

ANTI COMPETITION ISSUES

Reproduced below is a Report prepared by Richard Fawcett, an attorney in Hong Kong, on a recent ruling by the Hong Kong communications industry regulatory authority, Office of the Telecommunications Authority ["OFTA"] which we believe the Nigerian communications industry regulators, Nigerian Communications Commission ["NCC"] and National Broadcasting Commission ["NBC"] and indeed all industry stakeholders – in particular, law and policy makers and the practitioners – can learn plenty from.

"On January 20 2000 the Office of the Telecommunications Authority (OFTA) published a report on its investigation into the simultaneous adjustment on January 2 by all mobile operators in Hong Kong of their prices by identical or similar amounts.

"OFTA was concerned about two issues. First, whether the simultaneous price adjustments breached conditions in the mobile operators' licences relating to anti-competitive behaviour. Second, whether consumer interest was adequately protected by the manner in which the price adjustments were announced and implemented.

"The licenses of all mobile operators include the following condition (General Condition 9):

"The licensee shall not enter into any agreement or arrangement, whether legally enforceable or not, which shall in any way prevent or restrict competition in relation to the operation of the service [defined in each licence as a public mobile radio-communications service using cellular communication technology within given spectrum ranges] or any other telecommunication service licensed by the Telecommunications Authority."

"Every licensee not subject to price control (ie, that is not dominant in a particular market sector) is free to change its prices without OFTA's approval. However, any form of cooperation between two or more operators in relation to the timing or amount of price adjustments, which prevents or restricts competition would be contrary to the licence condition.

"In responding to OFTA's investigation, no mobile operator tried to argue that, if an agreement or arrangement between mobile operators in relation to the price adjustments was found to exist, such agreement or arrangement would not breach the licence condition. It therefore fell to OFTA to determine whether such an agreement or arrangement existed.

Competition Analysis

"Because of the absence in Hong Kong of any general competition law framework, OFTA had to look abroad, principally to the European Community. (The licence condition prohibiting anti-competitive behaviour is based in part on similar prohibitions contained in the Treaty of Rome).

"Decisions in EC cases have established that a party is prohibited from entering into any arrangement (whether formal or informal), through direct or indirect communications with its competitors, which has the effect of inducing a competitor's determination regarding pricing policy (eg, the amount and timing of any price adjustment).

“OFTA concluded that the relevant market for the purposes of its investigation was the market for mobile telephone services through the use of portable or other mobile handsets. Competition within this market is limited because of the lack of additional available spectrum (before third generation mobile services are introduced).

“OFTA looked at a number of factors to determine whether the mobile operators' price adjustments had been driven by competition considerations, including:

- the 'products' of each operator (ie, mobile call minutes) cannot be easily differentiated;
- prices are published;
- demand is growing rapidly; and
- there is strong evidence of past competition.

“OFTA decided that these factors do not preclude the viability of a concerted, anti-competitive practice in raising prices because a price increase would not create the threat of new competition. It considered it strange that no licensee had sought to take advantage of the other licensees' price increases (eg, by trying to expand its market share). Also, OFTA was not satisfied that it was a coincidence that each licensee chose to adjust its prices on January 2.

“OFTA concluded that, at the very least, some kind of understanding must have existed which led to the simultaneous price adjustments. OFTA was also satisfied that every mobile licensee was a party to such understanding or arrangement, and therefore each licensee breached General Condition 9.

“All licensees chose to rescind their January 2 price adjustments. Consequently, OFTA did not have to reach a conclusion as to whether consumer interest was adequately protected by the manner in which the price adjustments were announced and implemented.

Comment

“OFTA should be applauded for its prompt reaction to this example of anti-competitive conduct and for publishing its report within three weeks of the conduct complained of. As the telecommunications market is liberalized, it is inevitable that more competition issues will arise. These issues must be addressed in a timely fashion.”

Lessons from the Hong Kong Experience

There are several lessons that Nigeria can and should draw from the Hong Kong OFTA experience and these are applicable to the entire spectrum of the Communications industry. In other words, even though the Report is based on mobile cellular services, the lessons therefrom apply as much to fixed-line and value-added services and all other forms of communications activities. As usual, we are using “communications” in the widest sense of the word to include the tripod of telecommunications, information technology and broadcasting.

The processes of convergence of these three arms of the industry have already started in Nigeria even if they are at the very very elementary stages, and we believe that official support should be given to the processes. The mindset of industry practitioners must

also be consciously re-worked to think of and act at all times with convergence in mind. In effect, the lessons that we would draw from the Hong Kong OFTA experience apply as much to NCC as it applies to NBC.

The very ready lessons for Nigeria include the following:

- **Transparent process.** The openness in the OFTA investigation and the publication of its Report imbues the process with obvious transparency and fairness. OFTA could have probably chosen to have a closed investigation process and a confidential report but that would have tainted the process and lent itself to questions on transparency and fairness. We have consistently advocated for very open and transparent processes for all regulatory processes for the industry including but not limited to publication of NCC reports (e.g. the GSM pre-qualification processes) and public hearings for purposes of making rules, regulations and legislation. Copies of NCC licenses [including, for example, the GSM draft license document] and reports should also be available to members of the public upon payment of specified administrative charges.

The confidence and trust that such an open process engenders from literally every stakeholder - local and foreign investors, industry practitioners, the consuming public, just to mention but a few - outweighs by a great quantum whatever disadvantages that anybody can think of, and quite honestly, we cannot think of any, other than the need to preserve the ancient provisions of the Official Secrets Act! That is understandable for a strictly civil service organisation, but then the regulatory authorities are not *strictu sensu* civil service organisations. More fundamentally, regulatory practice, worldwide, derives its credibility and sustenance from open, transparent and fair practice.

- **Consumer protection.** One of the twin pillars on which OFTA anchored its investigation was the protection of consumer interest. The ultimate essence of deregulation is to afford the consumer choices of communications services at affordable prices. The processes for achieving this goal must be charted primarily by the regulatory agencies, the legislature and policy makers and implementers. NCC in particular has responsibilities, under its enabling statute, for “the protection of consumers from unfair practices of licensees and other persons in the supply of telecommunications services and facilities”, “to receive and investigate complaints from licensees, carriers, consumers and other persons in the telecommunications industry”, and “to monitor and report to the Minister on charges paid by consumers”. The NBC equally has responsibility under its enabling statute, for “receiving, considering and investigating complaints from individuals and bodies corporate or incorporate regarding the contents of a broadcast and the conduct of a broadcasting station”.

As an aside, these provisions underscore the need for public, open and transparent processes by the regulator. The consumers, for example, cannot complain about “unfair practices of licensees” when they do not know the license conditions and the various “dos” and “don’ts” specified by the regulatory authorities. The same position applies to “licensees, carriers . . . and other persons in the telecommunications industry” whose complaints NCC is expected under the statute, to investigate. Unfortunately, neither NCC nor NBC has been very active in carrying out their statutory responsibilities that relate to consumer protection and affairs. There is even no public education on the roles of NBC and NCC as consumer affairs monitoring bodies and the processes for making these complaints have not been worked out and publicized. Neither organisation would appear to have a unit strictly devoted to consumer affairs, manned by qualified staff thereon. As it relates

to the OFTA ruling, the processes are also yet to be evolved to ensure that the prices paid by consumers for services are fair and justified and that concessions that service providers earn [e.g. from re-negotiation of interconnectivity tariffs] are passed on, in full or at least in part, to the consumers. All of these processes should be developed as soon as possible.

- **Price control.** Tied to the issue of consumer protection is the need for price control by the regulatory authorities. This applies to both the dominant and non-dominant operators. The Hong Kong OFTA investigation, incidentally, was directed at non-dominant operators even though, according to OFTA regulations, they are “free to change” their respective “prices without OFTA’s approval”. In the case of dominant operators, OFTA imposes price control on them. However, the Hong Kong ruling confirms that, even though non-dominant operators are free to change their prices at will, this must be carried out *inter alia* in a manner that does not amount to anti-competitive practices.

We have also consistently advocated an objective standard for price determination and control. In particular, the service providers should be open with the make-up, basis and constituents of their prices and these should be based on verifiable facts and data. It is only on the basis of such objective standards that the regulator can justifiably infer whether or not the prices are reasonable and control same as necessary. The regulators must also have on their payrolls economists and corporate managers who are experienced and seasoned in the mechanics and intricacies of communications pricing, sufficient to challenge and earn the respect of the operators.

- **Dominant and non-dominant operators.** As earlier stated, price control, according to the Report, applies both to the dominant and the non-dominant operators. In Nigeria, there appears to be a misconception that regulation, particularly as far as pricing is concerned, is intended basically for the dominant operator(s). That is a wrong. One of the issues brought out succinctly by this Report is that both dominant and non-dominant operators are prone to anti-competition practices and must be closely watched by the industry regulator. In Hong Kong, there is a price control on the dominant operator(s) but there are also regulations e.g. License Condition No. 9 quoted above, which is aimed at preventing anti-competition practices by the non-dominant operators in areas like price fixing.
- **Competition Laws.** Even though the Hong Kong mobile cellular license condition expressly forbade price fixing by operators, OFTA still needed in aid a statutory framework and case law to make its ruling. License conditions do not carry the weight and impact of statutory provisions and cannot be of general application. The point to note here is that there is an urgent need for a Competition Law of general application. Anti-competition practices come in different forms and the much more prevalent types are agreements between service providers for price fixing, exclusive contracts and formation of cartels, discriminatory provision of services, mergers that shut out competition and create dominant operators. It is important that all of these anti-competition practices be codified and the sanctions therefor specified. The processes for investigation and establishment of these anti-competition practices must also be properly spelt out and imbued with transparency.

Nigeria really does not have Competition Laws properly so-called and prior to now we had consistently advocated that NCC promulgate fair trading regulations urgently for the communications industry. We need to now modify that position and call for the legislation of Competition Laws of general application i.e. for all anti-competition practices for all economic activities. Anti-competition practices are

definitely not an exclusive preserve of the communications industry. There are as common in the energy and banking sectors and with the planned deregulation of Nigeria's energy sector, there is the need for such body of laws that would be of general application.

Actual implementation of these laws would be effected for the different economic sectors by the relevant regulatory authorities. Britain, for example, has competition laws of general application, apart from the Economic Community's regulations. However, OFTEL, the Communications industry regulator, is responsible for the enforcement of these laws in the communications sub-sector. In the same vein, NCC/NBC, could be responsible for the enforcement of the Nigerian Competition Laws in the communications sub-sector.

- **Sundry issues.** There are two sundry issues that deserve brief comments:
 - **Behaviour of Operators.** According to the Report, "no mobile operator tried to argue that, if an agreement or arrangement between mobile operators in relation to the price adjustments was found to exist, such agreement or arrangement would not breach the license condition". More than that, after the release of OFTA's report, "all licensees chose to rescind their January 2 price adjustments" according to the Report. Consequently, OFTA did not have to reach a conclusion as to whether consumer interest was adequately protected by the manner in which the price adjustments were announced and implemented." The lack of filibustering and deployment of delay tactics by the Hong Kong operators is actually commendable and worthy of emulation by Nigerian operators.
 - **Speedy resolution by OFTA.** OFTA carried out its investigations and published its report within three weeks of the conduct complained of. In the Nigerian context, that was exceptional. The Nigerian authorities out to borrow a leaf from the Hong Kong OFTA in speedy resolution of issues. Uncertainty in processes, which is more often than not caused by delays in decision-making and further delays in the release of official positions and pronouncements on policy matters, is extremely debilitating and destructive of economic activities in the sector. Perhaps it would be wise to introduce in future main and subsidiary legislation, time-lines and deadlines for the processes of regulations e.g. investigation of complaints, attending to license applications, etc.