, telecommunications services, cable television, satellite communications, wireless telecommunications and the internet[36].

In terms of aspects of application of the Principal law regulating telecommunications in Nigeria, the NCC Act, 2003clearly states that it applies to the provision and use of all communications services and networks, in whole or in part within Nigeria or on a ship or aircraft registered in Nigeria[37].

2.3.2 SOURCES

The sources of Nigerian Telecommunications Law are generally same as the sources of other Laws in Nigeria. These Laws are derived from the fundamental sources of Nigerian Law as follows:

(a) The Constitution

The Nigerian Constitution is a Federal one. A federal constitution is one which provides for division of powers between the constituents of the Federal Government.

[36]Geller, H. (1985) *Communications Law--A Half Century Later*.Fed.Comm. LJ 37, p.73.

[37]Nigerian Communications Act 2003, Section 2

The Nigerian Constitution is supreme. Constitutional supremacy relates to the supremacy of authority of the constitution over other laws. Section 1(1) provides, "this Constitution and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria". In addition to this, Section 1(3) provides, "if any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail and that other law shall to the extent of the inconsistency be void". The current Constitution is the 1999 Constitution. It came into operations on 29th May, 1999.

By virtue of section 13(2)(b)[38], the security and welfare of the people is the primary purpose of the government. Sections 22 set out the obligation of Mass media which comprise aspects of telecommunications stating that 'The Press, Radio, Television and other agencies of the mass media shall at all times be free to uphold the fundamental objectives contained in this Chapter and uphold the responsibility and accountability of the Government to the people'[39]. Hence all Acts, Policies and Guidelines bordering on telecommunications must be geared towards the realisation of these constitutionally guaranteed fundamental objectives of the Nigerian State.

(b) Legislation

The Constitution regulates the distribution of legislative business between the National Assembly which has power to make laws for the Federation and the House of Assembly of each state of the federation.

[38]Constitution of the Federal Republic of Nigeria, 1999 (as amended), Section 13.
[39]Ibid, Section 22

The current legislation in force at the Federal level is largely contained in the Laws of the Federation of Nigeria 2004 (LFN). Laws made subsequently are found in the annual volumes of the laws of the FRN. Federal laws enacted under the military regime known as Decrees and state laws known as Edicts form the bulk of primary legislations.[40]

The principal law regulating telecommunications in Nigeria is the Nigerian Communications Act, 2003. Details of its provisions will be examined in chapter 3 of this work,

(c) English Law

This consists of:

(i) The received English Law comprising of the following, the common law, the doctrine of equity, statutes of general application in force in England on January 1, 1900, Statutes and subsidiary legislation on specified matters, and

(ii) English law (statutes) made before 1st October, 1960 and extending to Nigeria which are not yet repealed. Laws made by the local colonial legislature are treated as part of the Nigerian legislation.

Despite the influence of English law, the Nigerian legal system is very complex because of legal pluralism.

Legal pluralism is the existence of multiple legal systems within one geographic area. It occurs when different laws govern different groups within a country or where, to an extent, the legal systems of the indigenous population have been given some recognition. Legal pluralism is prevalent in former colonies, where the law of a former colonial authority may exist alongside traditional legal systems. This is evident in the Nigerian

[40]Ladan, M.T. (2006), *Introduction to Jurisprudence: Classical and Islamic.*Malthouse Press, Lagos. P.67.

Legal system where the customary law exists side by side with the inherited English Legal System.

(d) Judicial Precedent

This is "an earlier happening, decision, etc, taken as an example or rule for what comes up later. The doctrine of precedent is founded on the objective of law that ensures that like cases are decided alike. The operation of the doctrine is tied to the hierarchy of the courts. A court is bound by the decisions of any court above it in the hierarchy and usually by a court of co-ordinate or equivalent jurisdiction. The Supreme Court is the highest court of the land. The Court of Appeal is the penultimate court to entertain appeals from the High Courts, which are the trial courts of general jurisdiction. The Court of Appeal and all lower courts are bound by the decision of the Supreme Court[41].

The judicial precedent does not apply to certain courts like the customary/area courts and the sharia courts.

The Federal and State courts are not in two parallel lines. It is only to a limited extent that it may be asserted that each state has its own legal system.

(e) International Law

Nigeria is a member of the United Nations, the Commonwealth of Nations, African Union and many others.Although Nigeria is a signatory to various international conventionsand covenants, these are not enforceable in Nigeria unless they areenacted into law by the National Assembly.

[41]Ibid

Some International Telecommunications bodies who regulations and rules govern telecommunications policies and guidelines in Nigeria include the International Telecommunications Union (ITU), African Telecommunications Union (ATU), Commonwealth Telecommunication Organisation (CTO), West African Telecommunications Regulators Association (WATRA) and Organisation for Economic Co-operation and Development (OECD).[42]

2.4 DEVELOPMENTS IN TELECOMMUNICATIONS IN NIGERIA

The telephone was invented in the seventeenth century by Alexander Graham Bell. Over the years, the telecommunications network has grown to become the largest man-made machine ever made, handling more than 1000 billion calls annually and encompassing the whole globe.[43]

The most rapid growth is the period from the late 1960s to the present day. This is the result of the combination of the development in electronics; the development of digital communication and the convergence of telecommunications and computing technologies; the development of optical fibres and the application of micro-electronics to radio communications[44]

The earliest systems were telegraph systems, which were a form of digital system. Telephony was analogue from its inception up to the early 1970s when developments in

[42]Some other international telecommunications regulatory bodies are Asia- pacific Telecommunity (APT). See <http://www.APTSEE.org/>accessed on 24 June 2014; Caribbean Telecommunications Union (CTU). See <http://www.c-t-u.org/>accessed on 24 June 2014; European Conference of Postal and Telecommunications (CEPT). See <www.cept.org>accessed on 24 June 2014; Inter-American Telecommunications Commission (CITEL). See<www.citel.oas.org/>accessed on 24 June 2014.

[43]Long C. D., *Op Cit*., p.4.

[44]*Ibid*

computing began to transfer across into telecommunications.[45] Until the early 1980s, in almost all countries, telecommunications was the subject of monopoly supply with the public network operator normally being a state-owned corporation. This monopoly culture was in contrast to the competitive culture of the new computing industry, which used, to a large extent, the same technology and saw rapid reductions in costs and improvements in capabilities.[46]

A historical timeline depicting watershed threshold in the evolution of telecommunications in Nigeria will now be presented in order to show various Reforms and interventions in the Industry.

2.4.1: Pre-Independence Era[47]

The need for interconnectivity at international level was not through the International Telecommunications Union (ITU).[48] Historically, Nigerian telecommunications standards were dictated by British practice from the colonial times to the early 1970s. However, the journey to success in Nigeria's telecommunications milieu has been long and tortuous.

Telecommunications facilities in Nigeria were first established in 1886 by the colonial administration,[49] although what is today the Nigerian telecommunications subsector

[45] *Ibid*, p.5
[46] *Ibid*

[47] Nigeria got independence from the British on 1st October 1960. The pre-independence era in the Nigerian telecommunications industry is the period before 1st October 1960.

[48] Long C. D., *Op cit.*, p.4.

[49] Case Study: Telecoms in West Africa' <www.itlaw.strath.ac.uk/distlearn/downloads>accessed on 17 May 2014. See also 'Revising Nigeria's Telecommunications Industry'<www.nigeriabusinessinfo.com >accessed on30 August, 2014.

actually began in 1855 when the colonial administration agreed to a request by their officers in the Sub-Saharan African Countries to establish telecommunications links with the colonial officers in London.[50] Before then, the British Post Office had extended its services to the colonies within the British West African regions.[51]

2.4.2: Post-Independence Era: Period between 1960-1985

At independence in 1960, with a population of about 40 million people in the country, Nigeria had about 18,724 phone lines for use.[52] Nigeria was really challenged in terms of telecommunication. Between 1960 and 1985, the telecommunications sector consisted of the Department of Post and Telecommunications (P&T) in charge of the internal network and a limited liability company, the Nigerian External Telecommunication (NET) Limited, responsible for the external telecommunications services.[53] At that period, telephone penetration remained poor and the quality of service was largely unsatisfactory.[54] The system was invaluable, congested, expensive and customer unfriendly. In 1985, the Post and Telecommunications (P&T) was split into Postal and Telecommunications Division which was later merged with Nigerian External Telecommunications (NET) to form Nigerian Telecommunications Limited (NITEL). However, unlike in United Kingdom where a 51% stake of British Telecoms was sold,

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[50]Adewale, S.A and Bamise J.B., *The Legal Protection of Consumers of Telecommunications Services*. A Paper presented to 2005/2006 LL.M Class of Aviation and Communications Law, Faculty of Law, ObafemiAwolowo University, Ile-Ife, Nigeria.

[51]*Ibid.*

[52]Adegbemile A. A., *Op Cit.*

[53]*Ibid*, p.885

[54]*Ibid*

the Nigerian Federal Government was the sole regulator and the financier of NITEL until when NITEL was sold to Transnational Corporation of Nigeria Plc (Transcorp) in 2006.[55]

2.4.3: Period between 1985-1992: Privatisation of Telecommunications Sector in Nigeria

In order to deal with the issue of reforms which apply to all public enterprises in Nigeria, theFederal Military Government set up a Technical Committee on Privatisation andCommercialisation (TCPC) in July 1987[56]and promulgated the Privatisation and Commercialisation Decree.[57] The Decree provided for the necessary legal framework for planning, organization and implementation of Government anticipated programmes on public enterprises commercialization and privatization as integral parts of Nigerian restructuring of national economy.[58] The Decree established the Technical Committee on Privatisation and Commercialisation (TCPC) and with the coming of the TCPC,[59]the status of NITEL changed. This was made possible with the tripartite performance contract agreement signed on 22nd May 1992 by NITEL, Federal Government and TCPC which projected NITEL as a full-fledged commercial entity.[60]Under the agreement,

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[55]*Ibid*

[56]Oshio E. P. and Stewart N.F., *The Legal and Institutional Frameworks of Privatization in Nigeria: A Discourse*
<http:www.//nigerialawguru.com/articles/company%20law/THE%LEGAL%20%AND%20INSTITUTI NAL%20FRAMEWORKS%20OF%20F%20PRIVATISATION%20IN%20NIGERIA20A%20DISCOURSE.pdf> accessed on 14 August 2014.

[57]No. 25 of 1988**.**Can now be found as Public Enterprises (Privatisation and Commercialisation) Act, *Cap P 38 LFN 2004.*

[58]Obadan M. I. and Ayodele A. S.(1998).*Commercialisation and Privatisation Policy in Nigeria,* National Centre for Economic Management and Administration, Ibadan, Nigeria, p. 73.

[59]Now Bureau for Public Enterprises (BPE). The current Act establishing the BPE is the Public Enterprises (Privatisation and Commercialisation) Act, *Cap. P 38 LFN 2004*, which, by Section 12, established the Bureau. By the Act, NITEL and its mobile section, Nigerian Mobile Telecommunications Limited (M-Tel) were partially privatized by the effect of Section 1 (1) and Part I of the First Schedule to the Act.

[60] The effect of this agreement is the change in the nomenclature of NITEL from Limited Liability Company (Ltd) to Public Limited Liability Company (Plc).

NITEL was to be self-financing and should improve telecommunications services. The major event in the Nigerian Telecommunications industry between 1985 and 1992 is that NITEL was the main basic provider of domestic and international services. This monopoly has had serious effects on the industry in terms of gross inefficiency, high cost and lack of universal access.[61]

Competition was only available as far as equipment supply was concerned and there was noconvergence[62] among the three arms of communications.[63]From 1986, NITEL embarked on the modernization of the telecommunications networks through the introduction of digitalexchange, optic fibre and digital satellite earth stations. NITEL services were equally increased to include mobile telephone, prepaid card public payphone terminal, cellular pagingand electronic mails (e-mails).[64]

In order to achieve the self-financing and telecommunications service improvement of NITEL, three measures have been taken namely: re-organisation, staff training and improvements in the installation of the state of art exchange and transmission of equipment and facilities.[65] Although, modernization of Telecommunications networks started in 1986 while commercialisation of NITEL started in 1992, deregulation of NigerianTelecommunications industry started partially in 1991 under the regulatory arm of NITEL's Planning and Operation Division.

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[61]Adegbemile A. A., *Op Cit.*

[62]Usoro, P., *Telecommunications in Nigeria: Operation and Legal Framework*, A paper presented at the 2004 Workshops ALPHA JURIS Continuing Legal Education Series Law West Limited.

[63] The three arms of Communications are Telecommunications, Information Technology and Broadcasting

[64]Adegbemile A. A., *Op Cit.*

[65]*Ibid.*

In October 1991, approvals were given to five companies[66]to operate prepaid card public payphone in the six geopolitical zones of Nigeria.[67] This was the trend in the developments in Nigerian telecommunications industry until 1992 when the Nigerian Communications Commission was established.

2.4.4: Period between 1992-2003: Deregulation of the Nigerian Telecommunications Sector

In 1992, the Nigerian Communications Commission (NCC) was established by the NigerianCommunications Commission Act[68]. The NCC was established to take over the regulation of telecommunications activities from NITEL's Planning and Operation Division, and since then all telecommunications service operators are being licensed by the commission. As at the onset of deregulation in 1992, NITEL had 500, 000 lines to a population of 100 million.[69] The 1992 Act introduced competition and regulation of the telecommunications sub-sector. A major post 1992 legal framework issue is the location of regulatory power for a converged industry in the three arms of communications.

In 1992 when NCC was established, the body opened up all telecommunications activityareas to private operators to participate and compete with the former government monopoly, NITEL.[70] However, until 1999, NITEL had a monopoly on the

[66] The five companies are Chawaleks Telecommunications Ltd, SATCOMS Ltd, Nakaita Holdings Ltd, GPT Ltd and Murhi International Ltd.

[67] The six geo-political zones in Nigeria are: North-Central, North East, North West, South-South, South-West and South-East.

[68]No. 75 of 1992

[69]Adegbemile A. A., *Op Cit.*

[70]*Ibid*, p.886.

telecommunications sector and on assumption of office in 1999, the President OlusegunObasanjo Administration swung into action to make the complete deregulation of the telecommunications sector a reality, most especially the granting of licences to Gobal System for Mobile Communications (GSM) service providers. In August 2001, the GSM Services were launched commercially and several GSM operators have been licensed.[71]

The motivating forces driving the deregulation of telecommunications services in Nigeriainclude:

(i) Private consumer and business demand for good quality telecommunications services at affordable prices and competitiveness;

(ii) Need for reduced time for telephone installation and service delivery;

(iii) Diversification and complexity of user needs;

(iv) Advances in technology;

(v) Demand for improved business efficiency in the face of tight budgets;

(vi) Economic development and job creation; and

(vii) The trend worldwide.

In the light of the foregoing, the Nigerian Government's decision to deregulate the telecommunications industry has had positive and far-reaching implications which are expected to provide the needed leverage and act as a catalyst for various forms of business, economic, social and organisational developments.

The strategic implication of the foregoing is that the core areas of public switches and trunks and international services have been reserved for the national operator, NITEL. This is to provide the

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[71]Osondu C. N., *Regulatory Challenges in the Nigerian GSM Market.* A Paper Presented at the Nigerian Bar Association Annual Bar Delegates Conference, Abuja, September 18, 2004.

necessary incentive and cross-subsidy for services to the rural communities and social services. That notwithstanding, and in order not to frustrate private sector participation, government, as a matter of policy, has maintained that the national career - NITEL is required to:

(i) provide network access and interconnectivity to other licensed operators,

(ii) charge fair and competitive tariffs for such access and interconnectivity,

(iii) concentrate its efforts and resources on core infrastructure development, i.e. the provision of public switches and long distance trunk capacity.

In return, it was expected that NITEL will benefit from increased traffic to be generatedthrough its network by private operators and through enhanced revenue generation and collection.

The regulatory body, the Nigerian Communications Commission, was formally inaugurated on the 16th of July 1993.[72]

2.4.5: Period between 2003 – Date

A new regime in the Nigerian telecommunications industry emerged in 2003 when theNigerian Communications Act 2003[73] was passed into law. The NCC is now moreempowered and by virtue of the powers conferred on it, the NCC has published many rules, guidelines and regulations in order to accomplish its primary object of creating and providing a regulatory framework for the Nigerian communications industry.[74]

[72]Alabi G.A., 'Telecommunications in Nigeria' http://www.africaupenn.edu/ECA/aisi_inftl.html accessed on 07 September, 2014.

[73] The Nigerian Communications Act No 19 of 2003 repealed the Nigerian Communications Commission Act 1992 and all subsequent amendments thereto by Section 150 of the 2003 Act. The Nigerian Communications Act 2003 is now embodied in *Cap N 97, Laws of the Federation of Nigeria 2004*.

[74] Guidelines and Regulations published by the Nigerian Communications Commission include EnforcementRegulations 2004; Consumer Code of Practice Regulations 2007; Determination of Interconnect Rate

The grant of licenses to private operators is not without its demerits. The NCC envisagedemergence of private monopolies or cartels and thus it increased its regulatory oversight of the industry in 2003/2004. Regulatory interventions also came about to prevent hapless consumers from inefficient telecoms networks and poor consumer services.[75] The NCC alsoannounced a number of strategic plans including a strategic plan for 2003-2007 such as the Wire Nigeria (WIN) project, and the Rural Telecommunications Development Fund (RTDF).NCC has also worked towards and made specific pronouncements on reduced interconnection rates and has ensured that Private Telecommunications Operators (PTO) reduced International Call charges rates and also established a consumer parliament.[76]

The growth of the telecommunications market in Nigeria has continued at geometric rates,thereby sustaining the market as one of the fastest growing telecommunications markets in the world. Nigeria is now officially the largest growth market for telecommunications in Africa and the Middle East, and possesses the most vibrant fixed and mobile telephony companies in Africa.[77]

2006 (which replaced Interconnection Rate Determination 2003); Guidelines on Procedure for Granting Approval to Disconnect Telecommunications Operations; Guidelines on International Gateway Access and Voice over Internet Protocol (VoIP); Dispute Resolution Guidelines 2004; Telecommunications Network Interconnection Regulations 2003 (now replaced by the Telecommunications Networks Interconnection Regulations 2007); Universal Access and Universal Service Regulations 2007; Competition Practices Regulations 2007; Frequency Spectrum (Fees & Pricing, e.t.c) Regulations 2004 and Technical Specifications for the Installation of Telecommunications Masts and Towers 2009.

[75] NCC, *Trends in Telecommunications Markets in Nigeria 2003-2004*.' The publication details the Trends in Telecommunications Markets in Nigeria during the years 2003-2004. Thepublication is the second edition made by the NCC.

[76]*Trends in Telecommunications in Nigeria 1997-2002*. A publication of NCC, published in 2003. This is the maiden edition of the NCC report on Trends in Telecommunications in Nigeria. The success of the publication vis-à-vis its acclaimed usefulness for research and planning purpose probably encouraged the commission to embark on the second edition, *Trends in Telecommunications Markets in Nigeria 2003-2004* in 2005 with a promise to continue publishing the report annually.

[77] NCC, *Trends in Telecommunications Markets in Nigeria 2003-2004.*

In 2011 The Hon Minister of Communications Technology, Mrs. Omobola Johnson, set up an Adhoc Committee to harmonize all the various policies for the different sectors in the ICT industry (Telecommunications, Broadcasting, Information Technology and Postal Services). The work of this Committee led to the latest National Information and Communication Technology (ICT) Policy, 2012 whose mission is to fully integrate Information and Communication Technologies into the socioeconomic development of Nigeria, in order to transform Nigeria into a knowledge-based economy.

2.5 CONCLUSION

Since the emergence of GSM in Nigeria, the dynamism of the mobile operators has resultedin mobile outpacing fixed-lines. This shows that the Nigerian telecommunications landscape has witnessed an exponential growth in the last decade; it took 40 years to reach 400, 000 connections, 3 years to reach 4 million connections and just another 4 years to reach 40 million connections in 2008.[78]Currently in 2017 based on recent Industry Statistics published by the NCC and Nigeria's Bureau of Statistics, there are presently 226 million lines out of which about 150 million are active.[79]The dynamic open market approach adopted by the government since the emergence of GSM from 2001 to date has promoted rapid deployment of Information and Communication Technology (ICT) services nationwide. While connected lines only grew atan average of 10,000

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[78]Ndukwe, E., *Consumer Rights in the Telecommunications Industry*. A Paper presented at the Annual Distinguished Lecture of the Justice Chambers, Faculty of Law, ObafemiAwolowo University, Ile-Ife, Nigeria, 16th May, 2008. Engr Earnest Ndukwe was the Executive Vice-Chairman/Chief Executive Officer of Nigerian Communications Commission.

[79]Industry statistics published by the Nigerian Communication Commission (www.ncc.gov.ng/index.php?option=com_content&view=article&id..html). Accessed 5th March, 2017.

connections per annum between 1960 and the end of 2000, an average growth rate of over 7 million lines per annum was attained between 2001 and 2008.[80]As at the end of December 2016, Nigeria had attained 150 million of (fixed and mobile) active subscriber connections.[81] Total teledensity which was less than 0.4% in 2000 soared to 110.09% by March 2017[82]

Deregulation and liberalization of telecommunications industry is a global phenomenon and awelcome approach in the international telecommunications market. However, the regulatory authority needs to exercise extreme caution so that private operator(s) would not monopolisethe industry because if this happens the essence of deregulation and liberalization may be defeated. The regulatory body should authorize operators to provide competitive telephoning service and improve services over their networks.

[80]*Ibid.*

[81] *Ibid.*

[82]*Ibid.*

CHAPTER THREE

INSTITUTIONAL MECHANISMS AND TELECOMMUNICATIONS UNIONS

3.1 INTRODUCTION

The telecommunications industry is a key part of the economy in the world and of crucial strategic importance for the economy's competitiveness. The aim and objective of marketliberalization includes not only the benefits to consumers of improved prices, choice and quality of service and widened product range but also overall economic development.[83]

Regulation of telecommunications is of utmost importance as a tool for regulatory reforms in the telecommunications industry. Regulatory reform has emerged as an important area in telecommunications sector and for regulatory reforms to be beneficial, the regulatory regimes need to be transparent, coherent and comprehensive, spanning from establishing the appropriate institutional framework to liberalizing network industries, advocating and enforcing competition policy and law and opening external and internal markets to trade and investment.[84]

This chapter examines several regulatory regimes in the Nigerian telecommunications industry. But because telecommunications is an international phenomenon, the chapter also considers what obtains in the international environment. The chapter juxtaposes the roles of various institutional mechanisms and regulatory authorities with a view to finding out their interrelationship and proffering recommendations on the need to avoid

[83]See Organization for Economic Co-operation and Development (OECD) Reviews of Regulatory Reform in Telecommunications<http://www.ictregulationtoolkit.org/en/publication.2382. html>accessed on 20 July 2014.

[84]*Ibid.*

multiple and confusing regulatory regimes which may be counter-productive to the telecommunications systems.[85]As part of regulatory framework for telecommunications, the need for efficient market structure, authorization and licensing cannot be over emphasised. So also is the logical and physical linking of one telecommunications service with another.

That a regulatory framework of telecommunications is put in place is not the end of regulation. There needs to be mechanisms for the enforcement of the regulation.[86]

Interconnection takes a vital role in this chapter. Telecommunications systems have to be technically compatible with each other and have to be actually connected.[87]

3.2: INSTITUTIONAL MECHANISMS FOR TELECOMMUNICATIONS INDUSTRY IN NIGERIA

In this section, regulatory authorities of telecommunications industry in Nigeria are considered within the Nigerian legislative framework. This is to ensure coherence and logical arrangement of the work. Although this section may not be a discussion of all regulatory authorities of telecommunications industry in Nigeria, it is believed that the section will cover the main regulatory bodies that have direct or indirect link with telecommunications industry and services.

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[85] For instance there is need for Nigerian Communications Commission (NCC) and National EnvironmentalStandards Regulation and Enforcement Agency (NESREA) to harmonize their regulatory duties in the telecommunications industry and set regulatory boundaries for efficient telecoms operation without adversely affecting environmental sustainability.

[86] Mechanisms are put in place to ensure adequate enforcement procedure in the telecommunications industry. There are several statutory instruments such as Enforcement Regulations of 2004, Telecommunications Network Interconnection Regulations 2007, etc., all aimed at sanitizing the telecommunications industry for the achievement of global standards in telecommunications.

[87] Long C.D., *Telecommunications Law and Practice* (2nd edn), Sweet & Maxwell, London (1995) p.3.

3.2.1: NIGERIAN COMMUNICATIONS COMMISSION (NCC)[88]

Regulatory bodies are established in different countries. These bodies regulate the activities and affairs of telecommunications industry. In Nigeria, the specific regulatory body in the telecommunications industry is the Nigerian Communications Commission (NCC), although there are other Nigerian legislation establishing other bodies that have indirect connection with telecommunications in Nigeria.[89]

Nigerian Communications Commission (NCC) was first established in 1992 by the Nigerian Communications Commission Act[90]. By the enactment of the Nigerian Communications Act 2003,[91] which repealed the 1992 Act, the establishment provision of the NCC can now be found in Section 3 of the 2003 Act[92]with responsibility for the regulation of the communications sector in Nigeria.[93]

The commission is a body corporate with perpetual succession and a common seal, capable of suing and being sued in its corporate name and shall have the power:

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[88]For the purpose of this part of this thesis, the Nigerian Communications Act shall be referred to as "the Act" for ease of reference, while the Nigerian Communication Commission shall be referred to as the Commission or NCC.

[89] Such other bodies include the Consumer Protection Council established by Section 1 (1) of the Consumer Protection Council Act, *Cap C 25, LFN 2004*; Standards Organisation of Nigeria established by the Standards Organisation of Nigeria Act, *Cap S 9 LFN 2004*: National Environmental Standards and Regulations Enforcement Agency established by Section 1 (1) of the National Environmental Standards and Regulations Enforcement Agency (Establishment) Act *No 25 of 2007.*

[90]No 75 of 1992

[91] Nigerian Communications Act 2003 cannot be found in the original LFN 2004 since LFN 2004 contains all Acts of the National Assembly or deemed to have been made by the National Assembly up till December 2002 by virtue of Revised LFN Edition Act 2004 while the Nigeria Communications Act 2003 was passed into law in 2003. It is now embodied in *Cap N97 LFN 2004* as an attachment thereto.

[92]Nigerian Communications Act, *Cap N 97 Laws of the Federation of Nigeria 2004.*

[93]Section 3 (1).d,Ibid.

(i) to enter into contract and incur obligations;

(ii) to acquire, hold, mortgage, purchase and deal howsoever with property whether movable or immovable; real or personal; and

(iii)to do all such things as are necessary for or incidental to the carrying out of its functions and duties under the Act.[94]

The Commission has the following functions under the Act:

(a) the facilitation of investments in and entry into the Nigerian market for provision and supply of communications services, equipment and facilities;
(b) the protection and promotion of 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;
(c) ensuring that licensees implement and operate at all times the most efficient and accurate billing system;
(d) 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;
(e) granting and renewing communications licences whether or not the licences themselves provide for renewal in accordance with the provisions of this Act and monitoring and enforcing compliance with licence terms and conditions by licensees;
(f) proposing and effecting amendments to licence conditions in accordance with the objectives and provisions of this Act;
(g) fixing and collecting fees for grant of communications licences and other regulatory services provided by the Commission.;
(h) the development and monitoring of performance standards and indices relating to the quality of telephone and other communications services and facilities supplied to consumers in Nigeria having regard to the best international performance indicators;
(i) 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;
(j) management and administration of frequency spectrum for the communications sector and assisting the National Frequency Management (NFM) Council in developing a national frequency plan;
(k) development, management and administration of a national numbering plan and electronic addresses plan and the assignment of numbers and electronic addresses therefrom to licensees;

[94]Section 3 (2) *Ibid.*

(l) proposing, adopting, publishing and enforcing technical specifications and standards for the importation and use of communications equipment in Nigeria and for connecting or interconnecting communications equipment and systems;
(m) the formulation and management of Nigeria's inputs into the setting of international technical standards for communications services and equipment;
(n) carrying out type approval tests on communications equipment and issuing certificates therefor on the basis of technical specifications and standards prescribed from time to time by the Commission;
(o) encouraging and promoting infrastructure sharing amongst licensees and providing regulatory guidelines thereon;
(p) examining and resolving complaints and objections filed by and disputes between licensed operators, subscribers or any other person involved in the communications industry, using such dispute-resolution methods as the Commission may determine from time to time including mediation and arbitration;
(q) preparation and implementation of programmes and plans that promote and ensure the development of the communications industry and the provision of communications services in Nigeria;
(r) designing, managing and implementing Universal Access strategy and programme in accordance with Federal Government's general policy and objectives thereon;
(s) advising the Minister on the formulation of the general policies for the communications industry and generally on matters relating to the communications industry in the exercise of the Minister's functions and responsibilities under this Act;
(t) implementation of the Government's general policies on communications industry and the execution of all such other functions and responsibilities as are given to the Commission under this Act or are incidental or related thereto;
(u) generally advising and assisting communications industry stakeholders and practitioners with a view to the development of the industry and attaining the objectives of this Act and its subsidiary legislation;
(v) representation of Nigeria at proceedings of international organisations and fora on matters relating to regulation of communications and matters ancillary and connected thereto; and
(w) general responsibility for economic and technical regulation of the communications industry.[95]

Pursuant to the Act, the Commission also has the power to make and publish regulations for all or any of the following issues:

[95]Section 4 (1),*Ibid.*

(a) writtenauthorisations, permits, assignments and licenses granted or issued under this Act;
(b) assignment of rights to the spectrum or numbers under Chapter VIII, including mechanisms for rate-based assignment;
(c) any fees, charges, rates or fines to be imposed pursuant to or under this Act or its subsidiary legislation;
(d) a system of universal service provision under Chapter VII, including but not limited to the quality of service standards;
(e) communications and related offences and penalties;
(f) any matter for which this Act makes express provision; and
(g) such other matters as are necessary for giving full effect to the provisions of this Act and for their due administration.[96]

The Act also established a Governing Board (the Board) for the Commission. The board is charged with the administration of the affairs of the Commission.[97]It consists of 9 Commissioners, a Chief Executive who shall be the Executive Vice Chairman of the Board, 2 Executive Commissioners and 3 non-executive Commissioners. The Board members are appointable by the president.[98] The acts of the Board are deemed to be acts of the Commission.[99]

3.2.2: NATIONAL FREQUENCY MANAGEMENT COUNCIL (NFM) The

National Frequency Management Council[100] was established by the Nigerian Communications Act with membership and functions as set out in the Act.[101]

The membership of the Council is made up of a Chairman who shall be the Minister responsible for communications; one representative of the Federal Ministry for the time being charged with the responsibility for communications; one representative of the

[96]Section 70 (1),Ibid. Pursuant to the provision, the Commission has issued and published several guidelines and regulations. See footnote 72 of previous chapter for a list of the Guidelines and Regulations.
[97]Section 5 (1).*Ibid*
[98]Sections 5 (2).*Ibid*.
[99]Section 5 (5).*Ibid.*
[100]hereinafter referred to as 'the Council'
[101]Section 26.*Ibid*.

Federal Ministry of Aviation; one representative of the Federal Ministry of Transport; one representative of the Federal Ministry of Science and Technology; two representatives of the Nigerian Communications Commission; one representative of the National Broadcasting Commission (NBC) and one representative from the security agencies of the Federal Republic of Nigeria.[102]

The National Frequency Management Council has the following functions:

(a) assist and advise the Minister on the representation of the Federal Republic of Nigeria and carrying out ancillary functions at international and regional spectrum allocation bodies including but not limited to International Telecommunications Union (ITU);
(b) assist and advise the Minister on the preparation and negotiation of bilateral and multi-lateral spectrum allocation treaties with other sovereign administrations;
(c) assist and advise the Minister on the preparation, negotiation and adoption of spectrum coordination agreements that are applicable to cross-border spectrum uses involving the Federal Republic of Nigeria and other countries;
(d) in consultation and conjunction with the Commission, prepare, update and publish on a regular basis a national frequency allocation table and establish a data bank that would assist and facilitate the management of the national spectrum;
(e) carry out bulk trans-sectoral allocation of spectrum to statutory bodies that are authorised by enabling laws to allocate spectrum to end-users; and
(f) receive and collate returns and statistics on spectrum allocation to end-users from the statutory bodies specified in paragraph (e) of this section and coordinate their respective activities.[103]

3.2.3: UNIVERSAL SERVICE PROVISION BOARD

As part of the effort at ensuring effective and efficient co-ordination and technical regulation of Universal Service provisions of telecommunications services, the Nigerian Communications Act makes provision for establishment of Universal Service Provision Fund.

This Fund[104] comprises funds derived from but not limited to the following sources:

[102]Section 27.*Ibid.*
[103]Section 28.*Ibid.*

- Such monies as may be specifically appropriated to the Universal Service Provision (USP) Fund from time to time by the National Assembly;
- Contributions from the Commission based on a portion of the annual levies paid to the Commission by licensees; and
- Gifts, loans, aids and such other assets that may from time to time specifically accrue to the USP Funds.[105] The administrative and operational expenses for USP shall be funded directly from the USP Fund and such expenses include salaries, emoluments, remunerative packages and allowances for USP Board members, the commission staff who are assigned on full-time basis to the USP Secretariat or such other staff of the USP Secretariat however engaged and USP Fund managers.[106]

For effective management of the USP Fund, the Act established the Universal Service Provision Board to supervise and provide board policy and directions for the management of the USP Fund.[107]

The functions of the Universal Service Provision (USP) Board include:

(i) supervising and providing broad policy directions for the management of the USP fund and the USP fund managers;

(ii) appointing and removing the USP fund managers, in consultation with the Corporate Affairs Commission;

(iii) appointing and removing auditors of the USP fund;

(iv) appointing Operating Plans, which shall include one or more USP programs and USP Projects and a budget for all operations and expenses of the USP Board, USP fund

[104]Universal Service Provision Fund. In the US, a similar fund is called Universal Service Fund (USF), and its goal is to provide at least one access line for basic telephone service to every household.
[105] S. 114 (2) of the Nigerian Communications Act.
[106] S. 114 (3), *Ibid*.
[107]S. 115, *Ibid*.

managers and all other matters to be financed by the USP fund during the period of the Operating Plan;

(i) approving standing orders to establish and regulate the activities of the USP fund manager and revisions to such standing orders from time to time;

(ii) approving all processes, procedures, guidelines and decisions necessary to give full force and effect to the universal Access and Universal Service Regulations; and

(iii) performing all other functions assigned to the USP Board pursuant to the Nigerian Communications Act and the Universal Access and Universal Service Regulations.[108]

3.3.: INTERNATIONAL TELECOMMUNICATIONS BODIES

There is no country in the world today that does not consider it essential to develop its communications infrastructures. While the 1960s and 1970s established the importance of developing transport and energy infrastructures for the harmonious development of developing countries, the 1980s showed that the development of many sectors of economic activities could no longer be envisaged without consistent development of telecommunications networks.[109]

International trade has to develop in the light of both the globalization and the increasing inter-linkage of economies, and the necessary tool to achieve this is telecommunication.

[108]Regulations 4, Universal Access and Universal Service Regulation 2007.

[109] Moreira, C. *Telecommunications: A Key Resources for International Trade*, JIBC(1996),Vol. 1, p.5

Telecommunications have to be regarded as a key resource for international trade in goods and services,[110]and this is the reason why discussions on telecommunications in a given country cannot be complete without considering the international environment, telecommunications also being an international phenomenon.

Although there are lots of international regulatory bodies and organisations in telecommunications industry, this work shall consider only five of them viz:- the International Telecommunications Union (ITU), African Telecommunications Union (ATU), Commonwealth Telecommunication Organisation (CTO), West African Telecommunications Regulators Association (WATRA) and Organisation for Economic Co-operation and Development (OECD).[111]

It is the hope of this section that Nigeria will learn lessons from International regulatory bodies in telecommunications in its effort at achieving global standards in telecommunications industry. The aims and objectives of the international regulatory bodies can be a basis for the formulation of government policies which will ultimately improve the standard of Information and Communications Technology.

3.3.1: INTERNATIONAL TELECOMMUNICATIONS UNION (ITU)

The International Telecommunications Union (ITU) is an agency of the United Nations which regulates Information and Communication Technology (ICT) issues. For nearly 145 years, ITU has co-ordinated the shared global use of the radio spectrum, promoted

[110]*Ibid*.

[111]Some other international telecommunications regulatory bodies are Asia- pacific Telecommunity (APT). See <http://www.APTSEE.org/>accessed on 24 June 2014; Caribbean Telecommunications Union (CTU). See <http://www.c-t-u.org/>accessed on 24 June 2014; European Conference of Postal and Telecommunications (CEPT). See <www.cept.org>accessed on 24 June 2014; Inter-American Telecommunications Commission (CITEL). See<www.citel.oas.org/>accessed on 24 June 2014.

international cooperation in assigning satellite orbits, worked to improve telecommunications infrastructure in the developing world and established worldwide standards.[112]

ITU was established on 17th May, 1865 in Paris with its headquarters in Geneva, Switzerland on the initiative of the French Government. It also organises worldwide and regional exhibitions and fora, such as ITU TELECOM WORLD, bringing together representatives of government and the telecommunications and ICT industry to exchange ideas, knowledge and technology.[113]

Membership of ITU is open to governments, which may join the Union as member states, as well as to private organisations like carriers, equipment manufacturers, funding bodies, research and development organisations and international and regional telecommunications organisations, which can join ITU as sector members.[114]The membership of ITU includes 191 member states and more than 700 sector members and Associates.[115]

As an international telecommunications organisation, the ITU's mission is to enable the growth and sustained development of telecommunications and information networks, and to facilitate universal access to the emerging information society and global economy. The ITU assists in mobilizing the technical, financial and human resources required by

[112]InternationalTelecommunicationUnion<http://en.wikipedia.org/wiki/International_Telecommunication_Union>accessed on 24 August 2014.

[113]*Ibid*

[114]*Ibid*

[115]*Ibid*

such development. It concentrates on strengthening emergency communications for disaster prevention and mitigation, especially in less developed regions.[116]

A major priority of the ITU is bridging the so-called 'digital divide' by building adequate and safe information and communication infrastructure and developing confidence in the use of cyberspace through enhanced online security.[117]

3.3.2: AFRICAN TELECOMMUNICATIONS UNION (ATU)

The African Telecommunications Union (ATU) is the leading continental organization fostering the development of Information and Communication Technologies infrastructure and service. It combines countries and mobile telecommunications providers within Africa in an attempt to increase development of the continent's ICT infrastructure in African.[118]

The formulation of the ATU dates back to 1977 when its mission was a part of the Organisation of African Unity (OAU).[119]The ATU was officially formed in 1999 as the successor to the Pan-African Telecommunications Union (PATU) and is headquartered in Kinshasa, Democratic Republic of Congo.[120]At this time, the Union slightly transformed from primarily a coordinating body for government related activity to include private and public stakeholders in the information and telecommunications technology sector. The

[116]*Ibid*

[117]*Ibid*

[118]African Telecommunications Union <www.atu-uat.org/>accessed on 24 June 2014.

[119]Which has been replaced by the African Union (AU).

[120] Due to war, the headquarters of ATU relocated to Nairobi, Kenya.

ATU now enforces a constitution and has added a Secretary General along with a technical management team to ensure a more effective transformation from the PATU.[121]

The ATU provides a collaborative atmosphere for public and private stakeholders to formulate and negotiate policies that might increase the role of Africa in the booming environment of ICT. While the PATU previously only allowed public membership of governments, the ATU now allows organisations from the private sector to become associate members.[122]The ATU has 46 member states[123] and 16 associate members.[124] Any private entity in the ICT sector may also apply for membership of ATU.[125]

The ATU is divided into five principal parts *vis*:- the Conference of Plenipotentiaries (CPL), the Administrative Council, the Technical and Development Conference, the GeneralSecretariat and Non-Permanent Unit.[126]

The ATU advocates for increased information development within the continent of Africa.

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[121]African Telecommunications Union<www.atu-uat.org/>accessed on 24 June 2014.

[122]*Ibid*

[123]The 46 members spanning North Africa, Southern Africa, East Africa, Central Africa and West Africa are North Africa: Algeria, Egypt, Libya, Morocco, Tunisia and Mauritania; Southern Africa: Lesotho, Malawi, South Africa, Swaziland, Zambia and Zimbabwe; East Africa: Cameroon, Djibouti, Ethiopia, Madagascar, Mauritius, Somalia, Sudan, Tanzania and Uganda; Central Africa: Angola, Burundi, Cameroun, Central African Republic of Congo, Equatorial Guinea, Gabon and Sao Tome & Principe; West Africa: Benin Republic, Bulkina Faso, Cote d'ivore, Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone and Togo.See African Telecommunications Union <www.atu-uat.org/about.htm>accessed 24 June 2014.

[124]These are Cameroon Telecommunications (CAMTEL), Cote d'Ivoire Telecom, Sudan Telecom Company Limited (SUDATEL)-Sudan, Loteny Telecom-Cote d'Ivoire, Botswana Telecommunications Authority (BTA)-Botswana, Safari Com Limited-Kenya, Telkom Kenya Ltd-Kenya, Telecom Lesotho (PTY) Ltd- Lesotho, P.Q. Africa-South Africa, Vodacom (PTY) Limited-South Africa, Zanzibar Telecom Limited (ZANTEL)-Tanzania, Tanzania Telecommunications Company Limited (TTCL)-Tanzania, Ghana Telecommunications Company Ltd-Ghana, Mauritius Telecom Ltd-Mauritius, Telecom Egypt-Egypt and INFOTEL Consulting-Nigeria. See African Telecommunications Union<www.atu-aut.org/about/htm accessed on 24 June, 2014.

[125]Whether or not it is affiliated with a host country in the African Union.

[126]African Telecommunications Union <www.atu-uat.org/>accessed on 24 June 2014.

The aim of the ATU is to ensure transparency and accountability, effective funding and financing, and quality service to all with whom it collaborates. The ATU also promotes positive collaboration with the Institute for Computer Technology Research and Development (ICTRD).[127]

Internet has become the permanent communication technology for fostering economic growth, and this is a great focus area of ATU. ATU attempts to address the connectivity gap among the nations in Africa and strives for universal access through Africa. In achieving its goals, the ATU hopes to be a meaningful player in the development and progression of Africa as a significant contributor to the global information and knowledge society.[128]The core activity programs of the ATU include contributing to global decision-making, integrating regional market, attracting investment into ICT infrastructure and building human and institutional capacity. It is part of its mission to promote rapid development of info- communication in Africa in order to achieve universal access and full inter-country connectivity.152

3.3.3: COMMONWEALTH TELECOMMUNICATIONS ORGANISATION (CTO)

The Commonwealth Telecommunications Organisation (CTO) is an international development partnership between commonwealth and non-commonwealth governments, business and civil society organisations. It provides the international community with effective means to help bridge the digital divide and achieve social and economic development, by delivering to developing countries unique knowledge-sharing

[127]*Ibid*

[128]*Ibid*

programmesin the use of ICT in the specific areas of telecommunications, Information Technology (IT), broadcasting and the Internet.[129]

The history of Commonwealth Telecommunications Organisation (CTO) dates back to its creation in 1901 as the Pacific Cable Board. Since then, the CTO has been at the Centre of continuous and extensive international communications development funding, co-operation and assistance programmes. Since 1985, the Organisation has delivered to its recipient members in Europe, the Caribbean, Americas, Africa and Asia-pacific regions, over 3,500 bilateral and multilateral telecommunications and ICT capacity-building projects in the form of policy, operational and regulatory training and expert assistance.[130]

The long history of CTO as a development agency provides the Organisation with a unique and growing delivery capacity of ICT-for-development programmes and services. Recently, the CTO has significantly reviewed its mandate to reflect and respond to today's global development challenges as set in the United Nations Millennium Development Goals (MDGs). The mission of CTO today is to offer the highest quality programmes for capacity development, knowledge sharing and information services, expand and diversify partnerships between governments, business and other organisations to reduce global poverty and fulfill the global development agenda for ICT.[131]

[129]Commonwealth Telecommunications Organisation (CTO)
<http://www.the commonwealth.org/Internal/151940/>accessed on 24 August 2014.

[130]*Ibid*

[131]*Ibid*

3.3.4: WEST AFRICAN TELECOMMUNICATIONS REGULATORS ASSOCIATION (WATRA)[132]

The Economic Community of West African States (ECOWAS) vision for the telecommunications sector is 'to have a single liberalised telecommunications market in the Community, following the adoption of uniform legislative and regulatory frameworks, andthe interconnection and integration of national networks.' ECOWAS reiterated its total support for WATRA and its endeavor to develop harmonised ICT policy and regulatory guidelines for use by the ECOWAS countries.[133]

The West African Telecommunications Regulators Association (WATRA) was established in November 2002. It was borne out of the need to address present realities in the telecommunications industry in the sub-region while focusing on the need for West Africa to evolve a harmonized regulatory identity to boost investment and investor-confidence and to more effectively regulate and monitor telecommunications service.[134]The first Annual General Meeting (AGM) of WATRA was held in Abuja, Nigeria between 24th and 27thMarch 2003.

The current membership of WATRA is fifteen countries with headquarters located in Abuja, Nigeria.[135]It consists of independent National Regulatory Authorities and departments for regulation of telecommunications services established by governments of

[132]Otherwise known as West African Telecommunications Regulators Authority (WATRA).

[133] See the West African Telecommunications Regulators Authority <http//:www.watra.org/>accessed on 11 September 2014.

[134] Ibid.

[135] WATRA members are: Benin Republic, Burkina Faso, Cape-Verde, Cote d 'Ivoire, The Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal and Sierra Leone. See<http:/www.watra.org/index.pht?option=com_content&view=article&id-176&Itemid=184&lang=en> accessed on 11 September 2014.

member states in the ECOWAS sub-region and Mauritania. WATRA partners with international development organizations, private telecommunications operators, governments, ICT equipment manufacturers, ICT equipment vendors and industry stakeholders.[136] WATRA comprises of three institutions namely: the Conference of Regulators, the Executive Committee and the Secretariat. The Secretariat is the Administrative organ of WATRA.[137]

The aims of WATRA include:

(i) to encourage the creation of a viable, homogeneous telecommunications market-place in West Africa;

(ii) to establish conditions that will allow any operator to provide trans-national or global services, in line with the principle of non-discrimination

(iii) to ensure that commitments entered into in dealings with the World Trade Organisation (WTO) are not at variance with ECOWAS objectives;

(iv) to establish a conducive framework within which member states of ECOWAS can evolve a common stand regarding international telecommunications agreements, conventions and treaties;

(v) to allow joint management of certain scarce or limited telecommunications facilities and resources such as the radio frequency spectrum;

(vi) to enable application of uniform rate and tariffs for ICT services;

(vii) to implement mutual recognition of equipment and terminal type approval processes;

[136] The West African Telecommunications Regulators Authority <http//:www.watra.org/> accessed on 11 September 2014.

[137] *Ibid*.

(viii) to provide ECOWAS with the legal instruments regulating network interconnection; and

(ix) to define a framework for the functions and purposes of member state regulatory bodies.[138]

3.3.5: ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD)

The Organisation for Economic Co-operation and Development (OECD) is an international organisation in the area of economic growth and development. Regulatory reform has emerged as an important policy area in OECD and non-OECD countries. Over the years, much has changed in the context of telecommunications regulation. The OECD has assessed regulatory policies in its member countries as part of its regulatory reform programmes.

The OECD is a unique forum where the government of thirty two[139] countries work together to address the economic, social and environmental challenge of globalization. The organisation is also at the forefront of efforts to understand and to help governments respond to new developments and concerns such as corporate governance, the information economy and the challenges of an emerging population. The organisation defines itself as a forum ofcountries committed to democracy and the market economy, providing a setting where governments can compare policy experiences, seek answers to

[138]See Site Search WATRA Objectives, <http:/www.watra.org/index.pht?option=com_content&view=article&id-176&Itemid=224&lang=en> accessed on 11 September 2014. See also 'Nigeria Telecoms Market, A Snap Shot View' < http://www.africaanalysis.co.za/NigeriaTelecomsWhitePaper.pdf>accessed on 12 September 2014.

[139]See Organisation for Economic Co-operation and Development <http://en.wikapedia.org/wiki/ Organisation_ for Economic_cooperationand_Development#Formation_of_the_OECD>accessed on 29 August 2014.

common problems, identify good practice and work to co-ordinate domestic and international policies.[140]

The OECD originated in 1948 as the Organisation for European Economic Co-operation (OEEC) led by Robert Marjolin of France, to help administer the Marshal Plan for the reconstruction of Europe after World War II. Later its membership was extended to non-European states. In 1961 it was re-formed into OECD,[141]pursuant to Article 1 of the OECD convention signed in Paris on 14th December, 1960, and which came into force on 30thSeptember, 1961.[142]Since its establishment, and particularly in the recent years, the telecommunications sector in OECD countries has seen significant regulatory reforms. Twenty-six OECD countries had, in 2001, unrestricted market access to all forms of telecommunications, including voice telephony and infrastructure investment, compared to only a handful just a few years ago.[143]

The contribution of OECD to the growth and developments in telecommunications is not infinitesimal. It has dealt with communications convergence,[144] anti-spam regulation,[145]telecommunication regulatory institutional structures and

[140]See OECD DAC Handbook on Security System Reform (SSR) Supporting Security and Justice <http://www.oecd.org/data oecd/43/25/38406485.pdf> accessed on 28 August 2014.

[141]See Organisation for Economic Co-operation and Development <http://en.wikipedia.org/wiki/organisation_for_economic_cooperation_and_Development#Foundation_of_the_OECD>accessed on 28 August 2014.

[142]See OECD Reviews of Regulatory Reforms in the Telecommunications Industry <http://www.oecd.org/dataoecd/48/28/1960562.pdf>accessed on 28 August 2014.

[143]*Ibid*

[144] See Report on the OECD Roundtable on Communications Convergence (London 2005).

[145] OECD Task Force on Spam- Anti-spam Regulation 2005.

responsibilities,[146]regulatory reforms in telecommunications,[147] protection of consumers from fraudulent deceptive commercial practices across borders,competition law, access pricing in telecommunications,challenges to economic growth and development, market structure and performance in telecommunications.[148]

The original member countries of the OECD are Australia, Belgium, Canada, Denmark, France, Germany, Greece, Iceland, Ireland, Italy, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States.[149]

Also subsequently became members through accession are Japan,Finland,Australia,New Zealand,Mexico,the Czech Republic,Hungary,Poland,Korea,the Slovak Republic,Chileand Slovenia.

Pursuant to Article 1 of the OECD Convention signed in Paris on 14th December 1960, the OECD shall promote policies designed:

(i) to achieve the highest sustainable economic growth and development and a rising standard of living in member countries while maintaining financial stability, and thus to contribute to the development of the world economy;

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[146]*Telecommunications Regulatory Institutional Structures and Responsibilities*. A Report presented to the Working Party on Telecommunications and Information Services Policies to OECD in June 2005).

[147]OECD Regulatory Reform in Germany, Regulatory Reform in Telecommunications.<http://www.ictregulationtoolkit.org/en/publication.2382.html>accessd on 20 July 2014; Regulatory Reform in the Telecommunications Industry, Regulatory Reform in Poland From Transition to New Regulatory Challenges<http://www.oecd.org/data oecd/32/15/1954711.pdf>accessed on 28 August 2014; OECD

[148]*Ibid*

[149]OECD Guidelines for Protecting Consumers From Fraudulent and Deceptive Commercial Practices across Borders; OECD Regulatory Reform in Canada From Transition to New Regulation Challenges; OECD Regulatory Reform in Germany, Regulatory Reform in Telecommunications. It shows that the original member countries are twenty.

(ii) to contribute to sound economic expansion in member as well as non-member countries in the process of economic development; and

(iii) to contribute to the expansion of world trade on a multilateral non-discriminatory basis in accordance with international obligations.[150]

Regulatory Reforms has emerged as an important policy area in OECD and non-OECD Countries and in achieving its aims and objectives in the telecommunications sector, the OECD has embarked on various regulatory reforms in the telecommunications sector of member countries. For regulatory reforms to be beneficial, the regulatory regimes need to be transparent, coherent and comprehensive, spanning from establishing the appropriate institutional framework to liberalizing network, industries, advocating and enforcing competition policy and law and opening external and internal markets to trade and investment.

As part of the OECD regulatory policies and reforms programme, the OECD has reviewed and accessed regulatory policies in almost all the member countries. In most OECD countries, regulatory reforms have also concerned the policy and institutional setting.[151]Regulatory authorities in most OECD countries have traditionally adopted a national geographical area of focus when framing the geographical scope oftelecommunications markets.[152]

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[150] See OECD Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Practice AcrossBorders. See especially Convention on the Organization for Economic Co-operation and Development<http://www.oecd.org/document/7/0,3343,en-2649-201185-1915847-1-1-1-1,00html> accessed on 29 August 2014.

[151]Boyland, O. and Nicoletti, G., *Regulation, Market Structure and Performance in Telecommunications*<http://www.regulationbodyofknowledge.org/external/Document/ww.oecd.org/dataoecd/24/33/2736298.pdf>accessed on 28 August 2014.

[152]See Statistics Publications & Documents Information by Country <http://www.oecd.org/topic/0.3373en_264937441_1_1_1_1_137441.00.html> accessed on 20 August 2014.

Twenty-five non-members are currently participating as regular observers or full participants in OECD Committees. About 50 non-members are engaged in OECD working parties, schemes or programmes. The OECD conducts a policy dialogue and capacity building activities with non-members to share their views on best policy practices and to bear on OECD's policy debate.[153]

The OECD's Centre for Co-operation with non-members develops and oversees the strategic orientation of the relations with non-members.[154]

In 2003, the OECD established a working group headed by Seiichiro Noboru[155]to work out a strategy for the enlargement and co-operation with non-members. The working group proposed that selection of candidate countries to be based on four criteria: 'like-mindedness', 'significant player', 'mutual benefit' and 'global considerations'.[156]

It was as a result of the recommendations of the working group that the OECD Ministerial Council decided to open accession discussions with Chile, Estonia, Israel, the Russian Federation and Slovenia and to strengthen co-operation with Brazil, China, India, Indonesia and South Africa through a process of enhanced engagement.[157]

Several Civil Society groups and developing countries however criticized the OECD, and the main criticism has been the narrowness of the organisation because its membership is

[153]Organisation for Economic Co-operation and Development <http://en.wikipedia.org/wiki/Organissation_for_Economic_Cooperation_and_Development#Foundation_of OECD>accessed on 29 August 2014.

[154]*Ibid*

[155] Japan's Ambassador to the Organisation for Economic Cooperation and Development.

[156]Organisation for Economic Co-operation and Development <http://en.wikipedia.org/wiki/Organisation_for_Economic_Cooperation_and_Development#Foundation_of_OEC> accessed on 29 August 2014.

[157]*Ibid*

limited to a selected few rich nations.[158] It is hoped that Nigerian government will take necessary steps to become a member of OECD to be able to benefit from the enormous advantages of OECD programmes in telecommunications industry.

3.5 CONCLUSION

With the emergence of Global System for Mobile Communications (GSM) in Nigeria incommercial roll-out in 2001, a new regime of telecommunications has been created. Licenseshave been granted to many telecommunications operators by the regulatory authority. The provision of telecommunications services which hitherto was the monopolistic affairs of NITEL has now been liberalised by force of privatisation and deregulation processes. This, in effect, has created an atmosphere requiring an effective and efficient legal framework for telecommunications market. While the available institutional and regulatory structures in the Nigerian telecommunications industry are laced with prospects, the need to look outwardly into international environment cannot be jettisoned; the roles of international regulatory bodies cannot be over-emphasised.

[158] *Ibid*

CHAPTER FOUR

EMERGING LEGAL CHALLENGES OF TELECOMMUNICATIONS IN NIGERIA

4.1. INTRODUCTION

Despite a rather late start, available statistics indicate that telecommunication technology is rapidly gaining ground in Nigeria. Due to its many possibilities, telecommunications constitute veritable tools for socio-economic development, which makes the legal and regulatory environment for its application in developing countries critical. Among other impacts, telecommunications technology have brought about significant changes in business practices with respect to banking transactions and, to some extent, the buying and selling of goods and services, through the possibilities of the medium to promote trade and commerce through wider access to prospective customers from anywhere on the globe for products and services.

On the negative side however, the telecommunications technology has been accompanied by the emergence of new challenges such as the challenge of data protection, and cybercrimes. Thus, cybercrimes like child pornography, fraudulent electronic fund transfers, and unauthorised access to computer systems have become widespread. Tackling the problem of cybercrime and the attendant image nightmare to Nigeria poses legal and policy challenges, which result in efforts to stretch the laws in a bid to accommodating the new challenges. However, this research focuses on paths that are less traveled regarding challenges and tackled them under four major headings: the challenges of Multiple Regulation of Telecoms operators; Challenge of Cyber-Security and Lack of a wholistic Data Protection Law to protect the data of Consumers; The Challenge of

Interconnectivity, Access to Network Facilities and Protection of Telecoms Infrastructure andThe near absence of a Comprehensive Competition Law.

Regulatory challenges also abound with the emerging frontiers in telecommunications technology. Some of these regulatory challenges include the absence of adequate Competition Law, Security of Telecoms infrastructure, Interconnectivity and Access to network facilities, the challenge of multiple regulation and taxation of telecoms companies thereby making any efficient and effective regulation difficult.

The fact however, is that there is a limit to which laws, which were promulgated in a different technological and socio-economic context, can adequately cater for the new technological realities presented by Telecommunications. It thus becomes necessary for legal rules to be developed to tackle the issues and challenges brought about by Telecommunications, in order to promote public confidence, maximize the benefits of the technology and encourage wider acceptance and use by individuals as well as private and public organisations. This chapter examines emerging legal and regulatory challenges posed by telecommunications in Nigeria against the background of international standards, and discusses emerging legal responses under Nigerian law.

4.2. Multiple Regulatory Regime and Government Interference

The successes recorded by the telecommunications industry in the last 10 years have reinforced the internationally acknowledged perception that communications is a powerful, progressive tool of socio-economic development. The continued boast to socio-economic development (e.g. in terms of job creation, security, social cohesion), the impact upon culture and quality of life and the contribution to Gross Domestic Product

(GDP) are gains which have been recorded by the industry as a direct result of the advent of mobile telephony in Nigeria.

Sadly however, while this sector has been a major catalyst for socio- economic development it has become apparent that undue interference in the operations of communications networks by various strata of society and particularly agencies of government could hamper progress made so far.

Predominantly, the industry has witnessed untoward intervention and actions from various Ministries, Departments and Agencies (MDAs) of Governments (at the 3 tiers) who see an opportunity to generate revenue from the operations of telecoms operators through the imposition of Multiple, illegitimate levies and taxes. The failure of the industry to submit to these illegitimate regime and demands often results in disruptive enforcement actions by these MDAs from Federal, State and Local Government. Network operators continue to witness harassment, forcibly sealing of telecoms sites or removing components of site installations in their bid to compel compliance. These continued intervention in telecoms operations by MDAs results in a disruptive of services, degradation of service quality, a major increase in operating expenses and the general cost of carrying on communications business in Nigeria.[159]

In a federal system there are issues reserved for either federal or state to legislate on and the ones both have powers to regulate. In the case of telecommunications, it is the federal that has exclusive right to regulate the telecommunications industry which led it into

[159]NCC Industry Working Group, *A Position Paper on Hazards and Further Implications of Multiple Taxation and Regulation of the Communications Industry in Nigeria* (www.ncc.gov.ng/index.php.) Accessed 24th September, 2014.

establishing a Commission in the name of Nigerian Communications Commission (NCC) backed with an act to effectively perform that function[160].

However, events in the recent past suggest that other federal government agencies as well as states are now making effort to usurp NCCs function in the telecommunications industry which is unknown to the country's law. It has become a common practice for any government agency be it federal or state to solicits for one levy or the other from operators while some seek that operators secure one approval or the other from them which comes with a fee before they can build infrastructure[161].

The Nigerian Communications Commission (NCC) is the sector-specific regulatory body in the Nigerian telecommunications industry. The NCC is responsible for the monitoring of performance standards and indices relating to telecommunications services and facilities in Nigeria.[162] Its functions also include the general responsibility for economic and technical regulation of the communications industry.[163] It also enforces technical specifications and standards for the importation and use of communications equipment and for connecting or interconnecting communications equipment and systems and carries out type approval tests on communications equipment and issuing certificate therefor on the basis of technical specifications and standards prescribed by the commission from time to time.[164] In demonstration of its pivotal responsibility in its

[160]Section 4 (h), Nigerian Communication Act, 2003.

[161]Onwuegbuchi, C., *The Threat of Multiple Regulations in TelecomIndustry*, (www.nigeriacommunicationsweek.com.ng/telecom-digest) Accessed 24th September, 2014.

[162]Section 4 (h), Nigerian Communication Act, 2003.

[163]Section 4 (w),*Ibid*.

[164]Section 4 (l) and (n),*Ibid*.

concern over the environmental implications of the installation of telecommunications equipment, the NCC issued Guidelines on Technical Specifications for the Installation of Telecommunications Masts and Towers.[165]

However, the government does not leave the environmental conduct of telecommunications operations in the hand of NCC alone. The National Environmental Standards and Regulations Enforcement Agency (NESREA) also have statutory duties in the general environmental conducts.[166] NESREA is responsible for the protection and development of the environment, biodiversity conservation and sustainable development in Nigeria's natural resources in general.[167] The vision of the agency is to ensure a clear and healthier environment for all Nigerians while the mission is to inspire personal and collective responsibility in building an environmentally-conscious society for the achievement of sustainable development in Nigeria.[168]

From the foregoing, it could be seen that both NCC and NESREA have major roles to play in the formation of regulatory instruments which govern the environmental conduct of telecommunications operators in the installation of telecommunications equipment and facilities. Because of the regulatory overlap, therefore, there have been several clashes between NCC and NESREA on the one hand and NESREA and telecommunications operators on the other hand. The result of this is the shutting down of telecommunications

[165]*Guidelines on Technical Specifications for the Installation of Telecommunications Masts and Towers*.Issued by NCC on 9th April 2009. See www.ncc.gov.ng. Accessed on 24th September, 2014.

[166] Established by the Section 1 (1) of the National Environmental Standards and Regulations EnforcementAgency (Establishment) Act No 25 of 2007.

[167]Section 2, NESREA Act, 2007.

[168]See Standard Organization of Nigeria http://www.nigeriafirst.org/printer-792.html . Accessed on 17 August 2014.

base stations by NESREA over alleged environmental breaches.[169] NESREA has also posited that it will crack down on more telecommunications companies for flouting Environmental Impact Assessment Regulations.[170]

While the Association of Licenses Telecommunications Operators of Nigeria (ALTON) appreciated the need for NESREA to play a major role in the formation of regulatory instruments governing the environmental conduct of telecommunications operators, it opined that since NCC, as the sole statutory regulator of the telecommunications industry, has issued Guidelines on Technical Standards for the Installation of Masts and Towers based on applicable international standards, there is no need for a fresh set of regulations from NESREA; rather the NESREA should review its regulations and appropriate provisions be subsumed into the NCC's Guidelines on Technical Specifications for the Installation of Masts and Towers to address any additional concerns which NESREA believes have not been adequately addressed by the NCC Guidelines.[171]

There is also now multiplicity of conflict between various arms of government (Federal, State and Local Government) each trying to regulate telecom operators using the backing of their various enabling laws. For instance, there has been a recurring problem between state Environmental or Physical Planning Boards and telecom operators on whether they

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[169]Ariyoosu D.A, *An Examination of the Legal Regulations and Taxation of Telecommunications and Electronic Commerce in Nigeria*,www.unilorin.edu.ng/law.Accessed 24th September, 2014. See also, Osadebamiren, P., 'Telecoms Revolution and Environmental Sustainability' *Summit Newspaper*, Page 24, 21 July 2011.; Ezekiel, E., 'FG Shuts MTN Base Stations over Environmental Breaches' *The Punch Newspaper*, Page 17, 24th August 2010; Mohammed, A., *Nigerian Communications Commission, NESREA Clash over Regulation of Telecoms*<http://www.allafrica.com/stories/201007150188.html> accessed on 20th December, 2014.

[170]Ezekiel, E., *Erection of Masts: NESREA Goes Tough on More Telecoms Companies*<http://www.nigeriabestforum.com/generaltopic1?p=52892> Accessed on 13 November, 2014.

[171]The Association of Licensed Telecommunications Operators of Nigeria <http://www.altoning.com/docs/Alton%20Comments%20on&20NESREA%20Regulations%20ofor%20Telecoms%20facilitiesl.pdf> accessed on 29 November, 2014. ALTON made the comment in its submission on the NESREA'S Draft National Environmental (Standards for Telecommunications Facilities) Regulations 2010.

or NESREA should be the proper agency to regulate telecom operators on issues relating to the construction and installation of mast. In 2009, Federal High Court sitting in Kaduna held in *Nigerian Communications Commission vs National Environmental Standards and Regulation Enforcement Agency*[172], that by virtue of the provisions NESREA Act Environmental Impact Assessment (EIA) Act, construction and installation of a huge telecom mast in a residential area is an activity likely to affect the environment. Hence since it is only the National Assembly that can legislate or make laws on EIA, the certificate approval issued by Kaduna Environmental Protection Agency (KEPA) for the installation of a telecom mast was ultra vires its powers[173].

There is therefore the need to work out harmonized laws and regulations to ensure that all interests are accommodated for a peaceful roll-on of quality telecommunications services and promote best practices without necessarily adversely affecting the environment.[174]

It is imperative to commend the Management of NCC and NESREA for the effort being made in collaborative regulation of the telecom industry. A noteworthy step was taken in 2014 with the signing of the MoU on Infrastructure Localisation.

In the 11 points memorandum of agreement endorsed by the two Ministers as well as the executive heads of NCC and NESREA, both agencies pledged to observe specific guidelines on issues such as setback, sealing, waiting time for Environmental Impact Assessment, EIA, approval and the process to follow in specific cases of unusual

[172](2009) Unreported Suit No. FHC/KD/CS//65/2009.
[173]Ibid
[174] See Ariyoosu D. A., *Legal Regulation and Environmental Impacts of Telecommunications Installations: The Nigerian Experience*. A Paper presented at the 13th Annual Conference of the Environmental Division of the Nigerian Society of Engineers on the theme: 'Environmental Impacts of Telecommunications Systems in Nigeria: Problems, Prospects and Solutions', International Conference Centre, Abuja, 15th September, 2010. See also, Ariyoosu D.A, *An Examination of the Legal Regulations and Taxation of Telecommunications and Electronic Commerce in Nigeria.* (www.unilorin.edu.ng/law). Accessed 24th September, 2014.

circumstances. Even though these are steps in the right direction, there is the need for Laws that will clearly delineate the respective roles and functions of these agencies so as to minimize overlap and conflict.

4.3 THE CHALLENGE OFCYBER-SECURITY AND DATA PROTECTION

4.3.1: The Challenge of Cyber-Security

From business, industry, government to not-for-profit organizations, the internet has simplified business processes such as sorting, summarizing, coding, editing, customized and generic report generation in a real-time processing mode. However, it has also brought unintended consequences such as criminal activities, spamming, credit card frauds, ATM frauds, phishing, identity theft and a blossoming haven for cybercriminal miscreants to perpetrate their insidious acts.

The first recorded cyber murder was committed in the United States seven years ago. According to the Indian Express, January 2002, an underworld don in a hospital was to undergo a minor surgery[175]. His rival went ahead to hire a computer expert who altered his prescriptions through hacking the hospital's computer system. He was administered the altered prescription by an innocent nurse, this resulted in the death of the patient.[176] Statistically, all over the world, there has been a form of cyber-crime committed every day since 2006. Prior to the year 2001, the phenomenon of cyber-crime was not globally

[175]Longe, O. B, Chiemeke, S., 'Cyber Crime and Criminality In Nigeria – What Roles Are Internet Access Points In Playing?', *European Journal Of Social Sciences* – Volume 6, Number 4, 2008.

[176]*Ibid*

associated with Nigeria.[177] This resonates with the fact that in Nigeria we came into realization of the full potential of the internet right about that time. Since then, however, the country has acquired a world-wide notoriety in criminal activities, especially financial scams, facilitated through the use of the Internet. Nigerian cyber criminals are daily devising new ways of perpetrating this form of crime and the existing methods of tracking these criminals are no longer suitable for to deal with their new tricks.

As technology has developed so have also the definitions of cyberspace, cyber security and cybercrimes. It has been argued that since computer crime may involve all categories of crime, a definition must emphasize the particularity, the knowledge or the use of computer technology. Cyber-space refers to the boundless space known as the internet. It refers to the interdependent network of information technology components that underpin many of our communications technologies in place today. Cyber security is the collection of tools, policies, security concepts, security safeguards, guidelines, risk management approaches, actions, training, best practices, assurance and technologies that can be used to protect the cyber environment and organization and user's assets.[178] Organization and user's assets include connected computing devices, personnel, infrastructure, applications, services, telecommunications systems, and the totality of transmitted and/or stored information in the cyber environment. Cyber security strives to ensure the attainment and maintenance of the security properties of the organization and user's assets against relevant security risks in the cyber environment. Cyber-security is the body

[177] *Ibid*
[178] *Ibid*, p.17

of rules put in place for the protection of the cyber space[179]. But as we become more dependent on cyberspace, we undoubtedly face new risks. Cyber-crime refers to the series of organized crime attacking both cyber space and cyber security. Sophisticated cyber criminals and nation-states, among others, present risks to our economy and national security. Nigeria's economic vitality and national security depend on a vast array of interdependent and critical networks, systems, services, and resources known as cyberspace.

The threat posed by breaches in our cyber-security is advancing faster than we can keep up with it. It is not possible to concentrate efforts on only one aspect of the breach as it means negligence and allowance of growth for other aspects of the breach. This leads us to conclude that we have to attack cyber security breaches as a whole. What then are these breaches?

Cyber-crime refers to criminal activity done using computers and the Internet. This includes anything from downloading illegal music files to stealing millions of dollars from online bank accounts. Cybercrime also includes non-monetary offenses, such as creating and distributing viruses on other computers or posting confidential business information on the Internet. Perhaps the most prominent form of cybercrime is identity theft, in which criminals use the Internet to steal personal information from other users.[180]

[179]Mohsin, A., *Cyber Crimes And Solutions*, Retrieved from http://ezinearticles.com/?Cyber-Crimes-And-Solutions&id=204167

[180]*Ibid*

Research has shown that there are various categories of cyber crime[181]

(i) ***Hacking:*** Hackers make use of the weaknesses and loop holes in operating systems to destroy data and steal important information from victim's computer. It is normally done through the use of a backdoor program installed on your machine. A lot of hackers also try to gain access to resources through the use of password hacking software. Hackers can also monitor what u do on your computer and can also import files on your computer. A hacker could install several programs on to your system without your knowledge. Such programs could also be used to steal personal information such as passwords and credit card information. Important data of a company can also be hacked to get the secret information of the future plans of the company.

(ii) ***Cyber-Theft***: Cyber-Theft is the use of computers and communication systems to steal information in electronic format. Hackers crack into the systems of banks and transfer money into their own bank accounts. This is a major concern, as larger amounts of money can be stolen and illegally transferred. Credit card fraud is also very common. Most of the companies and banks don't reveal that they have been the victims of cyber -theft because of the fear of losing customers and shareholders. Cyber-theft is the most common and the most reported of all cyber-crimes. Cyber-theft is a popular cyber-crime because it can quickly bring experienced cyber-criminal large cash resulting from very little effort

[181] Laura, A., *Cyber Crime and National Security: The Role of the Penal and Procedural Law*, Nigerian Institute of Advanced Legal Studies., Retrieved from (http://nials-nigeria.org/pub/lauraani.pdf) Accessed 24th September, 2014.

(iii) ***Viruses and worms*** is a very major threat to normal users and companies. Viruses are computer programs that are designed to damage computers. It is named virus because it spreads from one computer to another like a biological virus. A virus must be attached to some other program or documents through which it enters the computer. A worm usually exploits loop holes in soft wares or the operating system. Trojan horse is dicey. It appears to do one thing but does something else. The system may accept it as one thing. Upon execution, it may release a virus, worm or logic bomb. A logic bomb is an attack triggered by an event, like computer clock reaching a certain date. Chernobyl and Melissa viruses are the recent examples. Experts estimate that the Mydoom worm infected approximately a quarter-million computers in a single day in January 2004.[182] Back in March 1999, the Melissa virus was so powerful that it forced Microsoft and a number of other very large companies to completely turn off their e-mail systems until the virus could be contained.[183]

(iv) **Spamming**– involves mass amounts of email being sent in order to promote and advertise products and websites. Email spam is becoming a serious issue amongst businesses, due to the cost overhead it causes not only in regards to bandwidth consumption but also to the amount of time spent downloading/ eliminating spam mail. Spammers are also devising increasingly advanced techniques to avoid spam filters, such as permutation of the emails contents and use of imagery that cannot be detected by spam filters.

[182] *Ibid*

[183] *Ibid*

(v) ***Financial Fraud***- These are commonly called "Phishing' scams, and involve a level of social engineering as they require the perpetrators to pose as a trustworthy representative of an organization, commonly the victim's bank.

(vi) ***Identity Theft, Credit Card Theft, Fraudulent Electronic Mails (Phishing):*** Phishing is an act of sending an e-mail to a user falsely claiming to be an established legitimate enterprise in order to scam the user into surrendering private information that will be used for identity theft[184].

(vii) ***Cyber Harassment***- is electronically and intentionally carrying out threatening acts against individuals. Such acts include cyber-stalking.

(viii) ***Cyber Laundering***- is an electronic transfer of illegally-obtained monies with the goal of hiding its source and possibly its destination.

(ix) ***Website Cloning***: One recent trend in cyber-crime is the emergence of fake 'copy-cat' web sites that take advantage of consumers what are unfamiliar with the Internet or who do not know the exact web address of the legitimate company that they wish to visit. The consumer, believing that they are entering credit details in order to purchase goods from the intended company, is instead unwittingly entering details into a fraudster's personal database. The fraudster is then able to make use of this information at a later stage, either for his own purposes or to sell on to others interested in perpetrating credit card fraud.

[184] *ibid*

Some emerging cyber tricks in Nigeria[185] include:

(i) ***Beneficiary of a Will Scam:*** The criminal sends e-mail to claim that the victim is the named beneficiary in the will of an estranged relative and stands to inherit an estate worth millions.

(ii) ***Online Charity:*** Another aspect of e-crime common in Nigeria is where fraudulent people host websites of charity organizations soliciting monetary donations and materials to these organizations that do not exist. Unfortunately, many unsuspecting people have been exploited through this means.

(iii) ***Next of Kin Scam:*** Collection of money from various bank and transfer fees by tempting the victim to claim an inheritance of millions of dollars in a Nigerian bank belonging to a lost relative.

(iv) ***The "Winning Ticket in Lottery you Never Entered" Scam:*** These scams lately include the State Department's green card lottery.

(v) ***Bogus Cashier's Check:*** The victim advertises an item for sale on the Internet, and is contacted

(vi) ***Computer/Internet Service Time Theft:*** Whiz kids in Nigeria have developed means of connecting Cyber Cafes to Network of some ISPs in a way that will not be detected by the ISPs and thereby allow the Cafes to operate at no cost.

(vii) ***Lottery scam:*** allowing users believe they are beneficiaries of an online lottery that is in fact a scam.[186]

[185]Ibinkunle F., 'Approach to Cyber Security Issues In Nigeria: Challenges And Solution' *International Journal of Cognitive Research in Science, Engineering and Education(IJCRSEE),* 2013, Vol. 1, No.1,(www.ijcrsee.edu). Accessed 24th September, 2014.

The speed and power of modern information technology complicates the detection and investigation of computer crimes. For example, communications networks now span the globe and a small personal computer can easily connect to sites that are located in different hemispheres or continents. This raises very significant problems in terms of jurisdiction, availability of evidence, co-ordination of the investigation and the legal framework(s) that can be applied to criminal acts that occur in this context.

New technologies create new concepts that have no legal equivalence or standing. Nevertheless, a virus utilizes the resources of the infected system without the owner's permission. Hence, even a benign virus may be variously interpreted as a system penetration, a piece of electronic graffiti or simply a nuisance prank. The major point however, is that the legal system and therefore the definition of computer crime itself is reactive and unable to encompass behaviors or acts that involve new computational concepts.

Information has several unique and abstract properties - for example its capacity to still be in the owner's possession after it has been copied or stolen. The last decade has seen the legal system struggle with the implications of this in a computer based context. Clearly, conventional notions of copyright, patent rights and theft have been strained when applied to software and computer based information, basically because existing concepts of theft and break-in for example, relate to common notions of permanent deprivation or removal (theft) or physical damage (break-ins).

A related property of digital information is the ease and extent to which it can be transformed and translated. That is, a piece of information (i.e., a program) can be represented in a huge variety of informational forms. It can be represented as program text (source code), executable code (binaries), or it can be transformed in a large number of ways -

[186] *Ibid*

mathematically, by encryption, or by conversion to say a holographic image or a piece of music. As long as the method(s) of transformation are known, the music, image, or encrypted text can be translated back to its original form. Therefore, the informational form in which information exists may eventually have no legal status. Instead, some measure of its value or functionality as information itself may eventually determine its legal and commercial position.

This malleability of information has implications in terms of system break-ins where information may not be destroyed (as in corrupted or erased) but is encrypted or made temporarily inaccessible. Such actions can hardly be classified as theft or even malicious damage.

4.3.2 The Challenge of Security of Telecoms Infrastructure and Terror Attacks on Telecom Facilities

The number of Base Transceiver Stations (BTS) in Nigeria, Africa's most populous nation, is estimated at about 30,000[187]. This figure is grossly inadequate to meet the communications needs of over 130 million active mobile subscribers in the country.

About 2 percent to 3 percent of Nigeria's BTS are shut down at any point in time, due to vandalism, resulting in a loss of about $50 million to $100 million every year[188].

Telecom operators have continued to raise alarm over the persistent willful and illegal obstruction of sending and delivering communication services, arising from the sealing of

[187]http://asokoinsight.com/news/39-billion-telecom-investment-danger-nigeria-fails-pass-critical-national-infrastructure-bill/. Accessed 19th February, 2015

[188]Uzor, B. '$39 Billion Telecom Investment in Danger as Nigeria Fails to Pass Critical National Infrastructure Bill', *BusinessDay Nigeria*, 29, October, 2014, p.17

telecoms BTS across the entire country, by various persons, including firms, organisations, communities, individuals, public office holders, federal, state, and local government agencies among others.

Telecoms analysts have noted that the current state of security for telecommunications infrastructure is not encouraging for any potential investor[189].

This situation is worrisome, considering that Nigeria still requires additional investments to accelerate broadband infrastructure deployment in order to meet the target of five-fold increase in broadband penetration by 2018[190].

Vandalism on telecoms infrastructure occasionally occurs in error, during excavation, but for the most part, it is perpetrated through acts of sabotage and theft of equipment

In 2013, the industry regulator, the Nigerian Communications Commission (NCC) noted that it had recorded about 1, 200 fibre cuts in few months[191]. These acts of vandalism are however common in rural areas of the country, which are characterised by high levels of poverty and unemployment. Moreover, the low standard of living and lack of opportunity leads many youth to revert to such criminal actions to extort and exploit telecom operators.

The actions of vandals create significant expenses for operators in terms of repair and replacement costs, lost revenue, and also 'appeasement' fees

Vandalism of telecoms infrastructure not only degrade quality of telecoms service, but constitute a massive threat to national security. The commission, as part of its mandate of

[189] *Ibid*
[190] *Ibid*

[191] http://www.ncc.gov.ng/thecommunicator/index.php?option=com_content&view=article&id=538:telecommunications-infrastructure-as-critical-national-infrastructure&catid=87:editorials&Itemid=5. Accessed 19th February, 2015

ensuring the protection and safety of telecommunications infrastructure, has drawn the attention of the general public to the express provisions of the Criminal Justice (Miscellaneous Provision) Act[192], which make it an offence to willfully and unlawfully damage telecommunication works; or otherwise prevent or obstruct the sending or delivering of a communication by means of telecommunication.

Apart from vandalism, natural calamities and shutting of base stations by individuals, organisations and government agencies, the current most ominous threat to telecommunication infrastructure is the activities of insurgents who deliberately target these infrastructure as a form of guerilla warfare now referred to as 'Cell Wars'[193].

Recent confrontations between state security forces and insurgents or terrorists in countries such as Afghanistan, India, and Iraq have shown how critical telecommunication infrastructure can easily become both a target of, and battle ground, for the actors in conflict. Analysts have dubbed this reality 'cell wars'. The experience of Afghanistan offers a perfect precedent for underscoring the Nigerian experience vis-à-vis BH attack on telecom facilities.

Attack on telecom facilities in Afghanistan dates back to 2007 when the Taliban began attacking transmission masts (resulting in limited damage) to extort money from telecom companies.[194] From 2008, the purpose of attack became different (strategic) and the frequency and extent of damage more severe. In the first of such attack, the Taliban on 1

[192]Cap. C39 Laws of the Federation of Nigeria, 2004

[193]Adisa, K. *The Costs of Boko Haram Attacks on Critical Telecommunication Infrastructure in Nigeria*.http://www.e-ir.info/2013/11/03/the-costs-of-boko-haram-attacks-on-critical-telecommunication-infrastructure-in-nigeria/. Accessed 19th February, 2015

[194]Boone, J., "Taliban target mobile phone masts to prevent tipoffs from Afghan civilians", *The Guardian*, 11 November 2011.http://www.guardian.co.uk/world/2011/nov/11/taliban-targets-mobile-phone-masts?newsfeed=true. Accessed 19th February, 2015

February 2008 destroyed a tower along the main highway in the Zhari district of Kandahar province, which belongs to Areeba, one of Afghanistan's four mobile phone companies.

On 25 February 2008, a Taliban spokesman, ZabiullahMujaheed, threatened that militants will blow up further towers across Afghanistan if the companies did not switch off their signals at night for 10 hours. According to him, the Taliban have 'decided to give a three-day deadline to all mobile phone companies to stop their signals from 5 p.m. to 3 a.m. in order to stop the enemies from getting intelligence through mobile phones'.[195] It was believed that the US and NATO Special Forces' night-time decapitation and capture operations against the Taliban relied substantially on intelligence gleaned from tipoffs and phone intercepts. To be sure, the US forces had killed more than 50 mid- and top-level Taliban leaders, by conducting specific military raids at night.

Telecom operators initially did not heed the order. In retribution, the Taliban started mounting crippling attacks on the network of transmission masts. Attacks soared, with an estimated 30 towers being destroyed or damaged in one 20-day period. Towers owned by companies such as the Afghan Wireless Communication Company, Areeba, and Roshan, were hit by militants in Helmand, Herat, Jawzjan, Kandahar, Logar, and Zabul provinces. Under pressure from these attacks, the major carriers began turning off their signals.

Despite US pressure and a decree by President Hamid Karzai ordering phone companies to defy insurgent demands, telecom operators resisted complying completely, fearing

[195]Shachtman, N., *Taliban Threatens Cell Towers*, 25 February 2008, http://www.wired.com/dangerroom/2008/02/.Accessed 19th February, 2015.

even more attacks on their facilities, offices and staff. The targeting of cell towers by the Taliban was both strategic and symbolic. The strategic objective of the Taliban was to deny US, NATO and Afghan forces of information or intelligence that would aid the capturing or killing of its members. In symbolic terms, it signifies the capacity of insurgents to hit targets listed as 'enemies'. Tactics like the cellphone offensive have allowed the Taliban to project their presence in far more insidious and sophisticated ways. By forcing a night-time communications blackout, the Taliban sends a daily reminder to hundreds of thousands, if not millions, of Afghans that they still hold substantial sway over their future.[196]

Faced with a similar situation in Nigeria, BH pulled a similar stunt. The proliferation of Base Transceiver Stations (BTS), also known as base stations, telecom masts or cell towers, is one of the visible features of the rapid growth of the sector. These base stations facilitate effective wireless communication between user apparatuses, for instance, mobile phones and networks. A breakdown of the 20,000 base stations across Nigeria shows that MTN owns 7,000; Globacom, 5000; Airtel, 4000; and Etisalat, 2,000. The Code-Division Multiple Access (CDMA) operators accounted for 2000 masts.[197]

The traditional threats to the integrity of telecom facilities such as base stations, generators, and fiber cables have been vandalism, with the intent of stealing valuable parts, accidental damage due to road construction and maintenance work, and natural

[196]Rubin, A.J., "Taliban Using Modern Means to Add to Sway", *New York Times*, October 4, 2011, http://www.nytimes.com/2011/10/05/world/asia/taliban-using-modern-means-to-add-to-sway.html?_r=2&ref=technology. Accessed 19th February, 2015

[197]Okonji, E., "Replacement of Damaged Base Stations to Cost Telcos N16bn", *Thisday*, 7 January 2013, p. 1.

disasters such as flooding. However, targeted attacks on this critical infrastructure by members of BH are now a major threat to the operation of the sector.

In July 2011, President Goodluck Jonathan revealed his administration's plans under the purview of the National Security Adviser (NSA) to make telecommunications operators dedicate emergency toll-free lines to the public to fast-track its intelligence gathering on the sect.[198] On 14 February 2012, a BH spokesman, Abul 'Qaqa', threatened that the group will attack GSM service providers and Nigeria Communication Commission (NCC) offices for their alleged role in the arrest of their members. As he puts it: 'we have realised that the mobile phone operators and the NCC have been assisting security agencies in tracking and arresting our members by bugging their lines and enabling the security agents to locate the position of our members'.[199]

The sect made good its threat on September 2012, when it launched a two-day coordinated attack on telecom masts belonging to several telecom operators across five cities in northern Nigeria: Bauchi, Gombe, Maiduguri, Kano, and Potiskum. A statement purportedly issued by the BH spokesman, AbulQaqa, admitted responsibility for the bombing of telecommunication facilities, claiming that they launched 'the attacks on masts of mobile telecom operators as a result of the assistance they offer security agents'[200]. BH has mounted several such attacks, mostly targeting base stations. Attacks on telecom facilities add a new dimension to the pre-existing security challenges, as

[198]Iroegbu, S., "FG to Provide Toll-free Lines to Tackle Boko Haram", *Thisday*, 27 July 2011, http://www.thisdaylive.com/articles/fg-to-provide-toll-free-lines-to-tackle-boko-haram/95784/. Accessed 19th February, 2015

[199]Iqtidaruddin, F.S., "Nigeria's Boko Haram threatens to attack telecom firms", *Business Recorder*, 14 February 2012, http://www.brecorder.com/world/africa/45736-nigerias-boko-haram-threatens-to-attack-telecom-firms-.html.Accessed 19th February, 2015.

[200]*Ibid*.

entire base stations are destroyed with IEDs, suicide bombers and other incendiary devices.

Overall in 2012, some 530 base stations were damaged in Nigeria. While 380 were destroyed by floods that affected many communities in many states of the federation, 150 were damaged in northern Nigeria by BH.[201] Like the Taliban in Afghanistan, the strategic objective of BH attacks on telecom infrastructure is to choke one of the supply lines of intelligence to Nigeria's intelligence and security system. However, when terrorists or insurgents successfully attack critical telecommunication infrastructure, it generates costs that could be assessed from different angles depending on the nature and criticality of such a facility to the economy and security. The BH attacks on base stations have generated at least three dimensions of 'costs', namely:

(i) Casualty Cost

Damage in the form of death, bodily injuries and trauma are obvious consequences of violent terrorist acts. In the BH case, both fixed assets and staff of such telecom providers are legitimate targets of attacks. Therefore, the death of any member of a family from such attacks leads to a deep fracturing of kinship structures. Some children have been left without parents, husbands without wives, and vice versa. Hence, for every person killed or injured, there are many more who must cope with the psychological, physical and economic effects that endure in its aftermath.

(ii) Service Cost

Attacks on telecom infrastructure obviously leads to network outages and poor services delivery, which manifest in the form of increased dropped call rates, poor connections and lack of voice clarity. Apart from voice calls, data services are also impaired such that

[201]Okonji, E., *Op. cit.*

the use of modems to browse the internet will not be effective. This disruptive effect cascades through the entire national system (such as banking services) that rely on voice calls and data services provided by the telecom sector.

(iii) Financial Cost

Another cost is that network operators will spend money initially earmarked for network expansion and optimising existing infrastructure on replacing the damaged facilities. Telecom operators in Nigeria have lost about

N75bn (naira) to damage caused by BH and flooding in 2012. Telecoms infrastructure analysts have put the average cost of a base station in Nigeria at $250,000 (N 39.47 million), and it will cost some N15.9 billion to replace the damaged base stations[202].

As a response, the Nigerian government has announced its plans to provide intense security for telecom infrastructures in the country. However, the implementation of the plan is not quick enough for telecommunication companies.

The Federal Government of Nigeria recently sponsored a bill[203] before the National Assembly which when passed into Law would ensure that Telecoms Infrastructure all around the country is protected and identified as an important national asset. Some of the challenges facing the industry in the country include: Man-made national disasters, criminal vandalism of infrastructure, theft & digging up of cables for sale in the black market or for other purposes, destruction of telecom facilities due to road construction, community interference and oversight functions from other governmental agencies. Although a Specific Act focussedon Telecoms Infrastructure as Critical National Infrastructure is yet to see the light of day, it is noteworthy that the current Cybercrime

[202] *Ibid*
[203] Critical National Infrastructure Bill

(Prohibition and Prevention Etc) Act 2015 made a cursory provision relating to telecoms infrastructure. Section 3 of the legislation vests the apportioning and designation of certain computer systems and networks as critical national information infrastructure in the President of the Federal Republic of Nigeria on the recommendation of the National Security Adviser to the President. Subsection (2) of the Act also vests the powers of prescribing minimum standards operational in handling critical national information infrastructure in the President. Section 4 also delegates these functional powers of the President to the Office of the National Security Adviser as it may require. Considering the age-long constitutional debate of the overwhelming powers granted to the Executive in Presidential systems of government, there is an agreeable apprehension of likely abuse of powers. Concentrating the control of the critical national information infrastructure in the Executive without a corresponding check of other arms of government in reviewing its actions poses a threat of tyranny. There should be a considerable divestment of powers in the Executive to other arms of government to allow for balance in making policies especially as it concerns enforcing legislations on cybercrimes in Nigeria.

In the USA and the EU, Telecommunications infrastructure is covered by Acts because of the important role the ICT industry plays in National Security and the Economy as a whole, which is why this bill before the National Assembly is very important and needs to be signed into Law as soon as possible.

4.3.3 The Challenge of Data Protection

In August, 2009, the Nigerian telecommunications regulator, the Nigerian Communications Commission (NCC), in exercise of its regulatory powers under the

Nigerian Communications Act (NCA) 2003, issued a directive which was published in the "Thisday Newspaper of December 31, 2009" to the effect that as from 1st March, 2010 all new "Subscriber Identity Module" (SIM) cards must be registered before activation[204].

This was followed by a subsequent directive for registration of the SIM cards by existing SIM card holders at a later date, failing which such SIM cards would be deactivated and refused data transmission in Nigeria. According to the NCC, the directives were borne out of the need to have a credible database of SIM card holders in Nigeria which will be used to identify (for possible prosecution) criminal actors who perpetrate criminal activities through the use of mobile phones by exploiting the anonymity of an unregistered SIM Card.

Nigerians, in their millions, embarked on the registration of their SIM cards for fear of having their SIM Cards de-activated by their respective telecommunication service providers without realizing the lurking danger of identity theft, unlawful use and disposal of their personal data and breach of their right to privacy.

Data protection laws ensure protection of the personal data of individuals. Under the European Data Protection Directive, the Directive on Privacy and Electronic Communications; ECOWAS Supplementary Act[205] onPersonal Data Protection Within ECOWAS and the UK Data Protection Act, certain principles are fundamental and they are universally agreed as "Data Protection Principles". They have formed the body of data protection laws all across major countries of the world, particularly in America and

[204]Industry statistics published by the Nigerian Communication Commission (www.ncc.gov.ng/industrystatistics/subscriber-data.html).

[205]A/SA.1/01/10

Europe. This body of principles regulates and ensures that personal data is collected, collated, processed, transmitted and transferred legitimately without infringing on the personal privacy of the individual. These principles are summarized as follows[206]:

(i) Personal data shall be processed fairly and lawfully ;

(ii) Personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes ;

(iii) Personal data shall be adequate, relevant and not excessive in relation to the purpose or purposes for which they are processed ;

(iv) Personal data shall be accurate and, where necessary, kept up to date ;

(v) Personal data processed for any purpose or purposes shall not be kept for longer than is necessary for that purpose or those purposes.

(vi) Personal data shall be processed in accordance with the rights of data subjects under this Act.

(vii) Appropriate technical and organisational measures shall be taken against unauthorized or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data

(viii) Personal Data should not be carried out of such countries if they do not have similar data protection laws and measures such as the European Union.

The rise in Internet based transactions over the last few years has resulted in a vast increase in the amount of personal and financial information being transmitted.[207] This,

[206]Rodney D. R, *Op. cit.*

therefore, necessitates a framework for right to privacy and data protection. The central problem of telecommunications activities such as e-commerce and transactions is privacy as many users do not accept e-commerce as a complete substitute to normal commercial transaction because of security concerns. Thus, the collection and storage of personal data can be helpful to create profiles of users and data files of consumers but the steps to abuse these data to further purposes is not far away[208].

In some economies (developed or developing) the individual's right to privacy is considered as a human right to be protected by the state. In particular, in view of the increasing capacity for automated storage and processing of data of a personal nature, specific legal and technical provisions to protect fundamental rights and freedom become necessary. The thrust of the problem associated with data protection in telecommunications technology was captured by Lord Hoffman in *R.v Brown*[209]where it was held as follows:

> Vast amounts of information about everyone are stored on computers, capable of instant transmission anywhere in the world and accessible at the touch of a keyboard. The right to keep oneself to oneself, to tell other people that certain things are none of their business is under technological threat.

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[207]Swindells C. and Henderson K., 'Legal Regulation of Electronic Commerce.'*Journal of Information Law and Technology (JILT)*, 1998, Vol. 3.<http://www.2.warwick.ac.uk/fac/soc/law/elj/jilt/1998_3/Swindells/#92> accessedon 22 September, 2014.

[208]Ariyoosu D.A, *Op Cit.*

[209](1996) 1 ALLER 545 at 556.

Unlike in some developed countries (or even developing countries), there is no specific legislation on data protection presently in Nigeria and this poses a great danger for ecommerce[210].

While right to private life[211] as enshrined in the Nigerian constitution can be referred to as protecting personal data, there is a need for specific law on the subject. Privacy concerns are being raised in many countries around the world and some countries have enacted laws, implemented industry self-regulations, or instituted administrative solutions designed to safeguard their citizens' privacy.[212]

Many nations have grappled with defining the scope of privacy that needs to be protected for citizens in their everyday lives. The emergence of technologies, especially the internet, has thrown all those efforts into confusion and forced a rethink of previous policies, proposals and regulations. The idea of personal privacy has consequently become closely linked to the safekeeping of information about oneself. The European Union (EU) is leading the way in this sphere and by its implicit linkage of standards of data protection in any country to trade relations with itself; the EU is pushing for change across the globe.[213]

The right of privacy is also guaranteed by both the European Convention on Human Rights and the United Nations Universal Declaration of Human Right.[214] The United

[210]Ariyoosu D.A., *Op cit.*

[211] See Section 37 of the Constitution of the Federal Republic 1999 under which the privacy of citizens, theirhomes, correspondences, telephone conversations and telegraphic communications are guaranteed and protected.

[212]Ariyoosu D.A, *Op. cit.*

[213]Endeshaw, A.,*Internet and E-commerce Law,* Prentice Hall Pearson Education Asia, Pte Ltd, (2001), p. 12.

[214]Swindells C. and Henderson K., 'Legal Regulation of Electronic Commerce.'*Journal of Information Law and Technology (JILT),* 1998, Vol. 3.<http://www.2.warwick.ac.uk/fac/soc/law/elj/jilt/1998_3/Swindells/#92> accessedon 22 September, 2014.

Nations Commission on International Trade Law (UNCITRAL) also provides for legal recognition of data messages. It embodies the fundamental principle that data messages should not be discriminated against; there should be no disparity of treatment between data messages and paper documents. Similarly, information cannot be denied legal effectiveness, validity or enforceability solely on the ground that it is in the form of a data message.[215]

In Nigeria, although there is no direct law on data protection in particular, the recent Law of Cybercrime[216] contains aspect which seeks to protect data of subscribers and users of online facilities. It is submitted that these provisions are insufficient in guaranteeing the Protection of Consumer data as they contain several aspects that empowers security and intelligence agencies to access these data without clearly defining the conditions, scope and strict limitations of such access.

Nigeria is also a signatory to the ECOWAS Act on Protection of Personal Data which encouraged member states to establish legal and institutional frameworks for Personal data protection of telecom users[217]

4.3.4. A Cursory overview of the Nigeria's Cybercrime (Prohibition and Prevention Etc.) Act 2016.

The explanatory memorandum of the Act is exhaustive of its intent, suggesting the deterrence theory of punishment. The nature of the legislation is punitive and this is

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[215]Article 5 of the UNCITRAL Model Law on Electronic Commerce with Guide to Enactment 1996 http://www.uncitral.org/pdf/english/texts/electcom/05-89450-Ebook.pdf.Accessed on 27 August 2014.

[216]Cybercrime (Prohibition and Prevention) Act, 2015. Section 38-39.

[217]Article 14 (1) and (2) of Chapter IV of ECOWAS Supplementary Act A/SA.1/01/10 on Personal Data Protection Within ECOWAS provides for the establishment of 'Data Protection of Authority' by member states.

sourced from the grown menace of cybercrimes in Nigeria. The core objectives of the Act are to also ensure cyber-security and protection of critical information infrastructure in Nigeria. The Act is divided into fifty-nine sections with eight parts with each part dealing with Objectives and Application; Protection of Critical Information Infrastructure; Offences and Penalties; Duties of Financial Institutions; Administration and Enforcement; Arrest, Search, Seizure and Prosecution; Jurisdiction and International Cooperation; Miscellaneous respectively.

Section 3 of the legislation vests the apportioning and designation of certain computer systems and networks as critical national information infrastructure in the President of the Federal Republic of Nigeria on the recommendation of the National Security Adviser to the President[218]. Subsection (2) of the Act also vests the powers of prescribing minimum standards operational in handling critical national information infrastructure in the President. Section 4 also delegates these functional powers of the President to the Office of the National Security Adviser as it may require. Considering the age-long constitutional debate of the overwhelming powers granted to the Executive in Presidential systems of government, there is an agreeable apprehension of likely abuse of powers. Concentrating the control of the critical national information infrastructure in the Executive without a corresponding check of other arms of government in reviewing its actions poses a threat of tyranny. There should be a considerable divestment of powers in the Executive to other arms of government to allow for balance in making policies especially as it concerns enforcing legislations on cybercrimes in Nigeria.

Section 6 of the Act criminalises the unlawful access to a computer which houses critical information infrastructure that are vital to National Security. Again, as typical of

[218]Cybercrime (Prohibition & Prevention etc) Act 2016.Section 2.

jurisdictions with queries of sincerity of purpose, the weight of "National Security" is thrown around in legislations to shroud the actual essence of government activities.

The government has failed as usual, to define what constitutes National security to be able to sponge governments' nefarious activities. Subsection (3) and (4) of the Act also begs the fact of an "intent to commit an offence" and "lawful authority" in relation to an ethical hacker of an organisation other than that of the Nigerian government.

Section 8 of the Act does not explain exhaustively what happens in the event of a launch of malware against computer information and in the course of protecting that computer information, the malware is neutralized and causes alteration of malware source. This section of the Act is open-ended enough to cause unforeseen interpretations.

It is pertinent to query the purport of Section 9 of the Act with respect to encrypted e-mails, when money or any valuable is contained. Does the fact that the interception is carried out by a Nigerian government agency makes the interception lawful or the government is included in the "unlawful interception" should any be carried out by the government? Also, Section 11 of the Act fails to define "authorisation". What qualifies as "non-public transmissions of public data?" Who and what defines "non-public transmissions of public data?" This is one of the extended challenges the powers vested in the Executive in Section 3 of the Act.

However, Section 13, 14 and 15 of the Act registers a good note for an effective prosecution of Nigerian cybercrimes activities. They resonate directly with the procedural principles of Section 84 of the Nigerian Evidence Act of 2011 for proving electronic

evidence in Nigerian courts which had until recently caused a roadblock in proving electronic-related crimes in Nigeria[219].

The culpability of financial institutions in Section 19, 20 and 37 of the Act is a welcome development given the incessant ripping of innocent Nigerians of their hard-earned monies through spurious charges in the name of rendering "seamless services" to them. The Act proactively superintends over the docility of the Nigerian Apex bank, the Central Bank of Nigeria in helping to sanitize its own jurisdiction. Also, this section is a sword for any litigant in Nigeria whose identity has been stolen due to the negligence of any financial institution especially during the era of proliferation of private data like the Bank Verification Exercise[220].

Section 21 of the Act poses a dilemma. What happens when the threat to a computer system or network is launched by a government agency? Should the victim still report such attack to the National Computer Emergency Response Team Coordination Team? Also, why must such non-reportage of threat be criminalised in subsection (3) of the Act? Does that not paint a picture of being a fowl before a jury of Jackals?

Perhaps, the most notorious aspect of the Cybercrimes Act of 2015 is its Section 24. The section is significant because of the role it plays on the regulation of the social media in Nigeria. Contemporary history is replete with examples of repressive legislations not standing the test of the masses' collective might. In not too distant future, this history will happen on the cancerous nature of this section with regards to human rights and Internet freedom in Nigeria[221]. Even though the commendable provision of Section 45 (1) (b) of

[219]Ilori, T. The Nigerian Cybercrimes Act 2015: Is it Uhuru yet, http://www.orderpaper.ng/nigerian-cybercrimes-act-2015-uhuru-yet. Accessed 18th March, 2017.
[220]*Ibid*
[221]*Ibid*

the 1999 Constitution of the Federal Republic of Nigeria (as amended) is very much agreed with, Nigerians have become more vigilant of where this section of the Act encroaches on rights of their fellow citizens online. The Supreme Court, through one of its most revered jurists, Justice KayodeEsho in RansomeKuti v. Attorney General of the Federation[222] stated that *"Fundamental right is a right which stands above the ordinary laws of the land and which in fact is antecedent to the political society itself. It is a primary condition to a civilised existence…"* Not only does the Section 24 of this Act reeks of state regulation and management of the social media, it also seeks to erode the principles of freedom of expression online in Nigeria. The hashtag revolution is gradually phasing out protests with placards. It is best advised that this section is removed in its entirety.

That Section 25 of the Act finally criminalises cybersquatting in the Nigerian cyberspace has offered hope to the body corporates who suffer economic loses from the menace. Also, as an addition, Section 29 and 34 also criminalises the negligent handling of personal data of citizens by service providers in Nigeria. It has been argued that the crime of cybersquatting is being aided by the sales of devices with citizens' data used by these services providers to third party vendors who in turn use this information to harass innocent Nigerians.

Section 28 of the Act amplifies sections 4 and 17 of the National Office for Technological Acquisition and Promotion Act[223]. Both legislations should be revised to have one take care of this head.

[222](1985) LPELR – SC.123/1984

[223]Cap. N62 LFN 2004

With the advent of malwares in the cyberspace, the Nigerian cyberspace has also over the years been affected by phishing and spamming activities. The Section 32 (1) (2) of the Act satisfactorily penalises the act to properly achieve its deterrence motive. Section 33 of the Act also tackles an aspect of the socio-economic scourge of Yahoo-Yahoo in Nigeria which involves credit card frauds.

Section 38 (2) (3) and (4) of the Act could be said to pass the digital rights test of having recourse to the provisions of Section 37 of the 1999 Constitution of the Federal Republic of Nigeria (as amended) in the use of personal data between government agencies and service providers. However, a more transparent process must be put in place such that these rights will not just be perceived to be protected but will manifestly be seen protected by these agencies.

Section 39 and 40 of the Act however crushes the optimism in Section 38. The Section fails to qualify what will pass as a reasonable suspicion. This has again left the interpretation of that portion of the law to loose imaginations. Whatever has to deal with the privacy of the Nigerian citizen ought not to be left to conjectures but definitive terms for proper referencing.

In the final analysis, the Cybercrimes (Prohibition, Prevention, ETC) Act may be a fair demonstration of combating cybercrimes in Nigeria, however, the Act failed to address important issues raised above. One of these issues is whether the Act passes digital rights and preservation of online freedom test, it does not. Typical of most governments in developing and developed societies, there is the paranoia of wanting to limit human expression and interaction and this is evinced in Section 24 of the Act[224].

[224] *Ibid*

Also, there is there is the guaranteeing of the protection of consumer data on the one hand and then the taking away of that protection by the state on the other hand in circumstances that are not clearly defined.

4.4 The Challenge of Competition Law

In Nigeria, there is no direct and specific competition law, yet business combinations are a feature of the economy. Although the law allows merger and business combination, the absence of a competition law clouds the horizon and makes the consumer open to monopolies that will hurt rather than help the economy.[225]Standards are critical to the long term commercial success of telecommunications as they can allow telecommunications products and services from different stakeholders to work together. They also encourage competition and reduce uncertainty in the global telecommunications market place.

The law provides for technical standards[226]and general competition practices[227]with sanctions upon violation of set down rules and regulations. Section 130 of the Nigerian Communications Act provides:

130-(1) Subject to subsection (2) of this section, the commission shall specify and publish to thegeneral public, technical code and specification in respect of communications equipment and facilities that may be used in Nigeria.

[225]Owasanoye, B., *Findings from Review of Laws for Social and Economic Development*. A Paper Presented at the Working Session of SPIDEL at the Nigerian Bar Association Annual General Conference on Tuesday August 18 2009 at Oceanview Expo Centre, Eko Hotel & Suites, Victoria Island Lagos, Nigeria.

[226]Sections 130-134 of the Nigerian Communications Act, 2003.

[227]Sections 90-95, Ibid.

(2) The technical code and specifications prepared by the commission under this section shall include-

(a) requirements for network interoperability including the provision of certain network capabilities such as calling line identification capability and pre-selection capability;

(b) the promotion of safety network facilities;

(c) the provision of network facilities or services, including requirements for qualified providers and installers.

(d) the provision of customer requirement and cabling including requirements for qualified installers;

(e) the approval of customer equipment and other access devices; and

(f) the adoption of technical standards promulgated by international bodies.

In specifying and publishing any technical code and specification, it is the duty of the NCC to first conduct a specified inquiry on the proposed code or specifications[228]. However, such inquiry may not be necessary with regard to technical code and specifications that are mandatorily prescribed by international organisations to which Nigeria belongs.[229] The use of technical equipment or systems must meet global standards and no use of same must hinder network interoperability or comprise public safety.[230]

[228]Section 130 (3), *Ibid*.

[229]Such as the International Telecommunications Union (ITU).

[230]Sector 131, Nigerian Communications Act, 2003.

Pursuant to the powers conferred on it, the NCC has specified and issued Guidelines on Technical Specifications for the Installation of Telecommunications Masts and Towers.[231] The guidelines provide standards to be adhered to by telecommunications services providers/operators, designer, fabricators and installers of telecommunications towers towards ensuring environmental safety and sound engineering practices. They take cognizance of types and constituents of tower structures and also provide a comprehensive data on wind speeds in Nigeria which may be used as reference material for engineers in the design of masts and towers.[232]

The siting of masts and towers must take cognizance of the provisions of the law and be guided by the provisions of the collocation and infrastructure sharing guidelines of NCC in such a way as to minimize their number, protect and promote public safety, and mitigate adverse visual impacts on the community[233]. Telecommunications towers above twenty five meters in height may not be permitted within places designated as residential, and where they are permitted by NCC they should be placed at a minimum set back of five metres distance to the nearest demised property, excluding the fence,and all towers sited within residential areas must conform to the set back stipulated in the guidelines to mitigate the effect of heat, smoke and noise pollution arising from generating sets.[234]Where towers and masts are sited without conforming to the set back and height as

[231]Guidelines on Technical Specifications for the Installation of Telecommunications Masts and Towers Issues by the NCC on 9th day of April, 2009. See www.ncc.gov.ng accessed on 18 August 2014.
[232]Section 1.Ibid.

[233]Ariyoosu D.A., *An Examination of the Legal Regulations and Taxation of Telecommunications and Electronic Commerce in Nigeria.* (www.unilorin.edu.ng/law). Accessed 24th September, 2014.

[234]Section 3(3), Guideline on Technical Specifications.

stipulated by the guidelines, such towers or masts would be removed and the owner of the tower would bear the cost of such removal.[235]

In connection with installation of their respective network facilities, all licensees are duty bound to take all reasonable steps to act in accordance with good engineering practice, protect the safety of persons and property, protect the environment and ensure that the activity interferes as little as practicable with the operation of public utility, public roads and paths, traffic movement and the use of land.[236]

On competition issues in the Nigerian telecommunications industry, the NCC has theexclusive competence to determine and enforce competition law in the industry. Section 90 of the Nigerian Communications Act provides:

Notwithstanding the provision 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 markets.[237]

Above shows that the introduction of competition in the market place does not mean that regulation is unnecessary. The roles of the regulator actually increase once governmentsauthorise competition. The liberalization and introduction of competition in the telecommunications market require strategic policies and regulations that establish an effective regulator, remove explicit barriers[238]to entry and dismantle implicit

[235]Section 3(6), *Ibid.*

[236] See Osadebamwen, P., 'Telecoms Revolution and Environmental Sustainability' *Summit Newspaper*(Nigeria 21 July 2010) p.20.

[237]Section 90 of the Nigerian Communications Act, 2003.

[238]For example the inability to interconnect with the incumbent.

barriers.[239]In effect therefore, regulatory reforms in the telecommunication sector of any economy must include measures aimed at:

(i) creating independent entities to oversee the introduction of competition in the market and establish regulatory mechanisms for issues such as interconnection, licensing and tariff rebalancing;

(ii) preparing the incumbent telecommunications operator to face competition, including timetables setting deadlines for the termination of market exclusivities;

(iii) allocating and managing nearest resources such as numbers and spectrum resources in a non-discriminating way within the liberalized markets;

(iv) expanding and enhancing access to telecommunications and ICT networks and services; and

(v) promoting and protecting consumer interests, including universal service and privacy.[240]

Regulators need to maintain a prominent role because market forces often fall short of creating the conditions necessary to satisfy public interest and objectives such as universal access and service.[241]

Although there is yet no generic competition law, the Nigerian Communications Act with statutory instruments made thereunder makes fair and adequate provision for general competition and anti-competition practices in the telecommunications sector. A licensee must not engage in any conduct which has the purpose or effect of substantially lessening

[239]Such as the potential influence of the incumbent telecommunications operator over the regulator.
[240]*Legal and Institutional Framework. Regulation in Transition to Competitive Market* <www.ictregulationtoolkit.org/en/Section.1254.html> accessed on 20 November, 2014.

[241]*Ibid*

competition in any aspect of the Nigerian telecommunications market,[242] and since the NCC has exclusive competence to determine and enforce compliance with competition laws and regulations in Nigerian telecommunications market, it has published guidelines andregulations concerning competition practices in the Nigerian telecommunications sector.[243]The NCC promotes fair competition in the communications industry and protects communications service and facilities providers from misuse of market power or anticompetitive and unfair practices by other service or facilities providers or equipment suppliers.[244]

Competition practice is, however, permitted in telecommunications market in qualified terms. This is manifest in the provision of section 91(1) of the Nigerian Communications Act which provides that:

A licensee shall not engage in any conduct which has the purpose or effect of substantially lessening competition in any aspect of the Nigerian communications market.[245]

What this connotes is that competition practices are allowed if they do not have the effect of substantially lessening competition. It suffices to say, therefore, that the regulatory framework in place promotes fair competition and protect against misuse of market power or other anti-competitive practices. Despite the anti-competition measures being put in place, the NCC still has the power to authorise conducts or practice which may be construed to have the purpose or effect of substantially lessening competition if satisfied

[242]Section 91(1) of the Nigerian Communications Act, 2003.

[243]*NCC Competition Practices Regulation 2007*<http://www.ncc.gov..ng/> accessed on 31 August 2014.

[244]Section 4 of the Nigerian Communications Act, 2003.

[245]Section 91 (1),*Ibid*.

that the authorization is in the national interest.[246] The position in Nigeria is, however, clear and unambiguous that the NCC has the power to regulate competition in telecommunications industry.

Competition issues in various sectors of the economy are handled by other regulatory regimes such as The Special Trade and Malpractices Investigation panel, standards organisation of Nigeria, Nigerian Civil Aviation authority, Securities and Exchange commission, Central Bank of Nigeria, and of particular importance to this thesis, The Nigerian Communication Commission (NCC) which is the national regulatory authority for the telecommunications industry in Nigeria. The question that arises however is whether the regulations set out by the NCC are sufficient to promote and preserve competition.

Competition law, also called antitrust law in some jurisdictions, lies at the core of the cluster of laws and regulations that cumulatively sustain the free market system. Informally defined, competition law is a set of rules (statutory and common law) used by governments, individuals and firms to evaluate and redress both public and private conduct that causes distortions to the "free flow" of competitive market interaction.The aims of competition law include: the encouragement of free and open markets; the provision of fair and equal competitive conditions to all market participants; the promotion of allocative efficiency; the maximization of consumer welfare; and the establishment of transparency and fairness in regulatory processes. These goals are framed within a competition policy context designed to uphold a liberal competitive order that maximizes national comparative advantages, encourages the free flow of products and services at the lowest prices, promotes innovation and strengthens production

[246]Section 93,I*bid.*

capacities in national and regional settings. Competition law thus provides the basic principles necessary to support free and open competition, in order to achieve, most fundamentally, an efficient allocation of economic resources and affiliated benefits. The basic principle is to take all necessary measures to establish equal opportunities (level playing ground) for all enterprises operating within the region in order to ensure fair competition and promote efficiency, economic growth and development.Competition policy recognises the logic of free and active competition on the markets, the importance of property laws, the need for increased international competition and the facilitation of entry into markets within the context that takes into account the level of development of each country and conscientiously seeks to correct structural imbalances and promote rapid growth and poverty reduction. In other words, the competition policy is founded on the dual principle of efficiency and fairness.

Competition law addresses the following three main issues[247]; they are; Abuses of dominance, anticompetitive agreements and Merger control regulations

Abuses of dominance. Dominance in an economic sense refers to a disproportionate amount of market power in the hands of one firm. If a firm is sufficiently powerful- that is, large enough relative to its market - that it can act without taking into account how its competitors may respond, then it may be defined as dominant.

Abuse of a dominant position is said to occur when a dominant firm in a market, or a dominant group of firms, engages in conduct that is intended to eliminate or discipline a competitor or to deter future entry by new competitors, with the result that competition is prevented or lessened substantially. It includes predatory pricing (pricing below cost to

[247]*Ibid*

drive competitors out of the market and then raising prices after their demise), tying up distribution networks (not allowing distributors to carry competitors' products) to exclude competitors in the market, denying competitors access to essential facilities without which they are unable to provide related goods or services and tied selling (requiring the purchase of a product not linked to the primary purchase)[248]

Anticompetitive agreements are generally contrary to competition regulations. It includes situations whereby two or more companies enter into an agreement on prices, dividing a product market and geographic area. The companies may also create price inflating scarcity through jointly limiting production. Cartels are an example of anticompetitive agreements. Cartel-like situations occur when companies get together to set prices. The restriction of cartels is one of the most important goals of a competition policy. Merger Control Regulations are laws which require firms with joint market share above a designated percentage to notify the competition authority of their intention to merge. The relevant authority then investigates and determines whether the merger would lead to over-concentration in the product market in which the firms trade, or would substantially lessen competition in the markets. This regulation ensures that prospective mergers do not lead to over concentration in product markets and excessive market power that would expose the economy to a firm's possible abuse of its dominant position[249].

(a) The Case for Competition Law in Nigeria

It has been widely argued that the current scenario in Nigeria whereby the economy is being operated without a competition law regime can at best be described as anomalous,

[248] *Ibid*
[249] *Ibid*

injurious to the national economy and contrary to the economic objectives enshrined in the 1999 Constitution of the Federal Republic of Nigeria.

Nigeria's current industrial policy thrust is however anchored on a guided deregulation of the economy and the Governments dis-engagement from activities, which are market-oriented. This leaves the Government to play the role of facilitator, focusing on the provision of incentives, policy and infrastructure, which are necessary to enhance the private sector role as the engine of growth. The industrial policy is intended to generate productive employment and raise productivity, increase exports of locally manufactured good, create a wider geographical dispersal of industries, improve the local technological skills, attract foreign direct investment and increase competition in the economy. As a result, various arguments have been canvassed in support of promulgating a competition law in Nigeria. One of such arguments is that a competition law will increase foreign direct investment by bolstering foreign investor confidence in both the stability of the economic environment and the host country's commitment to protecting competitive processes in the market place[250].

The adoption and correct implementation of a competition law policy will also provide the much needed assurance to the public that the ongoing move to a market system does not leave the citizens at the mercy of the markets.

The transition from a state controlled economy to privatisation and liberalised market has many times led to a fairly oligopolistic market structure because only large companies could afford to buy the formally state owned enterprises. A competition law regime would prevent private companies from taking advantage of the market failures involved

[250]Dimgba, N., *The Need and Challenges to the Establishment of Competition Law in Nigeria.*www.globalcompetitionforum.org.html. Accessed 3rd February, 2015

in the transition to a free market by prohibiting the unfair exercise of market power,it therefore prevents private fiefdoms. It will also serve to preserve the benefits of privatization Globally, Science, Technology and innovation (STI) are recognised as key drivers of wealth creation and improved living standards. Recognising this, successive Nigerian Governments have put in place various measures aimed at expanding Nigeria's capability and capacity in Science, Technology and Innovation. Over the years, the main focus in doing this has been in the areas of developing institutional capacity, infrastructure, human capital, as well as intensifying research activities. The adoption of a Competition law will also aid in increasing the inflow of foreign licensing agreements which brings new technology into the country. Strong and effective competition laws prohibiting horizontal collaborative practices - such as joint ventures among competitors and pooled licensing agreements - serve to encourage foreign firms to contract with domestic firms because they can fully appropriate the gains from their technology.

It is also pertinent that a Competition Law Regime be adopted in Nigeria in order to be protected against predation by multinational corporations operating in the country. For example, the enactment of a competition law prohibiting cartel behaviour gives the state a basis for protecting itself from bid rigging by foreign firms. The Adoption of a competition law regime may also be necessary as a result of pressures from foreign trading partners and other international lending institutions such as the World Bank and the International Monetary fund that may approve developmental aids on the condition that specific laws are implemented[251].

[251] *Ibid*.

One of the most important goals of Nigeria as a developing Nation is to increase its economic growth. It has been widely argued that this goal may be easily achieved through the implementation of a Competition law[252]. Many developing countries have adopted competition laws in the last decades. This high level of interest suggests competition law is widely seen as a desirable and worthwhile economic policy.For example, when competition law principles are applied to monopolies, it will lead to improved efficiency and performance. It has further been argued that competition rules help sustain two of the fundamental ingredients of economic growth, namely competitive market and a sound legal system[253].Other proponents of the theory that adopting a competition law will lead to economic growth argue that competition law rules are a pre-condition for the successful implementation of a privatisationprogramme, especially if the goal of the privatisation is not to replace Government monopolies with private ones[254].

Some proponents of Competition Law in Nigeria have also suggested that having competition legislation will deter corruption, because where government bodies have tremendous power to affect the competitive process when they issue licenses, permits, franchises and subsidies, when a competition law is adopted, some of these powers will be reduced and as such the responsiveness of government official to bribes in order to facilitate illicit economic gains will be reduced[255].

[252]National Stakeholders Meeting on Competition Issues.*Nigeria Disadvantaged Due to no Competition Law*. 23rd September, 2008.

[253]*Ibid*
[254]*Ibid*.

[255]Dimgba, N., *The Need and Challenges to the Establishment of Competition Law in Nigeria*.www.globalcompetitionforum.org.html. Accessed 3rd February, 2015

In particular, the adoption of Competition law is often seen as a tool against anticompetitive behaviour practices by both domestic enterprises and their foreign enterprises. With increasing openness to an economy, a competition law may be seen as necessary to protect domestic enterprises from forces of global competition or from possible abuses of market power by international enterprises and cartels

(b) The Proposed Competition Bill

Liberalisation of the Nigerian economy, increasing economic development, industrialization and the large size of the economy has led to the increasing openness to trade, opening up of the market to more investors' especially foreign investors. As a result it has become necessary to introduce Competition law to regulate competition and consumers' interests in commercial activity are protected.

In June 2001, the Competition and Anti-trust reform committee was inaugurated to work with the Bureau of Public Enterprises in formulating a competition policy for Nigeria. In the exercise of its duties, this committee came up with a draft Competition Bill which has since been presented to the Nigerian Senate as a bill to be passed to law.

The Federal Competition Bill, made up of 115 sections, has as its object, the regulation of competitive activity in every sector of the Nigerian economy. The main thrust of the bill is the creation of a competition regulator empowered to punish anti-competitive practices, regulate mergers, take over and acquisitions and protect regulated industries in every sector and location in Nigeria.

The Nigerian Competition Bill voids "[a]all agreements between undertakings, decisions by associations of undertakings and concerted or collaborative practices tending directly

or indirectly to prevent, restrict or distort normal competition within the national market. . . ."[256]

Six types of specific anticompetitive agreements/coordinated actions listed include: direct or indirect fixing of prices or of other trading conditions; limits on or controls of production, markets, technical development, or investment; division of market shares, customers or sources of supply; boycotts; discrimination in terms of trade and denial of access to arrangements or associations crucial to competition; and tying arrangements.

The Nigerian Bill on competition also aims to eliminate both unilateral and joint "monopolization" market practices by prohibiting all acts or behaviour constituting an abuse or acquisition and abuse of a dominant position of market power and enumerates examples, including the imposition of unfair purchase or selling prices or other unfair trading conditions with the purpose of eliminating competitors; the imposition of limitations on production, markets or technical development to the prejudice of consumers; the fixing of resale prices; restricting imports of goods covered by overseas' trademarks with the aim of charging artificially inflated prices; the application of unjustifiably dissimilar conditions to equivalent transactions; the refusal to transact business according to an enterprise's customary commercial terms; and tying arrangements[257].

Further, the Nigerian law sets forth the rules applicable to the regulation of mergers and acquisitions (M&A)[258]. The Bill provides a right to an appellate review (in a court of law)

[256]Section 7, Federal Competition Bill. www.globalcompetitionforum.org/regions/Africa/Nigeria.
[257]*Ibid*.

[258]Section 97,*Ibid*.

of all final decisions laid down by the Nigerian Competition Commission's dispute resolution bodies[259].

The Bill further provides that Competition Law shall apply to Public utilities, Federal and state Governments and their agencies or corporations[260]. However it fails to address the regulators that have been in force before the bill such as the Nigerian Communications Commission, who have exclusive rights to pronounce on matters related to competition in the telecommunications sector and The Electric Power Reform Act 2005 which provides for the development of competition in the electric power sector, with the creation of the National Electricity Regulation Commission which has as one of its objects, the promotion of competition.

It has been suggested that there is need to amend the provisions relating to sector specific regulators in Nigeria. It has been argued that the regulatory powers of sector specific regulators should not be absolute as this may result in over-regulation and this absolute power should be curbed in order for the industry wide regulators to be effective in its duties.

Another inadequacy of the Competition Bill is related to the thresholds set for determining dominance and monopoly power. Section 36 of the Bill indicates that an enterprise will be deemed to hold a dominant position if it holds more than 40% of the relevant market power. This set threshold may however be flawed as experience in The United Kingdom shows that a company may hold less than 40% and still be in a dominant position. An example is seen in the case of Virgin/British Airways where it was

[259]Section 68,*Ibid*.

[260]Section 8,*Ibid*.

found that though British Airways held less than 40% of the travel services market, it was dominant.

A further shortcoming of the proposed Competition Bill is with regards to the penalties for offences. The highest financial penalty fixed for a singular offence is =N=1 million (one million naira). Though this might seem sufficient, it is doubtful whether this might have a deterrent enough effect on corporations where this amount will probably be a tiny fraction of their profits expected from anti-competitive practices.

In addition, some penalties laid down will be very difficult to calculate. As an example, the Bill provides in Section 32(1) that any person who enters into an anticompetitive agreement shall be liable to a fine '...six times the amount of profit the person would have made'[261]. This fine is incalculable because it may be impossible to determine the profit that would have been made. The same applies to the Section 98 which fixes the penalty at six times the value of the anti-competitive transaction in question. Nigeria should take a cue from the manner in which penalties for anti-competitive practices of corporate entities are handled in industrialized nations. In order to effectively deter prohibited practices, penalties are usually fixed at a percentage of the annual turnover of the defaulting company.

In the European Commission, for instance, companies involved in anti-competitive cartels may be fined up to 10% of their annual turnover. This is more pre-emptive as it affects the financial standing of the entity in question regardless of its size.

(c) Benefits the Enactment of a Competition Law Will Have on The Telecommunications Industry

[261]Section 32 (1),*Ibid*.

In the past, almost all the major sectors of the Nigerian economy were being controlled and regulated by the major government agencies. These agencies are usually created by an Act of the National Assembly or military Decrees which require amendments before any other competitor can be allowed into such sector. For instance the Power Sector was solely managed by the National Electric Power Authority (NEPA), the telecommunication sector by the Nigerian Telecommunications (NITEL), the oil and gas Sector by the Nigerian National Petroleum Company (NNPC), the Nigerian Gas Company (NGC) and the rail sector by the Nigerian Railway Corporation (NCR). These Government monopolies were not only involved in corrupt practices, the absence of competition and a competition policy gave them a god like status. Hence, the deregulation of the major sectors of the economy to private initiatives has drastically made major changes in the operations of these Government agencies. Of particular importance to this section, The introduction of Global Satellite Mobile System of Communication (GSM) operators in the Telecommunication Sector has not only created employment, The open bidding for licence through the Bureau of Public Enterprises (BPE) and the National Communications Commission (NCC) gave birth to private operators such as the MTN Nigeria, a subsidiary of the South African Telecommunication giant (MTN), Celtel and the Second National Operator; Globacom Limited. These operators immediately curbed the monopoly of NITEL. However, it has been argued that without an appropriate competition law, these new telecommunications industries will tend to create a private monopoly. For instance, The monopolistic tendencies of MTN Nigeria was checked when it asserted in 2003 that the Per Second Billing (PSB) tariff in Nigeria was impossible until the year 2007, upon obtaining

licence, Globacom another private operator started off with the said per second billing (PSB) tariff thus forcing all other players to Adjust their tariff mode and rate. Hence, the consumers became the better for the thriving competition witnessed in that sector. The unilateral price fixing of MTN Nigeria was checked by the Competitors without government interference.

However, As far as these reforms in the telecommunications industry are concerned, the enactment of Competition legislation would be a timeous act on the part of the National Assembly.

4.5 The Challenge of Interconnectivity and Access to Network Facility

(a) Access and Interconnection

Communications facilities and services of different licensees of telecommunications must be made available to each other for effective and meaningful interconnectivity and supply of telecommunications services. Access in telecommunications services forms an indispensable discourse in telecommunications. Provisions of access enable a telecommunications licensee to have access to another licensee's communications facilities and services for the purpose of providing telecommunications services. Such facilities and services include the connection of equipment, access to physical infrastructure such as buildings, ducts and masts. Access is controlled by the Nigerian Communications Act, and subject to any exception as may be determined by the NCC and duly published, network facilities providers and network service providers are bound to provide access to their network facilities or network services listed in the access

list[262]to any other network facilities provider, network service provider, applications services provider or content applications service provider, who makes a written request for access to such network facilities provider or network service provider on reasonable terms and conditions.[263]

The access provided by one provider to another provider must be of at least the same or more favourable technical standards and quality provided on the first provider's network facilities or network service.[264]The term 'access' therefore encompasses all kinds of arrangements under which an operator or service provider acquires services from another operator in order to enable it to deliver services to its own customers. 'Interconnection' is a type of access right.[265]

The NCC also maintains a register of network facilities,[266] network services[267] and other facilities which facilitate the supply of network services or application services,[268]including content applications services[269]included in the access list.

[262] The list of facilities and services which may be included in the access list are network facilities, network service and other facilities and service that facilitates the provision of network services or applications services, including content application services. See Section 102 (1) of the Nigerian Communications Act.

[263]Section 101 (1) of the Nigerian Communications Act.

[264]Ibid, Section 101 (2).

[265] McCormack, E.(2007).'Access and Interconnection' in Walden, I., and Angel, J (eds.) *Telecommunications Law and Regulation* (2nd ed.), Oxford University Press, New York, USA, p.215.

[266]Network facilities mean any element or combination of elements of physical infrastructure used principally for or in connection with the provision of services but does not include customer equipment.

[267] Network Service is a service for carrying communications by means of guided or unguided electromagnetic radiation.

[268] Applications Service means a service provided by means of, but not solely by means of one, or more network services.

[269] Content applications service is an application service which provides content while content itself is any sound, text, still picture, moving picture or other audio-visual representation, tactile, representation or any combination of the preceding which is capable of being created, manipulated, stored, retrieved, or communicated electronically.

Access and interconnection are indispensable for logical linking of telecommunications services, hence the provisions relating to interconnection under the Nigerian Communications Act including the powers of the commission thereunder applies *mutatis mutandis* and extends to access provisions and issues ancillary thereto.[270]

By extension, therefore, any regulation or guideline made pursuant to the powers of the commission to make regulations and guidelines on interconnection also applies to access *mutatis mutandis.* It is in this regard that this section shall focus on interconnection to avoid repetition in the applicability of the provisions of the law to access and interconnection.[271]

In the telecommunications sector of the economy, the competing and complementary technologies are wired, wireless and satellite. Obviously, the consumer determines the types of transmission he or she wants, and at what speed and clarity, where necessary.[272]

As a result of the economic productivity and development, telecommunication is the engine of the world economy with transactions in millions of dollars being done everyday over the telephone, by fax, by electronic mail and the internet.[273]

In order to ensure that existing multiple telecommunications operators act responsibly among themselves and satisfy the subscribers within the articulated national interest, a

[270] See Section 103 of the Nigerian Communications Act. The provisions relating to Interconnection under theAct are contained in Sections 97, 98, 99 and 100 of the Nigerian Communications Act and they relate to Interconnection agreements, registration of Interconnection agreements, Interconnection regulations and disconnection of Interconnection.

[271]Ariyoosu D. A. 'Law and Policy of Interconnectivity Agreements in the Telecommunications Sector: An Overview' (2008/2009)1 *The Journal of Department of Public Law and Jurisprudence*, UsmanuDanfodiyoUniversity, Sokoto, Nigeria (2008/2009), Vol. 1., pp71-78.

[272]Aluko, M., *Resolving the Interconnectivity Battle in Nigeria- Some Suggestions.*<http://www.com./ publication/ aluko/ resolving- interconnectivity.htmkwenu!>accessed on 17 February 2015.

[273]Telecommunications & Information Technology Practice Group <www.itlaw.law.strath.ac.uk/distlearn/downloads> accessed on 15 October 2014.

national regulatory authority exists with the primary responsibility of regulating the telecommunications sector in a given economy.[274]

The overriding objective of the national telecommunications policy is to achieve the modernization and rapid expansion of the telecommunications network and services.

Telecommunications service should accordingly be efficient, affordable, reliable and available to all. The Federal Government of Nigeria actively liberalized the telecommunications market and encourages participation of the private sector at all levels.

It is part of the economic and technical regulation of the NCC that requires every licensed telecommunications operator to have mandatory access to technically adequate and economically efficient interconnection with all other operators. As a result of this, in exercise of the power conferred on it by Section 26 of the Nigerian Communications Commission Act 1992 (as amended) and of all other powers enabling it in that behalf that NCC with the approval of the Minister of Communications made the Telecommunications Networks Interconnection Regulations 2003.[275]

The Regulations provide for the rights and obligations of any telecommunications operator to interconnection. Accordingly, the Regulations provide as follows:

> A licensed telecommunications operator shall on receipt of a request for interconnection from another licensed telecommunications operator have an obligation to interconnect its telecommunications network with that of licensed telecommunications operator's network in accordance with the

[274] The regulatory body is Nigerian Communications Commission established vide Section 3(1) of the Nigerian Communications Act 2003 while the International Regulatory Authority is International Telecommunication Union (ITU). The ITU is an agency of the United Nations (UN).

[275] Its commencement date is 20th May, 2003. However, the Regulations have been repealed by the Telecommunications Networks Interconnection Regulations 2007, and for the purpose of this work the current regulations, that is the Telecommunications Networks Interconnection Regulations 2007 shall be cited and is hereinafter referred to simply in this section of the work as 'the Regulations' for ease of reference.

> principles of Section 97 of the Act, these Regulations and any Guidelines on interconnection adopted by the Commission.[276]

It should, however, be noted that the NCC may in its discretion limit the obligation required under the above quoted Regulation in any of the following circumstances:

(i) if an interconnection agreement is prohibited by law;

(ii) if the license issued to an operator does not authorize the services for whichinterconnection is requested;

(iii) if the requested interconnection is rendered impossible as a result of technicalspecifications;

(iv) if such interconnection would endanger life or safety;

(v) if such interconnection would result in injury or harm to the property of the licensedtelecommunications operator

(vi) if such interconnection would hinder the quality of services provided by the licensed operator.[277]

Disputes among telecommunications operators in respect of interconnection usually arise, and when any such dispute arises an attempt is first made to resolve the dispute between the disputing parties through negotiations or other alternative dispute resolution mechanism.[278]

Where no agreement is reached within the specified period, either party may appeal to the commission and the commission shall decide on the case, taking into consideration the

[276]Regulation 1(1). See also Section 96 of the Act.
[277]See Regulation 1 (5).

[278]Such as Arbitration. See Ariyoosu D. A. 'Arbitration as a Dispute Resolution Mechanism in the Telecommunications Industry: An Appraisal of Law and Policy' *Confluence Journal of Jurisprudence and International Law*, (2009) Vol. 2, pp.140-148.

interest of both parties.[279]Such an appeal shall be made in writing, setting out the areas of agreement and dispute, including but not limited to when interconnection was requested, what telecommunications network or service offerings were requested and on what issuesagreement failed to be reached.[280]

It is important to note that the hearing of the proceedings of the commission in public is not at large. Where the presence of the public may pose a threat to public order, national security or an important business, the public may, at the request of any of the parties concerned or by a determination of the commission, be excluded from the proceedings or any part thereof.[281]

The commission has time frame within which to conclude its hearing and will have due regard to the urgency of the matter before it. Thus, Regulation 17 (9) provides that the commission may, given the urgency of the case, issue an interim order before arriving at a decision and shall decide the case within four months, beginning from the date of the appeal.[282]

Any party who is not satisfied with the decision of the commission may appeal to the Federal High Court for a review of the decision and a copy of the application shall be lodged with the commission within 30 days from the date of the decision but the decision of the commission remains binding pending the final determination of the appeal by the Federal High Court.[283]

[279]Regulation 17 (1).

[280]Regulation 17 (2). See also Section 75 (1) of the Act.
[281]Regulation 17 (7) & (8).

[282] Note that by Section 76 (1) of the Nigerian Communications Act, the Commission may resolve the dispute by Alternative Dispute Resolution or such other means and upon such terms and conditions as it may deem fit.

[283]Regulation 17 (12) & (13).

The administrative remedy must first be exhausted because where a statute provides for resort to an administrative remedy, the court cannot competently adjudicate on any suit arising therefrom unless the administrative remedy has been exhausted.[284] In the case of *Blue-ChipCommunications Co Ltd vs. Nigerian Communications Commission,*[285]the plaintiff applied for a Third-Generation (3-G) Spectrum Mobile License from the defendant pursuant to the Nigerian Communications Act 2003. The defendant refused to grant the application explaining that there is a Five-year Exclusivity Contract between it and the GSM operators by reason of which no mobile license could be issue within the period. Being disgruntled by the defendant's decision, the plaintiff commenced an action at the Federal High Court, Abuja challenging the defendant's decision. The issue arose whether the suit was competent in view of the fact that the plaintiff did not complain against the defendant administratively. In striking out the case, the Court, per Stephen Jonah Adah J., held:

There is no evidence of the fact of compliance in this case. The plaintiff in his affidavit never alleged that he has followed the process of review of the decision he has brought to Court in this case under the Communications Act 2003 before accessing this court. In this situation therefore the action is incompetent.[286]

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[284] See the following cases: *MTN Nigeria Communications Ltd v. Nigerian Communications Commission* (2004) 1 TLR, 15-16; Lawal*vs. Oke*(2001) 1NWLR (pt 711) 88 at 106- 107; *Faloye vs. Omoseni*(2001) 9 NWLR (pt. 717) 190 at 200-201; *Kasunmu vs. Shitta-Bay &Ors*(2007) ALLFWLR (pt 356) 741 at 783; *Ojogbede v. Ogundipe*(2008) ALLWLR (pt 399) 589 at 599; *Blue-Chip Communications Co Ltd vs. Nigerian Communications Commission* (2004) 1 TLR 23 at 40:*Econet Wireless Nigeria Ltd vs N.C.C.* (Unreported) Suit No. FHC/ABJ/CS/58/2004 delivered on 20th April, 2004 by His Lordship, Hon Justice B.F.M. Nyako. See also Section 88 (3) of the Act. Note that following the procedure stated in the statute for settlement of interconnection dispute is a condition precedent to the jurisdiction of the court before which the matter is brought and if the procedure is not followed the court lacks the prerequisite competence and jurisdiction to entertain the matter.

[285](2004) 1 TLR, 23.

[286]*Blue- Chip Communications Co Ltd vs. Nigerian Communications Commission* (2004) 41.

It is equally of court's jurisdictional importance to note that it is immaterial whether telecommunications matters involve interconnection or not, once any matter arises out of the provision of the Nigerian Communications Act 2003, the Federal High Court has the exclusive original jurisdiction to entertain the matter,[287] after the prerequisite administrative procedure might have been followed.

It is imperative to examine Access and Interconnection from the following two (02) purviews: *(a) Rights and Obligation to Interconnect;and (b) Collocation and Infrastructure Sharing.*

(a) Rights and Obligation to Interconnect

A central requirement for the success of any telecommunications liberalisationprogramme is the creation of requisite interconnection rights and obligations. Interconnection in its most basic meaning refers to the joining of different networks such that any subscriber of one network could communicate with any subscriber of the other(s). Without interconnection subscribers to one network cannot communicate with subscribers on a different network. In this scenario a big network with a large subscriber base would appeal to consumers more than smaller competitors.[288] This might be beneficial to sector incumbents at the onset of liberalisation, as they have all existing subscribers, but prohibitive of new entry. Inadequate interconnection

[287] This is the effect of the combined reading of the provisions of Section 251 (1)(s) and 252 (2) of the Constitution of the Federal Republic of Nigeria 1999 and Section 138 of the Nigerian Communications Act 2003. See also the case of *Barrister Mike Nkwocha&Ors v. MTN Nigeria Ltd &Ors*(2004) 1 TLR, 1, at p4.

[288] An illustration of this was the success of Theodore Newton Vail's "one system, one policy, universal service" campaign in procuring a regulated monopoly from a hitherto competitive market. For an account of this in the US telecommunications sector before the adoption of a requirement for interconnection arrangements see HUBBER, P.W., KELLOGG, M.K., & THORNE, J., *Federal Telecommunications Law*, (2nd Ed.), 1999, pp. 11-27.

arrangements impose unnecessary costs and technical delays on operators. They can also result in delays and additional costs for businesses and ultimately for national economies.[289]

Interconnection is however important for consumers in that it allows them to communicate not only with other persons but also with services they demand. According to the Telecommunications Regulation handbook, services such as direct international dialing, all internet delivered services, e-commerce, and automated teller machines would not be possible without interconnection. The objective of a good interconnection policy is to achieve any-to-any connection, that is, seamless connection between different networks.[290]

Prior to enactment of the Communications Act 2003, there was no detailed statutory provision for interconnection. Section 17 of the Nigerian Communications Commission Act of 1992 provides for the right of a licensee or an authorised carrier to interconnect its system with that of another licensee or authorised carrier. It empowers licensees and authorised carriers to negotiate with a view to agreeing the terms and conditions for interconnecting their systems in line with provisions of the section while the Commission is vested with the power to set up an arbitration panel at the instance of one or more of the parties to the negotiation where the parties fail to agree terms and conditions for interconnection. The Act makes no provision for the principles that interconnection arrangements should be subject to neither does it contain any other provision for

[289]Opata, B.C., " Transplantation And Evolution of Legal Regulation Of Interconnection Arrangements In The Nigerian Telecommunications Sector", *International Journal of Communication Law & Policy*, Issue 14, Summer, 2011, p.12.

[290] In more mature and competitive telecommunications markets, regulation need not expressly require any-to-any connectivity as competitive pressures will cause the competing firms to interconnect with each other in other to access each other's subscribers. However in less mature or competitive markets express regulatory provisions might need to be introduced to secure this objective.

guidance of the parties negotiating interconnection agreements. The Commission published no regulations within this period which could have clarified matters.

In the absence of published regulations the Commission began from 2001 to insert detailed conditions relating to interconnection arrangements in licenses granted to public operators.[291] These provided the primary instruments for the regulation of interconnection by the Commission before 2003. The provisions of these license conditions represented the first attempts to make detailed provisions for the regulation of interconnection arrangements in Nigeria. In the main they incorporated the general principles expressed in the WTO Reference Paper on Basic telecommunication with regards to interconnections and provided the foundations for subsequent regulatory endeavours.

The Telecommunications Networks Interconnection Regulations and Guidelines of 2003 were the Commission's first subsidiary legislation passed on interconnection and signaled a departure from reliance on the License conditions in operators licenses for regulation of interconnection arrangements in Nigeria. The Network Interconnection Regulations 2003 addressed some of the perceived short comings of the License Conditions and filled in some gaps created by the minimal provisions of section 17 of the NCC Act 1992. Specifically, it refined licensed operator's general rights and obligations to interconnect and created interconnection obligations specific to dominant operators.

[291] *See. e.g.*, Digital Mobile Licence (Nigeria), Condition 16, *available at* http://www.ncc.gov.ng/digital_mobile/dml_licence.pdf (hereafter Digital Licence); Fixed Wireless Access Licence (Nigeria), Condition 16, *available at* http://www.ncc.gov.ng/fwa_licensing/Fixed%20Wireless%20Access%20Licence.pdf (hereafter FWA Licence); NITEL National Carrier Licence (Nigeria), conditions 27-31, *available at* http://www.ncc.gov.ng/PressReleases/NITEL%20National%20Carrier%20Licence.pdf (hereafter NITEL Licence); National Carrier Licence (Nigeria), conditions 30-34, *available at* http://www.ncc.gov.ng/SNO/national_carrier_licence.pdf (hereafter National Licence); National Long Distance Licence (Nigeria), condition 15, *available at* http://www.ncc.gov.ng/LicenseDocuments/NLDO.pdf.

Interconnection is defined, for the first time in the Nigerian telecommunications Sector, under the Regulations as:

> the physical and logical linking of telecommunications networks used by the same or different telecommunications operators in order to allow the users of one telecommunications operator to communicate with the users of the same or another telecommunications operator to access services provided by a telecommunications operator and the services may be provided by the parties involved or by other parties who have access to the telecommunications network.

This definition is similar to that adopted earlier by the European Commission.[292] Regulation 1 granted licensed telecommunications operators the right and upon request from another licensed operator, the obligation to negotiate interconnection with each other to secure provision and interoperability of services throughout Nigeria. Licensed telecommunications operator under the regulations means "a provider of services duly licensed to manage and operate a public network." Like with the license conditions before it, the obligation to interconnect was very much limited to negotiating. This obligation to negotiate interconnection was not absolute but could be limited at the Commission's discretion in circumstances.

The interconnection regulations and guidelines of 2003 as with the position under the license conditions retained a two tier system of rights and obligations. However instead of distinguishing between National Carriers on one hand and other licensees on the other the regulations and guidelines made provisions for licensed operators on one hand and particular provisions for dominant operators.

Regulations 10 to 12 contained specific interconnection obligations imposed only on dominant operators. Pursuant to Regulation 10 dominant operators were required to meet

[292]Parliament and Council Directive 2002/19/EC art.2, 2002 O.J. (L 108) 7, 11 (EC). See also the earlier Parliament and Council Directive 97/33/EC art. 2, 1997 O.J. (L199) 32

all reasonable requests for interconnection, particularly requests for access at any technically feasible point in dominant operators' network. Interconnection offered by dominant operators to other operators was to comply with the non-discriminatory principle. Dominant operators were also required to provide, all information required to facilitate the conclusion of an interconnection agreement, on the request of operators considering interconnecting with them. The regulation also requires dominant operators to submit for the Commission's approval and publish a Reference Interconnection Offer (RIO).[293] The contents for this Reference Interconnection Offer differed from that which the National Carriers licenses required the Carriers to submit and publish. For whereas the Carriers' RIO merely had to contain a description of services for which interconnection was offered in 'segmented components according to market needs and associated terms and conditions including charges'; the RIO for dominant operators under Regulation 10 had to be 'sufficiently unbundled, giving description of their interconnection offering broken down into components according to market needs.

The Regulation stipulated the Commission's power to prohibit conduct by dominant operators for violation of these imposed obligations and to declare interconnection agreements invalid either as a whole or in parts 'to the extent that the operator abuses its dominant position in the market. Before making such a declaration on the interconnection agreement or prohibiting conduct of the operator, the Commission is required to request the dominant operator to refrain from the abuse complained against.

[293] Regulation 10(1)(d) Note the similarities with respect to the requirement for sufficient unbundling of charges in Regulation 10(1)(d) and the provisions of art. 9(2) of the European Union's Access Directive, Directive 2002/19/EC on the non-discriminatory obligation to publish a sufficiently unbundled reference offer.

Regulation 11 provides the principles for interconnection charges and cost accounting applicable to dominant operators.[294] The principles it contains are similar to those imposed on the National Carriers by their license Conditions. The privilege to set justifiably differentiated interconnection tariffs, terms and conditions given to the National Carriers has been further qualified with respect to dominant operators in Regulation 11 with the Commission empowered to ensure that these do not result in distortion of competition. Dominant operators are to apply appropriate terms and conditions in accordance with the non-discrimination principle when providing telecommunications for its own services or to its own subsidiaries and affiliates. The Commission is also given the power to verify a dominant telecommunications operator's compliance with the cost accounting system and publish a statement pertaining to compliance with it annually. Furthermore, Regulation 12 requires dominant operators to keep separate accounts with respect to interconnection activities where these are not provided through a structurally separate subsidiary. Dominant operators are required to maintain separate accounts for their interconnection services and core telecommunications services which will be published after undergoing independent auditing.[295]

Thus the 2003 regulations and guidelines ushered in a regulatory framework for interconnection with a significant focus on dominant operators. The rationale was that until the markets become fully competitive focus only on dominant operators who would be capable of independently determining interconnection rates was necessary to avoid

[294]Opata, B.C., " Transplantation And Evolution of Legal Regulation Of Interconnection Arrangements In The Nigerian Telecommunications Sector", *International Journal of Communication Law & Policy*, Issue 14, Summer, 2011, p.12.

[295]*Ibid*

over regulation[296]. An approach not dissimilar to that adopted in the earlier European Union's Access Directive. A dominant operator under the regulations was defined to mean an operator determined by the Commission to be dominant in a relevant market segment with at least 50 percent of the relevant market share in a geographical area.[297] An operator with at least a market share of 30 percent of the relevant market share in a geographical area is presumed to be dominant; however this would require substantiation with further evidence.[298] The Guidelines which adopted a similar definition provide that a 50 percent share of the relevant market in a geographical area would lead the Commission to conclude that an operator is dominant unless "there are particular circumstances to the contrary."[299]

The two tier system of rights and obligations put in place by the Interconnection Regulations 2003 was revolutionised in a fundamental way by the Communications Act later in 2003. The Communications Act 2003 places an obligation on all network facilities providers and network service providers to upon request from another licensee; interconnect its communications system with the requesting licensee's network at technically feasible locations. Section 96 provides:

> If a network services or facilities provider receives a request for interconnection from another licensee, then the service or facilities provider shall have an obligation to interconnect its communications system with the other licensee's network at technically feasible locations, in accordance with

[296] Guidelines on Interconnection of Telecommunication Networks (Nigeria), paragraph 1(2), *available at* http://www.ncc.gov.ng/interconnection/Legislative-Guidelines%20on%20Interconnection.pdf (2003). Accessed 19th February, 2015.

[297]Telecommunications Networks Interconnection Regulations, regulation 19 (Nigeria), *available at* http://www.researchictafrica.net/countries/nigeria/Interconnection%20Regulations%202003.pdf (2003).

[298] Ibid

[299] Guidelines on Interconnection of Telecommunication Networks, *supra* note 347.

> the principles specified in section 97 of this Act and pursuant to terms and conditions negotiated between the parties in good faith.

This provision represents a departure from the 2003 Regulations and Guidelines in three material respects, the nature of the obligation to interconnect, the persons to whom the obligations accrue to and the location for interconnection. The general obligation for all operators was no longer to negotiate interconnection as was required under the Regulation 1; instead it was to provide interconnection upon request. Secondly, all network services providers and all network facilities providers now have an obligation to provide interconnection at technically feasible locations. The obligation to provide interconnection at technically feasible locations is no longer limited to dominant operators as was the case under the 2003 Network Interconnection Regulations and Guidelines. This modification appears better suited for the Nigerian telecommunications sector. As earlier stated the Commission had made no determination as to dominance so restricting the obligation to provide interconnection at technically feasible points to dominant operators in effect meant that no operator had that obligation. Imposing this obligation on all operators is more in line with the objective of ensuring seamless end to end connectivity of the different operators' networks.

Thirdly under the Regulations interconnection obligations were imposed on telecommunications operators, who were defined to mean providers of 'telecommunication services duly licensed to manage and operate a public network'. The interconnection rights and obligations under the Act however accrued to 'all network facilities providers and network service providers'. The Act defines "Network facilities provider" to mean 'a person who is an owner of any network facilities'; and "Network service provider" to mean a person who provides network services. Thus under the Act

right and obligations to interconnect is accorded to companies beyond those licensed to manage and operate a public network. Service providers without ownership of the network infrastructure through which their services are provided have the right to request interconnection in this sense.

The expansion of the category of persons enjoying the rights and obligations to interconnect under the Act was made evident in the Commission decision in the matter of *Interconnect Clearinghouse Nigeria Limited v MTN Nigeria Communications Limited*.[300]In this dispute, Interconnect Clearinghouse Limited (ICN), an Interconnect Exchange Operator licensed by the Commission filed a complaint to the Commission against MTN. ICN claimed that it was a network facilities provider by virtue of sections 96 and 157 of the Communications Act and consequently other network facilities providers including MTN owed it an obligation to interconnect upon request. MTN contended that its obligation to interconnect was only accorded to Public Switched Networks/ Operators. It contended that by the terms of Condition 22 of ICN's Interconnect Exchange License, ICN lacks the right to demand interconnection of its exchange with other operators. Secondly that ICN was only obliged to interconnect with requesting operators and that it lacked the *locus standi*to require mandated interconnection with non-requesting operators since it was not a Public Switched Network or operator. Consequently MTN claimed that it was lawful for it to decline to interconnect with ICN and relied on provisions of the Network Interconnection Regulations and Guidelines published by the Commission.

[300] Interconnect Clearing Hse. Nig. Ltd. v. MTN Nigeria Communications Limited, *available at* http://www.ncc.gov.ng/Headlines/decision_on_interconnect_mtn.htm (May 9, 2006).

A major issue for determination was "whether an Interconnect Exchange licensee was a proper license of the Commission that is owed an obligation to interconnect with Network services and facilities providers?"

On this issue, the Commission found that ICN as an Interconnect Exchange Licensee was a network facilities provider under sections 96 and 157 of the Communications Act. It found that there was no ambiguity or mischief in a strict interpretation of section 96 of the Act which mandates all network service providers and all network facilities providers to interconnect with other network services providers and network facilities providers under the Act. It thus, rejected MTN's argument that Conditions were attached to the various license to limit the scope of the provisions of the law. It also found that Condition 16 of MTN's license does not preclude it from interconnecting with ICN as the term licensee in Condition 16 was not limited only to holders of Digital Mobile licenses as ICN was a valid licensee under the Act. It distinguished facilities provider from network facilities provider and held that network facilities provider under section 157 of the Act includes licensed operators and owners of network elements used principally for or in connection with the provision of telecommunication services.

Consequently it decided that MTN has failed to discharge its obligations to interconnect with ICN by virtue of Sections 96 and 157 of the Communications Act 2003. The Commission in exercise of its powers under Regulation 5 (5) directed both parties to commence negotiation on interconnection agreement before May 15 2006.

Interconnection under the Act is pursuant to the terms and conditions agreed by the parties and must be in accordance with the provisions of section 97 of the Communications Act. Section 97 requires interconnection agreements between licenses

to be in writing. The agreements are required to comply with the provisions of the Communications Act and such interconnection guidelines or regulations as the Commission may from time to time publish. The agreement must also comply with eight principles prescribed in Section 97(1) (b). These are the principles of: neutrality; transparency; non-discrimination; fair competition; universal coverage; access to information; equality of access; and equal terms and conditions. In addition, the terms and conditions of an interconnection agreement shall primarily be agreed by the prospective interconnecting parties under section 97(2) subsequent to negotiations in good faith in accordance with section 96.[301]

The parties to an interconnection agreement are required to stay interconnected; under section 100 a party cannot be disconnected without the prior approval of the Commission. Disconnection for purposes of the Act is defined broadly in the guidelines on disconnection.[302] The Commission in its reported decisions has enforced this provision rather strictly in circumstances where an operator has restricted conveyance of communication from its network to an interconnecting party even on grounds of non-payment of interconnection charges if the disconnection occurred without prior approval of the Commission. In the Matter of *Intercellular Nigeria plc v MTN Nigeria*

[301] Regulation 3(1) of Interconnect Regulation, 2003 provides for the requirements of good faith in such negotiations.

[302] Nigerian Communications Commission, *Guidelines On Procedure For Granting Approval To Disconnect Telecommunications Operators*, *available at* http://www.ncc.gov.ng/RegulatorFramework/Legal-Draft_Disconnection_Guidelines.pdf, at paragraph 12(2) (defining disconnection as "not only the mere absence of physical connection between operators previously interconnected but also the reduction of bandwidth in both duration, parity bit marking to deny access or flow, allowing only unidirectional flow as against bi-directional and the general restriction of access however so called").

Communications limited[303], Intercellular alleged that MTN had unilaterally disconnected it from MTN's network. A Commission panel set up pursuant to Section 73 of the Act found that Intercellular owed interconnect debts to MTN and had a history of persistent late payment to MTN. It also found that MTN's disconnection of Intercellular was unilaterally done without prior written approval from the Commission. Consequently, it decided that the unilateral disconnection was a violation of Section 100 of the Act. It thus ordered MTN to reconnect Intercellular immediately. It however also ordered Intercellular to pay MTN the outstanding debt.

In conclusion the rights and obligation to interconnect have evolved from a two tier system of interconnection towards one where every telecommunication services and facilities provider is entitled to and should provide interconnection upon request at all technically feasible locations. This universalization of rights and obligations was designed to better facilitate seamless interconnection. The effectiveness of the two tier system was doubtful because no telecommunications service provider has been declared dominant and the national carriers had lost market share, thus imposing more meaningful obligations on this groups as was the case previously would have been ineffective and would have given the mobile operators responsible for majority of the teledensity of the country room to delay interconnection to new entrants or regional operators not affiliated to them.

(b) ***Collocation and Infrastructure Sharing.***

[303]Intercellular Nigeria Plc v. MTN Nigeria Communications Limited, *available at* http://www.ncc.gov.ng/Headlines/ncc_decision_in_intercellular_mtn_matter.htm (Mar. 3, 2006).*See also* VGC Communications Ltd v. Nigeria Telecommunications Ltd, *available at* http://www.ncc.gov.ng/Headlines/decision_on_vgc_nitel.htm (Oct. 4, 2006).

Just like other provisions on interconnection generally, provisions on collocation and infrastructure sharing were first contained in the License conditions of operators prior to the enactment of sector specific rules. However such license conditions were limited to the National carriers and the emphasis at this stage focused on sharing subject to negotiation by the interested parties, rights of way or rights to property acquired by the Carriers under national legislation.

Condition 27.12 of the NITEL license and Condition 30.11 of the other National carrier license contained identical provisions on collocation and facilities sharing. These emphasised that Collocation or facilities sharing was a matter for commercial and technical negotiation between the parties concerned. However, the Commission's power to intervene at the request of either party, to resolve disputes that may arise was recognised. The Commission is required to encourage National Carriers to share with other operator's facilities or property. This refers to where the Carrier has the right under national legislation to install facilities on private or public land or take advantage of a procedure for the expropriation or use of property particularly where essential requirements deprive other operators of access to viable alternatives. The license conditions do not appear to distinguish between co-location and infrastructure sharing and do not contain further or more detailed provisions to offer guidance for negotiations between other operators and a national carrier on this issue.

This provision was however slightly changed by the 2003 Network Interconnection Regulations and Guidelines. The provisions of Regulation 14 of the 2003 Regulations are similar with license conditions for the National Carriers but go beyond them in three material respects. The provisions were universalized and apply to all operators in the

telecommunications sector and not just limited to the licensed Carriers. Secondly the references to rights obtained under national legislation and public land were omitted in the regulations. Thirdly, the Commission's intervention to solve disputes related to collocation and infrastructure sharing was no longer dependent on the receipt of a request by a negotiating party but was now based on its powers under Regulation 17 of the 2003 Regulations.[304] Consequently, under Regulation 14, the Commission shall encourage any operator, who has the right to install facilities on private land or to take advantage of a procedure for expropriation or use of property, to share the facilities or property with other operators who lack access to viable alternatives.

Furthermore the Network Interconnection Guidelines of 2003 offered additional guidance to parties. Paragraph 19(3) required a dominant operator to include sufficient information on the location of infrastructure, capacity available for sharing as well as a price list for access to key infrastructure components in its Reference Interconnection Offer and listed key infrastructure components for which prices should be included.[305]

The 2007 Interconnection Regulations contained provisions similar to the provisions of the 2003 Interconnection Regulations.[306] However a specific Guideline for Collocation and facilities sharing was issued by the Commission. This Guideline distinguished between collocation and infrastructure sharing for the first time. However most of the provisions applicable to infrastructure sharing were applicable to collocation with the

[304]The improvements that Regulation 17 made to the Commission's dispute resolution powers have been discussed elsewhere and will not be repeated here. The Commission's power to intervene and impose a facility sharing arrangement between operators after consultation with them is reiterated by paragraph 19(4) of the Network Interconnection Guidelines.

[305]These include tower space, room for interconnection equipment, poles, ducts and conduits.

[306] The one notable difference is the omission of the words "as provided for in Part V of these Regulations" from Regulation 14 (2) of the 2007 Regulations.

necessary modifications. The Guidelines gave detailed provisions aimed at establishing a framework within which operators can negotiate collocation and infrastructure sharing arrangements. Its objectives include ensuring the minimisation or avoidance of unnecessary infrastructure duplication;[307]minimising capital expenditure on supporting infrastructure to free up more funds for investment in core network equipment;[308] and ensuring that the economic advantages from facilities sharing are harnessed for the benefit of all telecommunications stakeholders in Nigeria.[309] The last objective is encouragement of operators' adoption of cost oriented policy to achieve a reduction in the tariff chargeable to consumers.[310]

Although there is a general obligation to provide interconnection under section 96 of the Communications Act, subject to terms and conditions negotiated in good faith, an operator who controls or owns a facility amenable to sharing may enter into negotiations with another operator who submits a request to share in the use of the amenable facility.[311] Thus the obligation of an owner or controller of an amenable facility to collocate or share infrastructure appears lesser than the general obligation to provide interconnection upon request. In this regard it is arguable that the obligation to provide collation must be distinguished from the obligation to negotiate the terms and conditions of a request for infrastructure sharing. This is because under the Guidelines, collocation is

[307] Nigerian Communications Commission, *Guidelines on Collocation and Infrastructure Sharing*, *available at* http://www.ncc.gov.ng/RegulatorFramework/Guidelines%20on%20Collocation%20&%20Infrastructure%20Sharing.pdf, at paragraph 3(1)(a).

[308] *Ibid* at paragraph 3(1)(d).

[309] *Ibid* at paragraph 3(1)(e).

[310] *Ibid* at paragraph 3(1)(f).

[311] *Ibid* at paragraph 6(1).

distinguished from infrastructure sharing[312] which is a wider expression. The provisions for infrastructure sharing under the Guidelines shall apply to collocation unless specifically excluded[313]. However, since Collocation is an element of interconnection,[314] while infrastructure sharing strictly speaking is not, the Guidelines cannot lessen the obligation to provide interconnection under Section 96 of the Communications Act with regards to Collocation alone. If it were so those provisions would be inconsistent with the express provisions of the Act and therefore invalid. Infrastructure sharing strictly speaking under the Guidelines is not an aspect of interconnection but an area related to interconnection, consequently the lesser obligation to negotiate infrastructure sharing under the Guidelines are not inconsistent with the express provisions of the Act but are rather complementary.

The Guidelines however require negotiations on infrastructure sharing to be conducted with the utmost good faith.[315] However it is permissible for the owner or controller of an amenable facility to refuse request for infrastructure sharing on either of three grounds: insufficient capacity; safety, reliability and incompatibility of facilities; and general engineering considerations.[316] To the extent that these provisions of Paragraph 7(2) apply to collocation, they constitute further derogation from the provisions of Regulation 1(5)

[312] Collocation means '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'. Infrastructure sharing however means 'the joint use of network facilities by two or more operators subject to agreement signifying relevant technical and commercial conditions. For purposes of the guidelines infrastructure sharing unless otherwise explicitly stated refers to the sharing of facilities that are not feasible for collocation.

[313]Nigerian Communications Commission, *Guidelines on Collocation and Infrastructure Sharing, available at* http://www.ncc.gov.ng/RegulatorFramework/Guidelines%20on%20Collocation%20&%20Infrastructure%20Sharing.pdf, at paragraph 8 (8).

[314]*Ibid* at paragraph 8(1).

[315]*Ibid* at paragraph 6(2).

[316]*Ibid* at paragraph 7(2).

of the 2007 Interconnection Regulations on the circumstances in which the Commission may exercise its discretion to limit the obligation of operators to interconnect.

A provision of the Guidelines tailor made to ensure that the objective of encouraging sharing of passive infrastructure does not minimise incentives for operators to develop capacity is Paragraph 12 on reservation of capacity. It recognises the right of an operator to reserve some of the capacity for which it has made long term investments. This recognised right is balanced against the necessity of not impeding network roll-out plans of other operators including new entrants. Consequently, the right is limited to a single non-extendable 2 year period during which an operator that has undertaken significant investment may exercise the right to reserve not more than 50 percent of its newly developed capacity.

In conclusion, provisions on collocation and infrastructure sharing have evolved towards encouraging all operators to share passive infrastructure which is not likely to impede competition between them. The policy objective here has been to facilitate competition among operators by reducing costs associated with the duplication of passive infrastructure especially in remote and not very profitable areas. The end result is to secure increasing availability of services throughout the country at substantially reduced cost.

Without interconnectivity and access to network, there cannot be telecommunications. Thedelay interconnectivity to another operator or within the same operator on a timely basis has been a major challenge to the regulatory framework of the Nigerian telecommunications industry. Even when connected, the operators may not have enough links to the existingnetwork, thereby causing congestion and degradation of services.

This singular factor has imposed limit on how much expansion that can be undertaken by the operator and still maintain an acceptable level of quality of service.[317]

4.6 Conclusion

In this chapter, attempt has been made to discuss the emerging challenges and legal issues in telecommunications law and of electronic commerce in Nigeria.

With the emergence of Global System for Mobile Communications (GSM) in Nigeria in commercial roll-out in 2001, a new regime of telecommunications has been created. Licenses have been granted to many telecommunications operators by the regulatory authority. The provision of telecommunications services which hitherto was the monopolistic affairs of NITEL has now been liberalised by force of privatisation and deregulation processes. This, in effect, has created an atmosphere requiring an effective and efficient legal framework for telecommunications market. While the available institutional and regulatory structures in the Nigerian telecommunications industry are laced with prospects, the need to look outwardly into international environment cannot be jettisoned; the roles of international regulatory bodies cannot be over-emphasised.

Despite the encouraging current market and economic structures of the Nigerian telecommunications sector, the overlapping functions of government agencies and regulatory bodies in the telecommunications industry have left more questions than answers. The way out probably is for the concerned agencies and bodies to reach a compromise by entering into memorandum of understanding to determine which

[317] Ndukwe, E., *Telecommunications Challenges for Nigeria in the 21st Century* <http://www.ncc.gov.ng/speeches-presentation/EVCS%20prsntaion/nici-programmeEVCSpeech.pdf> accessed on 19 March, 2015.

functions should be performed by which agency or body. Or better still, amendment of related laws that create concerned agencies and bodies on telecommunications matters is needed.

Although Nigerian Telecommunications sector has been deregulated and this has enhanced and generated competitive environment, there should be certain level of regulation guiding the operations of the service providers so as to avoid a reversal of the current trend of competitive market instead of creating monopolistic atmosphere of few 'giant' service providers.

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CHAPTER FIVE

SUMMARY AND CONCLUSION

5.1 SUMMARY

The purpose of this dissertation has been to examine the legal framework for the regulation of telecommunications in Nigeria and the highlight the various emerging issues legal and operational challenge therefrom. With the liberalization of the telecommunications sector and the emergence of the Global System for Mobile Communications (GSM) in commercial quantity, the Nigerian telecommunications tempo has changed drastically, with licences granted to private operators, thus breaking the monopolistic status of the Nigerian Telecommunications Plc (NITEL)[318]. The exponential growth in the sector has attracted the global perception and Nigerian telecommunications has been adjudged one of the fastest growing telecommunications market in the world.[319] A lot of benefits have been recorded over the years in the industry - investment has increased, job opportunities have been created and there has been a general economic growth and consumer benefit. New services have emerged and convergence in services has been a matter of convenience. The competitive environment of deregulation of the sector has also resulted in relatively low prices and tariffs for consumers. Telecommunications has therefore presented copious opportunities for the creation of unprecedented wealth for the government and the people of Nigeria. It has been observed that 'on the national scale, telecommunications is the only sector of the economy that the Federal Government stopped throwing money into but started reaping inflow of funds

[318]Ariyoosu D.A, *Op. cit.*

[319]Okonji, E., Nigeria: 'Challenges of a Telecom Sector Despite Achievements' *Daily Independent Newspaper,* Nigeria, 29 September 2009, p17.

from. Despite the huge achievements of telecommunications in the country, however, the sector has been faced with a lot of challenges such as multiple regulation, government interference in telecommunications matters, challenges of cybersecurity, data protection, lack of a viable competition law, security of telecoms infrastructure, and the thorny issue of interconnectivity and access to network facilities.

The Nigerian Communications Commission (NCC) is the sector-specific regulatory body in the Nigerian telecommunications industry. The NCC is responsible for the monitoring of performance standards and indices relating to telecommunications services and facilities in Nigeria.

However, events in the recent past suggest that other federal government agencies as well as states are now making effort to usurp NCCs function in the telecommunications industry which is unknown to the country's law. It has become a common practice for any government agency be it federal or state to solicits for one levy or the other from operators while some seek that operators secure one approval or the other from them which comes with a fee before they can build infrastructure. This has posed serious operational challenges thereby affecting investment and quality of service in the sector. The effort of NCC and NESREA in promoting inter-agency collaboration in this regard is commendable but still needs to be supported by clearly defined regulations that will eliminate ambiguity in the regulation of telecoms operation.

For many years, there was a felt absence of a comprehensive law on cybercrime in Nigeria even though various criminal legislations contained aspects of laws bordering on cybercrime. It was only in 2015 that the Cybercrime (Prohibition and Prevention etc) Act was signed into Law by Present GoodluckEbele Jonathan. Although the Act tried to

tackled several of the challenges encountered in cyberspace, there is still much that could be done in strengthening the current Cybercrime Act such as clearly limiting the executive powers of the President where all computers designated as Critical National Infrastructure are vested sorely in him. This could lead to abuse of executive power. Moreover does the fact that the interception is carried out by a Nigerian government agency makes the interception lawful or the government is included in the "unlawful interception" should any be carried out by the government?

Furthermore, not only does the Section 24 of the Cybercrime Act reeks of state regulation and management of the social media, it also seeks to erode the principles of freedom of expression online in Nigeria. The hashtag revolution is gradually phasing out protests with placards. It is best advised that this section is removed in its entirety.

On the challenges of protection of Personal data of cyber users, whilst the effort of government in tackling this challenge through the provision of Section 38 of the Act, Sections 39 and 40 of the Act however crushes the optimism in Section 38. The Section fails to qualify what will pass as a reasonable suspicion. This has again left the interpretation of that portion of the law to loose imaginations. Whatever has to deal with the privacy of the Nigerian citizen ought not to be left to conjectures but definitive terms for proper referencing.

A case for a comprehensive Competition Law was made as this will strenghthen the NCC towards effect regulation of the Sector.

Finally, a proposed regime for the efficient and effective deployment and usage of telecom infrastructure was examined through examining the regulatory provision on Infrastructure sharing and collocation and suggesting ways of enhancing them.

5.2 FINDINGS

Considering the various challenges facing legal regulation of telecommunications and electronic commerce as highlighted in this work, it has appeared that the current state of the Nigerian law falls short of an efficacious system of electronic commerce and does not adequately address the problems and challenges of regulation and taxation of telecommunications.

The following is a summary of observation and findings from this research:

1. The is the challenge of multiple regulatory regime and government interference in telecommunications which has led to confusion and extra burden for telecoms operators.
2. Despite attempts by the new Cybercrime Act (Prohibition and Prevention etc) Act of 2015, a lot of challenges persist in the tackling of cybercrime as well as protecting data of cyber users.
3. The is still no single comprehensive law to guarantee data protection of users of telecommunications services and to specify under what conditions such data may be accessed by other parties.
4. There is no adequate competition law to check the menace of anti-competitive practices amongst telecom operators and curtail oppressive monopolies.
5. There is non-collocation of telecom facilities amongst telecom operators despite the provisions of the NCC guideline of collocation and infrastructure sharing.

In light of the above, there is therefore a need for urgent and immediate regulatory intervention.

5.3 RECOMMENDATIONS

In view of the aforementioned challenges confronting the Nigerian Telecommunications Space, we hereby, as a summary, recommend as follows[320]:

a) ***Harmonisation of the Statutory and Operational Frameworks Applicable to Designated Regulatory Authorities:***

Despite the encouraging current market and economic structures of the Nigerian telecommunications sector, the overlapping functions of government agencies and regulatory bodies such as the Nigerian Communications Commission and the National Environmental Standards and Regulations Enforcement Agency have left more questions than answers. Similarly the various tax authorities, environmental boards and physical planning agencies of various states and local government has continued to create inter-tiers and inter-agency tension. This has resulted in face-off between the regulatory bodies over their respective statutory functions. It is recommended that the concerned agencies and bodies should enter into memorandum of understanding to determine which functions should be performed by which agency or body pending any amendment to the laws creating the overlapping functions.

While NESREA may wish to address peculiarly environmental issues which it considers as insufficiently addressed in the NCC's Guidelines, such concerns should be addressed through a revision of the NCC's Guidelines. The NCC, as the telecommunications industry's sector specific regulator, is best placed to drive the current review process as it has acquired the requisite technical knowhow and has full

[320]Ariyoosu D.A, *An Examination of the Legal Regulations and Taxation of Telecommunications and Electronic Commerce in Nigeria* (www.unilorin.edu.ng/law). Accessed 24th September, 2014.

understanding of the issues to be addressed as it concerns the telecommunications industry.

It is imperative to commend the Management of NCC and NESREA for the effort being made in collaborative regulation of the telecom industry. A noteworthy step was taken in 2014 with the signing of the MoU on Infrastructure Localisation.

In the 11 points memorandum of agreement endorsed by the two Ministers as well as the executive heads of NCC and NESREA, both agencies pledged to observe specific guidelines on issues such as setback, sealing, waiting time for Environmental Impact Assessment, EIA, approval and the process to follow in specific cases of unusual circumstances. Even though these are steps in the right direction, there is the need for Laws that will clearly delineate the respective roles and functions of these agencies so as to minimize overlap and conflict.

(b) Need to address lacunas in the Cybercrime Act

There is the need to clearly address the lacunas in the current Cybercrime Act before they pose a greater clog in the wheel of telecoms regulation. One of these is to clearly define the limits of the State when it comes to accessing data of cyber-users. Although Section 38 of the Cybercrime Act appears to protect data ofcyber users, the provisions of section 39 and 40 threatens those rights by empowering the state to access data of cyber users without clear definitions of 'suspicions'.

Another lacuna is what happens when the threat to a computer system or network is launched by a government agency? Should the victim still report such attack to the

National Computer Emergency Response Team Coordination Team? Also, why must such non-reportage of threat be criminalised in subsection (3) of the Act?

Furthermore a much more thorny issue in the Cybercrime Act is the provisions of Section 24.Not only does the Section 24 of this Act reeks of state regulation and management of the social media, it also seeks to erode the principles of freedom of expression online in Nigeria. The hashtag revolution is gradually phasing out protests with placards. It is best advised that this section is removed in its entirety. A review and possible amendment of the Act is recommended in this light to strengthen the the fight against cybercrime and guarantee Protection of data of cyber users.

It is also the writer's suggestion that the provisions of ECOWAS Act on Personal Data Protection be domesticated via an act of the National Assembly to fully guarantee the Personal Data of Cyber Users in Nigeria.

(c) Encouragement of Collocation among Operators

In order to prevent proliferation of telecommunications facilities such as masts and towers, government should encourage collocation among telecommunications operators. This is necessary because if many telecommunications operators collocate, the amount to be used in building more base stations and making telecommunications installations especially in urban and areas already covered by some other operators would have been expended on other things such as building base stations in non-coverage and rural areas. This would generally improve quality of service and alleviate fear of falling towers. However, where necessary, operators should increase

their base stations and invest more on equipment that would enhance their service delivery and operational efficiency.

(d) **Registration of Subscriber Identification Module as a way of checking crimes:**

The NCC and the service providers should work in concert to ensure that existing subscribers, who have not registered their Subscriber Identification Module (SIM) and intending subscribers partake in the registration of SIM. This has become necessary in view of the rising criminality that GSM phones are deployed to in recent times including the upsurge in kidnapping, armed robbery and terrorism. In fact, such negative application of GSM phones is deplorable and can only be curtailed if the NCC and all the service providers insist on SIM registration at the point of purchase[321].

(e) ***Need for an Effective Monitoring and Enforcement Mechanism in The Structural Framework:***The competitive environment of telecommunications which allows more than one field operator must of necessity attract standards and rules of operation for orderliness, effectiveness and efficiency. The flexibility of choice open to customers also call for a wide interconnecting boundary between operators and a specific level of quality of service to be attained by all to avoid harmful effects on other operators and the public being served at large. There is therefore need for an effective monitoring and enforcement mechanism in the structural framework of managing

[321]Ariyoosu D.A, *Op cit.*

telecommunications. Furthermore, penalties applicable to violation of rules must be commensurate and promptly applied to deter violators.

(f) The need to put in place Effective mechanisms for the enforcement of the law and regulations of telecommunications. Although Enforcement Regulations were made by the NCC in 2004,there is a need to co-opt law enforcement agencies in the fight against violations oftelecommunications laws and regulations.

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