

NIGERIAN COMMUNICATIONS ACT

Competition Practices Regulations, 2007

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SCHEDULE

S. I. of 2007

NIGERIAN COMMUNICATIONS ACT
(2003 No. 19)

Competition Practices Regulations, 2007

Commencement:

In exercise of the powers conferred upon it by sections 70 and 90 of the Nigerian Communications Act 2003 and of all other powers enabling it in that behalf, THE NIGERIAN COMMUNICATIONS COMMISSION hereby makes the following Regulations:

PART I - SCOPE AND OBJECTIVES

1. These Regulations are made to provide a regulatory framework for the promotion of fair competition in the communications sector, and protection against the misuse of market power or other anti-competitive practices, pursuant to Part 1 of Chapter VI of the Act and all matters related thereto.

Scope of the Regulations.

2. These Regulations shall -

Objectives of the Regulations.

- (a) provide further guidance on the standards and procedures which the Commission will apply in determining whether particular conduct constitutes substantial lessening of competition for the purposes of the Act;
- (b) clarify what agreements or practices the Commission will find to be anti-competitive, and so prohibited under the Act;
- (c) provide further guidance on the standards and processes which the Commission will apply in determining whether a Licensee has a dominant position in one or more communications markets;
- (d) clarify what conduct the Commission will find to be an abuse of dominance, and subject to a “cease conduct” direction under the Act; and
- (e) provide further guidance on the merger review procedures to be applied by the Commission.

3. These Regulations apply to all Licensees and any other providers of communications services in Nigeria and Licensees shall remain subject to any conditions regarding anti-competitive conduct set out in their licenses.

Application of the Regulations.

PART II - SUBSTANTIAL LESSENING OF COMPETITION

4. While the provisions of section 91(1) of the Act prohibits Licensees from engaging in conduct which has the purpose or effect of substantially lessening competition in any aspect of the Nigerian communications market, section 91(2) permits the Commission to publish guidelines or regulations from time to time which clarify the meaning of “substantial lessening of competition” and section 92(4) permits the Commission to direct any Licensee in a dominant position to cease conduct which has or may have the effect of substantially lessening competition in any communications market, and to implement appropriate remedies.

Applicable provisions of the Act.

5. The purpose of this Part of the Regulations is to provide guidance, regarding the standards and procedures, which the Commission will apply in determining whether, particular conduct constitutes substantial lessening of competition.

Guidance on substantial lessening of competition.

6. In accordance with the provision of section 91(2) of the Act, which identifies market circumstances and other matters that might be included by the Commission in any guidelines or regulations with regard to the meaning of “substantial lessening of competition” in assessing whether any conduct constitutes substantial lessening of competition, the Commission shall consider the—

Considerations used in determining whether conduct constitute substantial lessening of competition.

- (a) definition of the relevant market or markets (using the market analysis methodology described in Part IV of these Regulations);
- (b) impact of the conduct on existing competitors in the identified markets;
- (c) impact of the conduct on further market entry;
- (d) impact of the conduct on consumers, including the availability and pricing of products and services; and
- (e) degree of interference with competition that results in identifiable injury to competitors or consumers.

7. In assessing whether a particular conduct meets the standard identified in Regulation 6(e), the Commission shall apply the following further considerations -

Considerations used with regard to Regulation 6(e).

- (a) a trivial or *de minimis* degree of lessening of competition will not be acted on by the Commission;
- (b) the degree of market power of the Licensee (using the market definition and assessment of market power methodologies described in Part IV of these Regulations);
- (c) a smaller degree of interference or injury resulting from the conduct of a Licensee with a large degree of market power (including

Licenses found to be in a dominant position) which may be found to constitute substantial lessening of competition.

8. Subject to a Licensee demonstrating otherwise in the course of any inquiry or other procedure conducted by the Commission, or in the course of an application pursuant to Section 93 of the Act, the following conduct or practices shall be deemed to result in a substantial lessening of competition:

Conduct deemed to be substantial Lessening of competition.

- (a) failing to supply interconnection or other essential facilities to a competing Licensee, in accordance with any interconnection agreement between the parties or any direction, rule or order issued by the Commission, pursuant to the Act or the Interconnection Regulations, except under circumstances that are objectively justified based on supply conditions, such as failure to supply, based on a shortage of available facilities;
- (b) discriminating in the provision of interconnection or other communications services or facilities to competing Licensees, except under circumstances that are objectively justified based on supply conditions, such as discrimination based on differences in the costs of supply;
- (c) bundling of communications services, whereby the Licensee in question requires, as a condition of supplying a service to a competing Licensee, that the competing Licensee acquire another service that it does not require;
- (d) offering a competing Licensee more favourable terms or conditions that are not justified by cost differences, if it acquires another service that it does not require;
- (e) pre-emptively acquiring or securing scarce facilities or resources, including rights of way, required by another Licensee for the operation of its business, with the effect of denying the use of the facilities or resources to the other service provider;
- (f) supplying communications services, at prices below long run average incremental costs or such other cost standard, as is adopted by the Commission;
- (g) using revenues or the allocation of costs from one communications service to cross-subsidize another communications service, except where such cross subsidy is specifically approved by the Commission including approval of tariffs or charges for the relevant communications services;
- (h) failing to comply with interconnection or facilities access obligations, including the Telecommunications Networks Interconnection Regulations 2007, any other interconnection or access terms specified

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or approved by the Commission, or any interconnection or access related decisions, directions or guidelines of the Commission;

- (i) performing any of the following actions, where such actions have the effect of impeding or preventing a competing Licensee's entry into, or expansion in, a communications market:
 - (i) deliberately reducing the margin of profit available to a competing Licensee that requires wholesale communications services from the Licensee in question, by increasing the prices for the wholesale communications services required by that competing Licensee, or decreasing the prices of communications services in retail markets where they compete, or both;
 - (ii) requiring or inducing a supplier to refrain from selling to a competing Licensee;
 - (iii) adopting technical specifications for networks or systems to deliberately prevent interconnection or interoperability with a network or system of a competing Licensee;
 - (iv) failing to make available to competing Licensees on a timely basis, technical specifications, information about essential facilities, or other commercially relevant information which is required by such competing Licensees to provide communications services and which is not available from other sources; and
 - (v) using information obtained from competing Licensees, for purposes related to interconnection or the supply of communications facilities or services by the Licensee in question, to compete with such competing Licensees; and
- (j) any failure by a Licensee to comply with any decision, rule, direction or guideline issued by the Commission, regarding either prohibited or required competitive practices.

9. The Commission may, from time to time, specify other conduct or practices that shall be deemed to result in substantial lessening of competition, including those that arise pursuant to Part III of these Regulations.

Power of Commission to add to conduct or practices that constitute substantial lessening of competition.

10. In reviewing conduct to determine whether it constitutes substantial lessening of competition, the Commission shall follow the procedures described in the Schedule to these Regulations.

Application of procedures in the Schedule to the Regulations.

PART III - ANTI-COMPETITIVE AGREEMENTS AND PRACTICES

11. The provision of section 91(3) of the Act prohibits Licensees from entering into agreements or arrangements which provide for rate fixing, market sharing, or any boycotting of a competitor, supplier or Licensee, while section 91(4), prohibits Licensees from requiring any person that acquires communications products or services, to acquire any other product or service, either from the Licensee or another person, or directing them not to acquire any other product or service, either from the Licensee or another person.

Applicable provisions of the Act.

12.-(1) The Commission shall have the power to review, either on its own initiative or on application by an interested person, other forms of agreement and related practices that have the purpose or effect of substantially lessening competition, apart from those referred to in sections 91(3) and (4) of the Act.

Power of the Commission to review agreements and practices.

(2) The agreements and practices identified in sections 91(3) and 91(4) of the Act are prohibited without the requirement of assessing their practical effects.

13. The Commission shall review under this Part, the following types of agreements and practices –

Types of agreement and practice to be reviewed by the Commission.

- (a) price-fixing agreements, pursuant to which, competing Licensees agree on or otherwise manipulate consumer prices;
- (b) bid-rigging, pursuant to which, competing Licensees manipulate the prices or conditions in what should otherwise be a competitive tender process;
- (c) market allocation agreements, pursuant to which, competing Licensees allocate geographic or product markets amongst themselves;
- (d) resale price maintenance, pursuant to which, a Licensee that supplies a competing service provider with products or services, attempts to impose restrictions on the prices charged by that service provider to consumers; and
- (e) exclusive dealing agreements, pursuant to which, a Licensee enters into an agreement with another party, for the supply of products or services on an exclusive basis, and where that exclusivity has or may

have the effect of substantially lessening competition in related communications markets.

14. The Commission may, review any other agreements or practices between Licensees or between Licensees and third parties, including joint-venture or similar collaboration agreements, to determine whether they have the purpose or effect of substantially lessening competition.

Power of the Commission to review other agreements and practices.

15. In any assessment of whether agreements or practices constitute substantial lessening of competition, the Commission shall apply the standards and processes described in Part II of these Regulations.

Standards and processes to be applied.

PART IV - DETERMINATION OF DOMINANT POSITION

16. The provision of section 92(1) of the Act empowers the Commission to make determination, whether a Licensee is in a dominant position in one or more communications markets in Nigeria and section 92(2), permits the Commission to publish guidelines or regulations, clarifying how it will apply the test of dominant position to Licensees, while section 92(3) identifies matters which the Commission may take into account in connection with such guidelines or regulations.

Applicable provisions of the Act.

17. The purpose of this Part of the Regulation is to provide further guidance, regarding the standards and processes to be used by the Commission, to determine whether a Licensee has a dominant position in one or more communication markets.

Guidance on dominant position.

18.-(1) The Commission shall apply the standards and processes described in this Part, with the objective of identifying those Licensees that have a position of economic strength in one or more specifically defined communications markets, such that, they have the ability to unilaterally restrict output, raise prices, reduce quality or otherwise, act independently of competitors or consumers.

Criteria for determination of dominant position.

(2) In determining whether a Licensee is in a dominant position, the Commission may, consider a range of market circumstances or criteria, but shall consider one or more of the following:

- (a) the market share of the Licensee, determined by reference to revenues, numbers of subscribers or volumes of sales;
- (b) the overall size of the Licensee in comparison to competing Licensees, particularly any resulting economies of scale or scope that permit the larger Licensee to produce products or services at lower costs;
- (c) control of network facilities or other infrastructure, access to which is required by competing Licensees and that cannot, for commercial or technical reasons, be duplicated by competing Licensees;

- (d) the absence of buying power or negotiating position by customers or consumers, including substantial barriers to switching service providers;
- (e) ease of market entry, and the extent to which actual or potential market entry protects against the exercise of market power such as raising prices;
- (f) the rate of technological or other change in the market, and related effects for market entry or the continuation of a dominant position.

19.-(1) The evaluation of dominant position shall begin with the definition of the relevant communications market or markets.

Criteria for the definition of relevant markets .

(2) In its assessment and definition of relevant communications markets, the Commission shall take account of the following circumstances and criteria:

- (a) markets shall be determined by, analyzing the products or services that make up a specific market, as well as the geographic scope of that market;
- (b) the Commission will assess demand-side substitutability, in order to measure the extent to which consumers are prepared or able to substitute other products or services for the products or services supplied by the Licensee in question;
- (c) the Commission will also assess supply-side substitutability, to determine the extent to which suppliers other than the Licensee in question are able to supply products or services that provide a competitive alternative to consumers.

20. Subject to any other determination of the Commission under this Part, or to any demonstration by a Licensee in the specific circumstances that the presumption should not apply, the Commission will presume that any Licensee whose gross revenues in a specific communications market exceed forty per cent (40%) of the total gross revenues of all Licensees in that market, is in a dominant position in that market.

Presumption of dominant position.

21. In addition to determining that an individual Licensee is in a dominant position, the Commission may also determine that two or more Licensees, acting jointly or collectively, are in a dominant position, including, where the Licensees have no common ownership, are not parties to any formal agreement or operate in different markets.

Determination of joint dominant position.

22. The procedures to be applied by the Commission in making any determination of dominant position are described in the Schedule to these Regulations.

Procedures for determining dominant position. Schedule.

PART V - ABUSE OF DOMINANT POSITION

23. The provision of section 92(4) of the Act, empowers the Commission to direct a Licensee in a dominant position, to cease conduct which has or may have the effect of substantially lessening competition in one or more communications markets, and to implement appropriate remedies.

Applicable provisions of the Act.

24. In determining whether any particular conduct engaged in by a Licensee, which the Commission has identified as being in a dominant position, constitutes substantial lessening of competition, the Commission shall apply the standards and procedures described in Part II of these Regulations.

Applicable standards and procedures.

25. Where the Commission determines that the conduct of a Licensee in a dominant position has or may have the effect of substantially lessening competition, the Commission may issue directions to the Licensee, pursuant to Regulation 34.

Commission's exercise of power to issue directions.

PART VI - REVIEW OF MERGERS, ACQUISITIONS AND TAKEOVERS

26. Further to the powers and functions of the Commission, regarding determinations of substantial lessening of competition and dominant position, and consistent with conditions of licences granted to public network operators, requiring prior notification and Commission approval before any change of shareholding affecting more than 10% of the total number of shares in a Licensee, the Commission may review all mergers, acquisitions and takeovers in the communications sector.

Basis for review of mergers, acquisitions and takeovers.

27. The Commission shall apply the review procedures, described in this Part of the Regulations to the following transactions:

Review procedures.

- (a) transactions that involve the acquisition of more than 10% of the shares of a Licensee; or
- (b) any other transaction that results in a change, in control of the Licensee; or
- (c) any transaction that results in the direct or indirect transfer or acquisition of any individual licence, previously granted by the Commission pursuant to the Act; and
- (d) where the Commission determines, based on the preliminary information provided by a Licensee in its initial transaction notification, that the transaction may, result in a substantial lessening of competition in one or more communications markets or may, result in the Licensee or any successor company having a dominant position in one or more communications markets.

28.-(1) Where a proposed transaction involves any of the circumstances described in Regulation 27 (a), (b) or (c), the transaction will require prior notification and the approval of the Commission.

Prior notification.

(2) The Licensee shall, submit a written notification and request for approval, at least sixty (60) days, prior to the completion date for the intended transaction, to be accompanied by at least, the following information:

- (a) the identification of all persons involved in the transaction, including buyers, sellers, their shareholders and affiliated companies, and any persons, having a greater than 10% ownership interest in all such persons;
- (b) a description of the nature of the proposed transaction, including a detailed analysis of the resulting scheme of arrangement and summary of its commercial terms;
- (c) financial information on the persons involved in the proposed transaction, including their annual revenues from all communications markets, identified by specific markets, the value of assets allocated to communications businesses and copies of any recent annual or quarterly financial reports;
- (d) a description of the communications markets in which the persons involved in the proposed transaction operate; and
- (e) a description of the effects of the transaction, on the control of network facilities or related infrastructure, including any interconnection or access arrangements with other Licensees.

29. The Commission may request additional information, regarding an application at any time.

Additional information.

30. Within thirty (30) days of receipt of a fully completed application, including any additional information requested by the Commission, the Commission may:

Approval or denial of approval of transactions.

- (a) approve the proposed transaction without conditions;
- (b) approve the proposed transaction with such conditions as the Commission determines are necessary, to prevent or compensate for any substantial lessening of competition, resulting from the transaction;
- (c) deny approval of the proposed transaction;
- (d) issue a notice initiating an inquiry or other public proceeding, regarding the proposed transaction, and following such proceeding,

the Commission may, take one of the actions described in subparagraphs (a), (b) or (c) above.

31. One or more parties to a proposed transaction may, apply to the Commission, requesting expedited approval of the transaction, including in the event that the Commission does not take one of the steps identified in Regulation 30 within the identified 30 day period.

Application for expedited approval.

32. In determining whether a proposed transaction may, result in a substantial lessening of competition or any dominant position, the Commission shall, apply the standards and procedures described in Parts II and IV of these Regulations.

Standards and procedures to be applied.

PART VII - MISCELLANEOUS PROVISIONS

33. Any person who contravenes any of the provisions of these Regulations, is in breach thereof and is liable to such fines, sanctions or penalties, including any penalties determined under the Enforcement Processes Regulations, 2005 or as may be determined by the Commission from time to time.

Penalty for contravention. No. 7 of 2005.

34. If the Commission determines that in a particular case, or in a number of cases, the actions or activities of a Licensee constitute an abuse of its dominant position or an anti-competitive practice, within the meaning of the Act or these Regulations, in addition to any other action or remedy provided for under the Act, these Regulations or the Enforcement Regulations 2005, the Commission may issue a direction to:

Power of the Commission to give directions.

- (a) require one or more persons named in the direction, to take one or more of the following actions:
 - (i) cease the actions or activities, specified in the direction immediately, or at a time prescribed in the direction, and subject to such conditions as are prescribed in the direction; or
 - (ii) make identified changes, in actions or activities specified in the direction, as a means of eliminating or reducing the abusive or anti-competitive impact;
- (b) require the Licensee involved in the abusive actions or anti-competitive practices, and the persons affected by such actions, activities or practices, to meet and attempt to determine remedies to prevent, eliminate or compensate for such actions, activities or practices, and to resolve any remaining dispute;
- (c) require the Licensee, to pay compensation to persons affected by its abusive actions or anti-competitive practices;
- (d) require the Licensee responsible for the abusive actions or anti-competitive practices specified in the direction, to publish an

acknowledgement and apology, for such actions or practices, in one or more newspapers of general circulation, in such a form, at such times and otherwise, as the Commission specifies in the direction;

- (e) require the Licensee, to provide periodic reports to the Commission, to assist in determining, whether the actions or practices are continuing and to determine their impact on communications markets, competing Licensees and consumers.

35. The Commission may, from time to time, issue additional rules, directions or guidelines on any aspect of these Regulations, and either of general application or specific to a proceeding.

Power of the Commission to issue further directions.

36. Terms and expressions defined in the Act shall have the same meanings in these Regulations. In addition, unless the context otherwise requires - :

Interpretation.

“**Act**” means, the Nigerian Communications Act, 2003;

“**consumer**” means, any subscriber, customer or other consumer of communications services, whether an individual, corporation or other legal entity;

“**Enforcement Processes Regulations 2005**” means the Nigerian Communications (Enforcement Processes, etc.) Regulations 2005, S.I. No. 7 of 2005 and as those regulations may be amended from time to time;

No. 7 of 2005.

“**Interconnection Regulations**” means, the Telecommunications Networks Interconnection Regulations 2003, S. I. No. 13 and as those regulations may be amended from time to time;

No. 13 of 2003.

“**Regulations**” means, the Competition Practices Regulations, 2007.

37. These Regulations may be cited as the Competition Practices Regulations, 2007.

Citation.

Procedures

In determining, whether conduct constitutes a substantial lessening of competition, pursuant to Sections 91(1) or 92(4) of the Act or a Licensee is in a dominant position pursuant to Section 92(1) of the Act, or a Licensee is otherwise acting contrary to these Regulations, the Commission shall follow the procedures set out in this Schedule or such other procedures specific, as are identified in any notice issued by the Commission and these procedures are intended to supplement, but are subject to, the procedural requirements of Chapter V of the Act.

Proceedings Commenced by Application from an Interested Party

1. An interested party, that is, a complainant that wants the Commission to investigate a competition related complaint or to take related action against a Licensee shall –

- (a) submit a written request (a “Request for Investigation”) to the Commission and the Complainant shall deliver a copy of the Request for Investigation to the other party (the “Responding Party”) on the same day that the request is submitted to the Commission;
- (b) in its Request for Investigation, summarize the nature of the complaint and the desired outcome, including a summary of all relevant events or circumstances and any related correspondence or other supporting materials.

2. The Responding Party shall have ten (10) days, from the day on which the Request for Investigation is delivered by the Complainant, to provide its comments if any, on why the Commission should not investigate or otherwise respond to the complaint (“Comments”) and the Responding Party shall deliver a copy of the Comments to the Complainant, on the same day that the comments are submitted to the Commission.

3. The Commission shall -

- (a) consider whether, it will undertake an investigation or take any other action in response to the complaint;
- (b) within thirty days of submission of the Request for Investigation, issue a written notice to the parties, identifying whether it will take action, the specific action to be taken and the basis for its decision.

4. Where the Commission receives more than one Request for Investigation in connection with substantially the same conduct or circumstances, it may consolidate the request into a single proceeding.

5. Within thirty days of notification by the Commission that it will undertake an investigation–

- (a) the Complainant shall make its formal written submissions, regarding the complaint and the submissions (“Complaint Submissions”) shall set out a full statement of the circumstances and arguments the Complainant relies on in support of its position and the desired outcome, including any specific breaches of the Act, any regulation, rule, direction, licence condition or other right or obligation, committed by the responding party and the consequences of those breaches for the Complainant;
- (b) the Complaint Submissions shall include, any documentary or other evidence relied on by the Complainant in support of its position and desired outcome and a copy of the Complaint Submissions shall be delivered to the Responding Party, on the same day that they are submitted to the Commission.

6. The Responding Party shall have fifteen (15) days, from the day on which the Complaint Submissions are delivered by the Complainant, to submit a written response to the submissions (“Response”) and a copy of the Response shall be delivered to the Complainant, on the same day that the Response is delivered to the Commission.

7. The response shall identify, any circumstances or arguments included in the Complaint Submissions that the Responding Party admits or agrees with and for each circumstance or argument relied on by the Complainant in the Complaint Submissions that the Responding Party rejects or disagrees with, the Responding Party shall, provide a clear statement of how its position differs from that of the Complainant and the circumstances and evidence in support of its position and desired outcome.

8. In appropriate cases, the Commission may, provide the Complainant an opportunity to reply in writing, to the Response and in such cases, the Commission shall, allow the Responding Party an opportunity, to submit a final written response, addressing any new submissions or evidence raised in the Complainant’s reply.

9. Each party shall, submit its further submissions or evidence, within the time period specified by the Commission, or if no time period is specified, then within fifteen (15) days of being informed by the Commission, that it may make the further submissions.

Proceedings Commenced by the Commission

10. The Commission may –

- (a) at any time, decide to initiate a proceeding, to determine whether conduct constitutes a substantial lessening of competition, pursuant to sections 91(1) or 92(4) of the Act, a Licensee is in a dominant position, pursuant to section 92(1) of the Act, or
- (b) any conduct of a Licensee, is otherwise contrary to these Regulations (a “ Commission Proceeding”).

11. The Commission shall, commence a Commission Proceeding, by delivering a written notice to the Licensee or any other person who is the subject of the proceeding (a “Proceeding Notice”), identifying the nature of the proceeding, including a summary of the events, circumstances, conduct and provisions of the Act, licence conditions or any regulations, decisions, directions, rules

or other actions of the Commission relevant to the proceeding and the potential outcome or practical effects of the proceeding.

12. The Proceeding Notice shall also specify, any additional or other procedures applicable to the proceeding, including the timing for the delivery of submissions, by the person(s) receiving the Proceeding Notice or any other interested persons and the further actions to be taken by the Commission in concluding the proceeding.

***Procedures applicable to all Proceedings
Commenced under these Regulations***

13. The Commission may, grant an extension of time, for any interested party to make its submissions and any request for an extension of time shall, be made in writing to the Commission, at least five (5) days before the expiration of the otherwise applicable deadline.

14. The Commission will, inform parties of its decision, in response to an extension request within three (3) days of receipt of the request.

15.-(1) The Commission may, request either or both parties, to submit additional information, at any time during the course of a proceeding.

(2) Any information provided by a party, shall be provided to the other party, at the time it is submitted to the Commission.

(3) Where a party wishes to submit confidential information to the Commission in connection with the proceeding, that party may, request the Commission for confidential treatment of such information, pursuant to Section 59 of the Act.

16. The Commission will, generally complete proceedings under these Regulations, and issue either a decision resolving the issues or a notice specifying any other actions to be taken in connection with the proceeding, within sixty (60) days of receiving all necessary information and the Commission may, by written notice to the parties, at any time during the relevant proceeding, extend the time for the Commission to issue its decision.

17. On completion of a proceeding under these Regulations, the Commission may:

- (a) issue a direction, requiring the responding party or any other person, to undertake specific actions or to cease specific actions or to resolve any conduct, contrary to the Act or any Regulation, rule, direction, licence condition or related right or obligation;
- (b) issue a direction, making specific determinations, regarding specific circumstances or issues relevant to the proceeding, including the payment of any applicable compensation;
- (c) exercise its rights under the Act or the Enforcement Processes Regulations, 2005, to impose specific monetary or other penalties for identified misconduct;

