

TELECOMMUNICATIONS OFFENCES AND ENFORCEMENT PROCESSES

The Federal Government of Nigeria, through the Executive Vice Chairman of the Nigerian Communications Commission [**NCC**], Engr Ernest Ndukwe, recently expressed grave concern, in newspaper reports, over the increased incident of telecommunications offences in the country. These offences constitute enormous drain on the revenue of government and service providers and inhibit very greatly the inflow of local and foreign investment funds into the telecommunications sub-sector. Law enforcement processes against these criminal activities are areas that require very urgent review by the Government in order to attract required funds for the very urgent and dire task of expanding the national network and the communications sub-sector generally. This article would review the legal provisions on telecommunications offences generally and make suggestions and recommendations on areas that require modification and/or improvements.

Telecommunications offences

The most common telecommunications offence identifiable by Nigerians is the operation of illegal call centers, mostly for international calls. Beyond that public face of illegal call centers are more sophisticated illegalities and offences carried out and committed by the operators of these centers. Three examples would illustrate the point.

First, newspaper reports allege that there are unlicensed international V-SAT services providers who illegally originate and terminate international traffic out of and into Nigerian Telecommunications Limited's [**NITEL**] national network. NCC Vice Chairman gave credence to these reports when he did, in the newspaper report earlier referred to, acknowledge the existence of these illegal operators and advised them to stop their criminal deeds forthwith or face legal sanctions.

Second, some call center operators legitimately subscribe to basic telephony services from some of the newly licensed operators and pay for the activation of international direct dialing [**IDD**] and the provision of specialized features such as call transfer. Through the manipulation of the call transfer feature, these criminals are able to make commercial international calls for their patrons while registering and paying local rates for these calls. Patrons of these international call centers usually pay to these criminal operators, tariffs that usually range between 40-50% of NITEL's international call rates and these huge sums stay in the pockets of these criminal operators who, as earlier stated, usually pre-pay the private operators for these calls at the local rates.

The billing systems of the private operators unfortunately consistently originate bills for these calls as local rather than international calls because of the manipulation of the call transfer feature. To compound issues, more often than not, these criminal subscribers use fake names and particulars to obtain the telephone lines and are consequently impossible to trace when the crimes are uncovered.

Meanwhile, these calls, which are routinely routed through NITEL's international gateways, are recognized and billed against the private operators correctly by NITEL as international calls. In effect, private operators are obliged to pay to NITEL for these calls at the international tariff rates since they are correctly captured by NITEL's billing systems as international calls and in the process, more often than not, they suffer huge losses thereby since they cannot trace these fake criminal subscribers who had

manipulated the system to make international calls for which they pre-paid at local call rates. Some private operators have indeed suffered huge losses on account of this scam.

A **third** and more commonly known face of this illegal transaction is the illegal diversion of telephone lines with IDD facilities, belonging to legitimate NITEL subscribers, by criminal elements for commercial provision of international calls to patrons. In this instance, the calls are correctly recorded by NITEL and billed to the subscribers who in most instances are not privy to the criminal use of their telephone lines. Since of course NITEL and the private operators demand that outstanding bills be settled before any complaints whatsoever are made, most hapless subscribers who want to retain their lines have no choice but to absorb these enormous costs which they were not party to.

Another prevalent telecommunications offence, particularly in mobile telephony, is the cloning of mobile handsets' programming data. This illegal operation allows the criminals to clone the number of any legitimate subscriber to Nigerian Mobile Telecommunications Limited's [**M-Tel**] services and make calls with the cloned handset while bills therefor are being debited by M-Tel to the legitimate subscriber's account. Most M-Tel subscribers have suffered huge losses on account of these criminal activities.

Legal Provisions

To be sure, Nigerian statute books indeed contain sufficient provisions against these and other telecommunications criminal activities. Government appears to have problems more with enforcement processes rather than the availability of statutory sanctions against telecommunications crimes. Telecommunications and Postal Offences (Amendment) Decree 1997 [**Telecommunications Offences Amendment Decree**] for example specifies that "a person who operates a telecommunications service . . . without a license from an approved agency or . . . outside the terms and conditions of his license is guilty of an offence". Unlicensed operators of international V-SAT services are clearly caught by the provisions of this law.

Furthermore, Nigerian Communication Commission Decree No. 75 of 1992 [**NCC Decree**] stipulates that "as from the commencement of this Decree . . . no person shall operate a telecommunications service in Nigeria unless the person . . . is licensed as a telecommunications services operator under the provisions of this Decree". It further states that "any person not licensed under this section of this Decree shall cease to operate telecommunications services in any part of Nigeria." Section 28(1) of the Decree makes the contravention of these provisions, criminal offences, by stipulating that "any person who contravenes any provisions of this Decree . . . is guilty of an offence . . ."

In regard to diversion and/or cloning of telephone lines and programme data, and the fraudulent use of a telephone facility for the making of international calls, the Telecommunications Offences Amendment Decree stipulates that "a person who without lawful authority, diverts, in any way whatsoever or to any other place or address, a telephone line which . . . has or has not been allocated to a subscriber by an operator, whether or not for the purpose of making or enabling another person to make a telephone call, or . . . has been allocated to or installed at a specified address, is guilty of an offence." It further states that "a person who . . . clones programme or activates for use in connection with the mobile phone of some other person, the programme data of a mobile telephone that has been allocated by an operator, or . . . without lawful authority, uses the facilities of an operator for an international call, is guilty of an offence."

In regard to obtaining telecommunications services by fraud, Telecommunications Offences Amendment Decree specifies that “a person who, for the purpose of obtaining any telephone or any other telecommunications service from an operator, uses the name, photograph or address of a person living or dead or who does not exist, is guilty of an offence and liable on conviction to imprisonment for a term of not less than 3 years but not exceeding 10 years without the option of a fine.”

Criminal Penalties

Before addressing the issue of enforcement processes, it is necessary to highlight a serious discrepancy between the criminal penalties specified for some of these offences in NCC Decree in contradistinction with Telecommunications Offences Decree.

Section 28(1) of NCC Decree specifies that “any person who contravenes any provisions of this Decree . . . is guilty of an offence and liable on conviction, where no specific penalty is prescribed therefor, to . . . a fine or N10,000 or to imprisonment for a term not exceeding one year or to both such fine and imprisonment as a first offender, or N50,000 or to imprisonment for a term not exceeding three years or to both such fine and imprisonment for subsequent convictions.” As earlier stated, an unlicensed service provider commits a crime under this Section and since there is no “specific penalty” in the Decree therefor, such an operator would, on conviction, be liable to the penalties specified in this Section of the Decree.

Section 8(1) of Telecommunications Offences Amendment Decree, on the other hand, stipulates that “a person who is guilty of an offence under any section of this Decree is liable on conviction, where not otherwise specified . . . in the case of an individual, to a term of not less than 5 years without the option of a fine, and . . . in the case of a body corporate, to a fine of N500,000.” This section of the Decree applies to all the criminal acts discussed in this article other than the offence of obtaining telecommunications services by fraud, which has its own specific penalty provision.

In effect, an unlicensed telecommunications service provider would be liable, upon conviction, under the Telecommunications Offences Amendment Decree to 5 years imprisonment **without an option** of a fine if he is an individual, or “in the case of a body corporate, to a fine of N500,000” whereas if he is charged under NCC Decree, he would get away with a tepid “fine of N10,000 **or** to imprisonment for a term not exceeding one year or to both such fine and imprisonment as a first offender” or to an even more ridiculous fine of “N50,000 **or** to imprisonment for a term not exceeding three years or to both such fine and imprisonment for subsequent convictions” [emphasis ours].

NCC Decree, on the other hand provides for the payment of “a fine not exceeding N500,000” by every director or officer of a body corporate or any member of a partnership or any other person concerned with the management of a firm, “where an offence against this Decree . . . has been committed by a body corporate or by a member of a partnership or other firm . . .” In addition, such a person “shall be liable to the payment of compensation for any damage resulting from such breach . . . as estimated by the Commission . . .” The only extenuating circumstances for such a person are if he satisfies “the court that . . . he effected due diligence to secure compliance with the provisions of the Decree and/or such offence was committed without his knowledge, consent or connivance”. These distinctions are not at all drawn in the Telecommunications Offences Amendment Decree.

Furthermore, in addition to the terms of imprisonment or fines, Telecommunications Offences Amendment Decree provides for the forfeiture “to the Federal Government” of

“any article or other thing used in the commission or in connection with an offence” under the Decree. There is no corresponding provision in NCC Decree.

Incidentally, neither Decree makes any reference to the other’s provisions and there is absolutely no provision on which Decree ranks superior to the other. In the circumstance, prosecutors and law enforcers would appear to have discretions as to under which Decree to prosecute unlicensed operators. Such an unfettered discretion gives room for discriminatory practices on the part of law enforcers and prosecutors and could negate the principles of transparency which is an absolute must both in law enforcement generally and for the regulation of the communications sub-sector. As part of the processes of reforming the communications sub-sector, it is important that the provisions of these laws be looked into and harmonized.

Enforcement Provisions

Statutory enforcement provisions can best be examined under investigation processes and provisions for prosecution of telecommunications crimes.

(i) Investigation Processes

Hazy and ill-defined reporting and investigation processes appear to lie at the heart of Government’s seeming inability to act decisively against perpetrators of telecommunications crimes. Incidentally, this aspect of the enforcement processes is the starting point and constitutes the core for the control if not total elimination of telecommunications crimes in Nigeria.

Telecommunications and Postal Offences Decree No. 21 of 1995 [**“Telecommunications Offences Decree”**] as amended by Telecommunications Offences Amendment Decree, empowers the Minister of Communications to “constitute a Task Force for the purpose of enforcing or giving effect to the provisions of this Decree”. Pursuant to these powers, previous Ministers of Communications, under military regimes, constituted task forces, which were primarily responsible for the investigation of telecommunications crimes and apprehension of offenders. These task forces were headed by and made up, in large part, of military and para-military personnel.

With the advent of civil government on May 29, 1999, task forces were generally disbanded and the military has largely been confined to its primary role of defending the sovereign integrity of Nigeria. However, the provisions of the Telecommunications Offences Decree in regard to the constitution of the Task Force has not been repealed and consequently subsist and remains valid up till date. Government is understandably very reluctant to set up a Task Force on Telecommunications Offences in order not to give any impression whatsoever of a retrogression to the military era and the attendant excesses thereof.

By existing Nigerian laws and civil convention, all criminal activities are reported to and investigated by the Nigeria Police Force. However, within the Nigeria Police Force, there is no specialized unit, to the knowledge of the public that is dedicated to investigation and apprehension of telecommunications offenders and suspected criminals. In effect, there is no central, coordinating body, within or outside the Nigeria Police Force for the control and possible elimination of telecommunications offences and crimes.

Aggrieved persons and organisations, consequently have a choice of either reporting incidents of telecommunications crimes to their neighborhood divisional police stations or the Special Anti-Fraud Unit of the Force Headquarters. In fact, nothing in the Police regulations, to the best of the public’s knowledge, stipulates that aggrieved persons can

make such reports directly to the Special Anti-Fraud Unit as a station of first-report and there is nothing that compels the divisional police station to transfer any such report to the ostensibly better staffed, equipped and trained Special Anti-Fraud Unit.

Clearly, there are lacunas in the reporting and investigating processes and these ill-defined processes and lacunas argue very strongly for the establishment of some sort of Task Force for the apprehension of telecommunications offenders. Such a dedicated unit offers several advantages amongst which are the specialized skill and experience, which the members thereof would gain and apply in the course of their work. Such a dedicated unit would also play the central coordinating role for crime control that is currently lacking in the telecommunications sub-sector. The establishment of such a central, dedicated unit is important, urgent and paramount considering the very technical and specialized nature of these crimes and the urgent need to move decisively against the perpetrators thereof. As earlier mentioned, such an urgent and decisive move is imperative in order to give comfort and confidence to local and foreign investors whose monies are required to urgently expand Nigeria's telecommunications infrastructures.

It is possible to adapt the provisions of this Decree to civil government since of course, the Decree did not stipulate that the Task Force must be headed by or made up, in part or whole, of military personnel. In fact, the Decree expressly stipulates that the Task Force "shall consist of such number of persons as the Minister may, from time to time, determine". Since of course the Nigerian Police Force has universal responsibility for the maintenance of law and order and consequential apprehension of criminals, such a dedicated unit should be constituted by and under the Police Force. In order not to give any military coloration to such a task force, it may be wise to rename it as a dedicated or specialized unit of the Police Force. It necessarily would of course have to draw intellectual and technical support if not membership from such specialized organisations like NCC, Federal Ministries of Communications and Justice, NITEL, M-Tel and private service providers.

(ii) Prosecution processes

Apart from some procedural conflict between the provisions of Telecommunications Offences Amendment Decree and NCC Decree, the provisions in regard to prosecution of telecommunications offenders are fairly non-contentious and straightforward. Prosecution of offenders under the Telecommunications Offences Amendment Decree is **exclusively** the responsibility of the Federal Attorney-General "or such officer in the Federal Ministry of Justice as he may authorize so to do". In addition, the Attorney General may authorize the Attorney General or any State or any officer in the Ministry of Justice of that State "to undertake any such prosecution directly or assist therein".

He may also, at the instance of NCC or "an operator", authorize any other legal practitioner in Nigeria, "including a legal practitioner in the employment of" NCC or the operator, "to undertake any such prosecution directly or assist therein". "An operator" in the Decree is defined to include NITEL, M-Tel, and "any other telecommunications company or body approved by the Federal Government or any of its agencies to provide or operate a telecommunications service". In effect, prosecution of offenders could be at the instance of any of the licensed private service providers and their nominated Counsel could conduct the trial.

The conflict in the prosecution processes however arises from the discretion given to NCC to institute proceedings either through the Federal Attorney-General or a State's Attorney General. Section 25(3) of the NCC Decree stipulates that "the Commission may transmit such evidence as may be available concerning" the actual or intended

violation of the Decree “to the Attorney-General of the Federation or the Attorney-General of the State concerned who may institute the necessary criminal proceedings under this Decree”. This discretion is actually given to the Attorney General, not NCC, in Telecommunications Offences Amendment Decree. This is another legal area that requires harmonization under the on-going sector reform programme.

Court of Jurisdiction

Telecommunications Offences Amendment Decree requires that “the Head of State, Commander-in-Chief of the Armed Forces” constitute “for the purposes of this Decree such number of Tribunals as he may deem necessary to be known as the Telecommunications and Postal Offences Tribunals” [**“Telecommunications Tribunals”**]. The Decree also provides for the Tribunal rules and procedures. These Tribunals were established and fully operational during the military regimes. However, with the advent of civil government, all tribunals, including Telecommunications Tribunals, were apparently disbanded.

In particular, Tribunals (Certain Consequential Amendments, etc.) Decree 1999 [**“Tribunals Decree”**] disbanded certain named tribunals and transferred matters before them to the Federal High Courts for adjudication. The named Tribunals under the Decree included Tribunals under Food and Drugs Act, Recovery of Public Property (Special Military Tribunal Decree) 1984, Special Tribunal Miscellaneous Offences Decree 1984, Counterfeit and Fake Currency Decree 1984, etc.

Significantly and quite curiously, Telecommunications Tribunals were not disbanded under the Tribunals Decree and there was no omnibus provision therein to cover, include and effect the disbandment of the Telecommunications Tribunals. Perhaps, this was an oversight on the part of Government, which now creates a material flaw in legislation. A fundamental legal contradiction is thus created whereby the law **as is** requires the establishment of Telecommunications Tribunals for the prosecution of telecommunications offences even as civil disposition totally revolts and objects against these and any other Tribunals. This is a major legal contradiction and lacunae that requires speedy harmonization and streamlining.

Section 24 of the NCC Decree however, in contradistinction with Telecommunications Offences Amendment Decree expressly stipulates, without any equivocation whatsoever, that “the Federal High Court shall have jurisdiction for the trial of offences and violations arising under this Decree . . . over all suits brought to enforce any liability or duty created by the provisions of this Decree”. Notwithstanding this express provision, it is important and necessary to amend and harmonize the provisions of Telecommunications Offences Amendment Decree with civil disposition and the provisions of NCC Decree considering the fact that the range of offences is much wider in the Telecommunications Offences Amendment Decree than in NCC Decree and these offences, not being provided for in NCC Decree, cannot consequently be prosecuted thereunder.

Additional Recommendations

Apart from the specific recommendations contained in the earlier part of this write-up, it is important that Government and relevant industry stakeholders consider the following additional issues:

(i) Specialized training and skills

Telecommunications crimes can only be effectively controlled and possibly eliminated if a corps of knowledgeable and trained specialist in telecommunications matters is created amongst investigators, prosecutors and the Judges. Currently, there is no such specialized unit in any of the three arms of legal enforcement aforementioned i.e. Nigeria Police Force, Federal and State Ministries of Justice and the Federal High Court Bench.

Beyond the criminal aspects of telecommunications practice, such specialized training is a *sine qua non* for just and proper adjudication of civil communications matters, which with the on-coming full liberalization of the sector would be quite commonplace and regular in the Federal High Court. It is indeed self-evident that Judges can best adjudicate on matters that they fully and properly understand and appreciate, the language and idioms of which they are quite conversant and comfortable with. This applies as much to the Bench as it does to the Bar.

(ii) Public enlightenment

There is a total dearth of public enlightenment on what constitutes telecommunications offences in Nigeria. It is very possible that some of the patrons of illegal call centers in most Nigerian cities are unaware of the criminal consequences of such acts. It is important that awareness be created amongst the country's population on this issue. Such an awareness programme coupled with effective prosecution of offenders would, in large measures, reduce the activities of telecommunications crimes perpetrators. NCC is well positioned as the industry's regulator, to undertake such public awareness campaign, in conjunction with other stakeholders.

(iii) Consumer Affairs Protection

The prosecution of telecommunications criminals howsoever does not remove the urgent need for an effective consumer affairs protection unit within NCC. It is such a unit that can look into the complaints of subscribers who are forced by service providers to pay for services that were not used by them e.g. when mobile numbers are cloned by criminals without the knowledge of the legitimate M-Tel subscriber. Another instance is when IDD telephone lines are diverted by criminals who incur huge bills on international calls without the knowledge and/or connivance of the legitimate subscribers. As earlier stated, the telephone companies routinely insist that the innocent subscribers, without any remedy whatsoever, settle such bills. These are examples of "unfair practices of licensees" against which NCC is statutorily required to protect consumers.

(iv) Involvement of Service Providers

It is important that all stakeholders, including in particular, but not limited to both private and public service providers, be involved in the processes of reviewing and modifying the Telecommunications Offences Act. The offences in the act relate not only to NITEL and M-Tel but also the services provided by the private service providers and it is important that their peculiar problems and difficulties be addressed by the amended Act.

(v) Judicial processes

The very best legislation invariably becomes impotent in the face of a grinding, slow and circuitous judicial process. That would easily be the fate of an amended

Telecommunications Offences Act if the Nigerian judicial processes are not overhauled to achieve speedy conclusion of matters generally. Currently, it is fairly common to have both civil and criminal trials that drag on in Nigerian courts for 5 to 10 years on account of endless and, most times, frivolous and avoidable adjournments. If the intention of the Telecommunications Offences Act is to deter criminals, then it is important that speedy trials be achieved and convictions obtained in proven cases. The deterrent effect of the law is defeated generally when trials drag endlessly, and the suspected criminals are free, on bail, to commit further crimes.