The NCC and a Price Floor for Internet Access in Nigeria: Competition Law Matters Arising

Stephen Oluwaseun Oke*

ABSTRACT

This essay seeks to evaluate the propriety of the relatively recent attempt by the Nigerian Communications Commission (NCC) to introduce a price floor in the market for internet access in Nigeria. It examines the NCC's decision through the lenses of competition law by providing insight into the legal framework forming the regulatory basis on which NCC issued the Directive and describing the NCC's approach to regulating competition in the communications industry. It further illuminates on the antitrust rationale that may have informed the decision and advances arguments, founded on competition law doctrines, as to why the Directive was flawed, beyond the harsh economic conditions under which the ill-timed Directive was issued.

1.0 BACKGROUND

When the Nigerian Communications Commission ("NCC") announced its decision to establish a price floor for the provision of internet access by all operators in the Nigerian telecommunications industry (the "Directive"), this author, like many other subscribers in Nigeria, did not welcome the announcement with open arms. According to NCC, the Directive

* Stephen Oluwaseun Oke is a legal practitioner based in Lagos. He is currently an Associate at the Law Firm of Banwo & Ighodalo. Stephen holds a LL.B from Babcock University, and a LL.M from the University of Cambridge where he fell in love with Competition Law. Stephen can be contacted through; Stephen.oke@yahoo.com or soke@banwo-ighodalo.com

was aimed at promoting a level playing field for all operators in the industry, and to encourage small operators and new entrants.[1]

A price floor is a minimum price placed on the provision of goods or services, typically by a regulator.[2] Unlike a price ceiling (stipulation of a maximum price) which has the effect of lowering market prices, a price floor tends to increase the prices offered by supplier(s) in a market. Consumers, therefore, have the propensity to antagonize any suggestion of a price floor, for the obvious reason that, as a general rule, consumers want to pay the lowest price possible for any given product or service. This principle applies to consumers in Nigeria as with consumers all over the world, and it is expressed in the law of demand which says that the quantity of a good or service demanded falls as the price rises, and vice versa.

In addition to its inconsistency with the age-long economic principle highlighted above, the Directive could not come at a worse time, having been announced in the middle of Nigeria's economic recession. It, therefore, came as no surprise when, NCC issued a new directive (the "Suspension Directive") that suspended any further action in that direction following the

[1] The Nigerian Communications Commission "NCC Suspends Directive on Data Segment Price Floor" available online at http://www.ncc.gov.ng/stakeholder/media-public/public-notices/121-ncc-suspends-directive-on-data-segment-price-floor (accessed on 4 July 2017).

[2] A price floor is quite distinguishable from a "fixed price" or "price increase" in that the regulator does not stipulate a fixed price to be charged by suppliers in a market, rather it stipulates a minimum prices below which no supplier may offer its goods or services. Suppliers are, therefore, free to sell at different prices above the price floor.

outcry of consumers and concerns expressed by the Nigerian Senate.[3]

This essay provides insight into the legal framework forming the regulatory basis on which NCC issued the Directive; and points out why (beyond the laws of demand and harsh economic climes), the Directive was flawed from a competition law perspective. Although the Directive has since been suspended, this perspective remains relevant, not for NCC, other market regulators, and consumers, especially in light of the impending *Federal Competition and Consumer Protection 2017* legislation.[4]

2.0 ASSUMPTIONS OF COMPETITION LAW

No meaningful evaluation of the Directive on a competition law pedestal can be achieved without proper understanding of the meaning and objective of competition law and market regulation premised thereon. Therefore, for the benefit of readers who are less conversant with competition law, it is imperative to begin with a brief primer on some basic assumptions of competition law that will serve as premises for evaluating the propriety of the NCC Directive.

[3]Supra note 1.

[4] Two bills, SB 257 and HB 60/01, each titled, "**Federal Competition and Consumer Protection Bill**", have been passed by the Senate and the House of Representatives and now await harmonization by both houses of the National Assembly before their transmission to the President for assent. Amongst other objectives, these bills seek to promote fair, efficient and competitive markets in the Nigerian economy, protect the interest of consumers and facilitate access by all citizens to safe products.

Consumer welfare is the primary and long-term goal of competition law or antitrust policy. Indicators of consumer welfare include, without limitation: (i) low prices; (ii) improved quality of goods/services; (iii) innovation; and (iv) choice, that is, the ability and ease of switching from one supplier to the other. It is generally assumed that consumer welfare thrives best in a market that operates on the principles of *fair competition*.

There is fair competition in a *free market*, that is, a market where there are many sellers and buyers, homogenous product/service, price determination by forces of demand and supply, free flow of information, etc. Although a free market is not attainable in "real life", competition law policy assumes that market regulation should aim to bring the market as close as practicable to a free market.

As a general rule, a market regulator should not interfere with price in the market. Ideally (and consistent with a free market), price should be determined by *market forces*, that is, the interaction between demand and supply. If a market regulator must regulate price at all, such interference (i) must be based on sound economic analysis in the market; and (ii) can only be justified if it aims to preserve fair competition (where "fair competition is not an end in itself, but a means to achieving "consumer welfare").

Finally, and perhaps most important for the purpose of this discourse, competition law assumes that, in a free market, sellers are in business to make profit – this is a legitimate goal, and one that incentivises supply/investment and innovation. Accordingly, there cannot be "fair competition" if one seller sells *below cost*, that is, selling for a price at which other sellers cannot make 1 kobo of profit (or sufficient profit to replenish supply) even if they were to operate efficiently.[5]

2.1 Illustration of selling "below cost"

If, for instance, in Nigeria:

- There are two different markets: a market for (i) *Widgets* and (ii**)** *Blodgets*;
- X, Y and Z are sellers in the market for Widgets*,* but X also sells in the market for Blodgets; and
- The minimum cost (e.g. cost of raw materials[6]) of producing a Widget is ₦5, with the implication that the sellers in the market for Widget cannot sell at a profit unless they sell above ₦5 to allow for a profit margin.

[5] Understandably, competition law should not aim to encourage inefficient operation. For this reason, the approach adopted by market regulators in advanced competition law regimes, such as the European Commission, is to intervene only where a pricing practice has been, or is capable of, hindering competition from undertakings that are 'as efficient' as the dominant undertaking. This is an economics-oriented approach. See paras 23 – 27 of the *Guidance on the Commission's Enforcement Priorities in Applying Article (102 TFEU) to Abusive Exclusionary Conduct by Dominant Undertakings* (2009/C 45/02). This approach was adopted by the Court of Justice of the European Union in C-209/10 *Post Danmark A/S* v *Konkurrenceradet*[2013] All ER (EC).

[6] Note that above example is simplistic. In reality, the cost analysis to be carried out by a market regulator involves more complex cost variables. Also, "cost" would typically include a fair return on investment

If X decides to sell each Widget for ₦4, he is not competing fairly because Y and Z cannot match that price. Typically, X would only be selling at a loss with the aim of frustrating its competitors out of the Widgets market. This strategy is called "*predatory pricing*". X would only be able to sustain his sale of Widgets at ₦4 (thereby incurring a loss of ₦1 on each Widget sold) by offsetting his loss in the Widgets market from the profits he is making in the market for Blodgets, or in some other market where he is selling above cost / at a profit. This anti-competitive practice, of channelling profits in one market to fund a predatory pricing strategy in a different market, is called "cross-subsidization".

In the short run, consumers will naturally be happy to buy Widgets from X (rather than from Y or Z) because, like the law of demand predicts, demand increases as price falls. However, in the long run, Y and Z will be forced out of the Widgets market, leaving only X who, at this point, becomes a monopolist. In the absence of constraints by now non-existent competitors, X can increase his price to ₦15 per Widget. It gets worse, however, because X may go a step further by leveraging his dominance in the Widgets market to mount pressure, through anti-competitive practices, on his rivals in the market for Blodgets. By this time, it is too late for the market regulator to salvage the Widgets market. This is one of the consequences that NCC had in mind when it made the Directive.

Having provided illumination on the basic principles of competition which are pertinent to this discourse, we shall now consider what legal basis, if any, the competition regulator had to attempt to regulate price in the market for internet data.

3.0 LEGAL FRAMEWORK AND BASIS FOR THE DIRECTIVE

3.1 Is NCC a Competition Regulator?

NCC, like other sector regulators, is a regulator of competition in the telecommunication market. *Nigerian Communications Act, 2003*[7] (the "NCA"), s. 90 gives NCC the exclusive competence to administer and enforce compliance with competition laws, and to sanction anticompetitive practices in the telecoms market. The *Competition Practices Regulations 2007* ("Competition Regulations") were made by NCC pursuant to its powers under the NCA.[8]

3.2 Does NCC have the Powers to Regulate Price?

NCC has statutory powers to regulate price. Section 108 gives NCC powers to regulate and approve tariff rates in the communications industry. Section 108(4) (d) requires NCC to structure tariff rates and set tariff levels to attract investments into the communications industry.

3.3 Must Tariffs Have any Correlation to "Costs"?

Section 108(4)(b) of the NCA provides that tariff rates "shall be cost-oriented and, in general, cross-subsidies shall be eliminated."

[7]Cap. N97 Laws of the Federation of Nigeria 2004.
[8]NCA, ss. 70 and 90 generally, and ss. 91, 92 and 95, in particular.

Further, *s. 108(4)(b)(c) of the NCA* provides that tariff rates shall not contain discounts that unreasonably prejudice the competitive opportunities of other providers. *Regulation 8(f) of the Competition Regulations* also precludes operators from "supplying communication services, at prices below long run average incremental costs or such other cost standard, as is adopted by the Commission."

4.0 ANALYSIS OF THE DIRECTIVE

4.1 Description of NCC's Approach

According to NCC, the Directive was aimed at promoting a level playing field for all operators in the industry, and to encourage small operators and new entrants**.** Consistent with the goal of competition law identified earlier, the NCC also stated that the decision was taken in order to protect the consumers who are at the receiving end, and save the smaller operators from predatory services that are likely to suffocate them and push them into extinction. For this reason, small operators were exempted from the new price regime. NCC considered "small operators" to be operators with less than 7.5% market share, and "new entrants" as operators who have operated in the data market for less than 3 years.

For the purpose of the Directive, NCC identified two distinct markets, for **(i)** GSM/voice call services; and **(ii)** internet access (data) services. The Directive aimed at imposing a price floor (minimum price) of *₦0.90k/MB* for data services. According to NCC, industry average market price for big operators such as

MTN, Etisalat, Airtel and Glo was *₦0.53k/MB* (with Glo charging as low as ₦0.21k/MB), while the average market price for smaller operators[9] was *₦0.71k/MB.*[10]

In identifying markets (e.g. market for voice calls as distinct from market for data services), NCC generally considers the services that make up a specific market, the geographical scope of the market, and demand-side and supply-side substitutability.[11]

In identifying market share, NCC considers the revenues, numbers of subscribers or volume of sales.

4.2 What Anticompetitive Practices was the Directive Targeting Specifically?

The Suspension Directive identifies predatory pricing as one of the anticompetitive practices which the Directive was aimed at curbing. Other relevant abuses include exclusionary pricing (typically by selling below cost) and cross-subsidization.

4.3 What is the Theory of Harm?

A candidate justification for the Directive would appear to be based on the assumption that bigger operators such as MTN and Globacom are pricing and supplying data below the cost of

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[9]Smile Communications - ₦0.84k/MB, Spectranet - ₦0.58k/MB and NATCOMS (NTEL) - ₦0.72k/MB.

[10]supra note 1.

[11]Nigerian Communications Commission "Determination of Dominance in Selected Communications Markets in Nigeria"Available at: <http://www.ncc.gov.ng/docman-main/legal-regulatory/legaldeterminations/365 determination-of-dominance-in-selected-communications-markets-in nigeria/file> (Accessed 4 July 2017).

supplying data service at acceptable quality levels and that, by so doing, they are implementing a predatory pricing strategy with the aim of frustrating smaller operators until they are eventually forced to exit the data market and impede potential suppliers from entering the market.

The theory would further be that big operators are sustaining their below-cost pricing in the data market ("secondary Market") by using profits from the market for voice calls ("primary Market") to offset the losses they may be incurring in the secondary market, making them culpable for cross-subsidisation. Smaller players are not present in the primary market, and they are generally new entrants in the telecommunications industry. For this reason, they will be at a disadvantage as they have no alternative market from which to cross-subsidize in order to match the price offered by big operators for data. Big operators would therefore not be competing "fairly"

Although consumers in the secondary market would in the short run enjoy low prices, in the long run customer welfare will be jeopardized because (i) under-pricing will inevitably lead to low quality of service; and (ii) big operators are likely to increase data price after they succeed in squeezing out smaller competitors from the data market and creating a price barrier to impede the ingress of "new entrants" to the market.

4.4 Why was the Directive Flawed?

In this author's opinion, the Directive was flawed for two major reasons: (i) speculative market regulation; and (ii) the seeming assumption that there cannot be fair competition in the data market without smaller operators.

4.4.1 Speculative market regulation:

Best practices in market regulation dictate that price regulation should be a last resort and must be justified, typically by concrete information on the cost-basis for pricing in the relevant market or evidence of anticompetitive pricing. By the Directive, NCC attempted to introduce the price floor "pending the finalisation of the study on the determination of cost-based pricing for retail broadband and data services in Nigeria."[12] Therefore, NCC admits that it had not determined the cost basis for pricing in the data market at the time it issued the Directive. In other words, the low prices charged by big players like MTN and Globacom may very well be above costs (like NCC, we do not know), in which event big operators might very well be competing fairly.

In the absence of information providing the cost bases for pricing, there can hardly be any justification for interfering with price competition, more so where this amounts to the imposition of higher prices on consumers. Any such move would amount to jumping the gun.

[12]'Exclusive: NCC directs mobile operators to increase data tariffs' *The Cable* 28 November 2016. Available at: https://www.thecable.ng/exclusive-ncc-directs-mobile-operators-increase-data-tariffs (accessed 4 July 2017).

4.4.2 There can be Fair Competition without Smaller Players, provided there are Capable Contenders

It would appear from NCC's move that, should the prevailing market price be technically above cost (including a fair return on investment), NCC would still think it necessary to impose a price floor if it does not consider the above-cost margin for return "attractive" enough to (i) keep smaller operators in the market; or (ii) attract new entrants. Such a regulatory disposition would, in this author's opinion, be based on the flawed assumption that there cannot be fair competition or a healthy level of consumer welfare if the only operators left to compete in the market are big operators, leaving a highly concentrated data market.

While it is ideal to have a market with low concentration, this state of affairs should not be "forced" on the market because to do so will risk (i) encouraging inefficiency on the part of smaller operators; (ii) making the consumers "subsidize" the operating cost (and possible inefficiency) of smaller operators, which will be inimical to the ultimate goal of market regulation - consumer welfare.

Nigerian consumers enjoy low prices for data. This is prima facie (although not conclusively) an indicator of consumer welfare. This state of affairs can be preserved even if only big operators are left to compete in the market, as long as NCC keeps a close eye on them to prevent a further concentration of the market (e.g. by a merger) or any collusive behaviour (such as price fixing agreements, agreements to fix conditions of sale, and other cartel behaviour). The Big Four (MTN, Etisalat, Airtel and Globacom) are near-equal contenders in terms of market share. Therefore, unless (i) two or more of them later collude to fix high prices or (ii) one or more of them leaves the market, there is no reason why consumers will not continue to enjoy low prices resulting from price competition by the big contenders.

5.0 CONCLUSION

NCC took the right step in suspending the Directive. Its responsiveness should be commended. Although, NCC has powers to regulate tariffs under the NCA, nothing short of empirically-determined information regarding costs for broadband and data services should justify any further attempt at price regulation in the data market. In summary, the Directive exemplified the need for a coherent and consistent competition law / market regulation Policy.

Further, and beyond the telecoms industry, there is need for objective mechanisms for information gathering in the Nigerian market regulatory sphere. It is only on the basis of credible information that a market regulator can rightly discharge its regulatory obligations, especially with regard to sensitive market elements such as price regulation and the determination of market share. Hopefully, these warnings will be heeded by the new multi-sector competition regulator which the Federal Competition and Consumer Protection Bill seeks to establish.