DETERMINATION OF MOBILE INTERNATIONAL TERMINATION RATE.

TRANSADVISORY
L E G A L

Determination of Mobile (Voice) International Termination Rate and Sundry Issues.

A TRANSADVISORY LEGAL ARTICLE

RILWAN I. IDRIS
Lead Partner,
Transadvisory Legal.

ATIKU JAFAR
Head, Energy Practice,
Transadvisory Legal.

FESTUS IBUDE
Head, Dispute Resolution,
Transadvisory Legal.

transadvisorylegal
trans_advisory
Transadvisory Legal
Savannah Suites, No 8 Faskari Street, Area III, Garki, F.C.T. Abuja.

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BACKGROUND

On the 25th November, 2021, the Nigeria Communications Commission (NCC) issued the Determination of Mobile (Voice) International Termination Rate (the "Determination"), effectively setting a new International Termination Rate (ITR) for voice calls in Nigeria. By so doing, the International Termination Rate pegged the floor price of voice services paid by IDA operators for terminating international calls on local networks at the rate of USD 0.045 prior to the Determination, the regime on interconnection rates was governed by the NCC's Mobile (Voice) Termination Rate issued on the 1st of June, 2018, under which an ITR rate of NGN 24.40 determined in 2016 continued to apply until a new Determination is made.

Expectedly, the new regime heralded widespread concerns from stakeholders, prompting the House of Representatives' Committee on Communications to meet stakeholders on the 16th of April, 2022, with a view to addressing the impacts of the Determination on the Nigerian telecommunications industry. On the request of the House Committee on Communications, IDA operators articulated and submitted the position to the Committee through the NCC, citing the negative impacts both the implementation and denomination of the new ITR in USD occasion. The IDA operators also cited indiscriminate and unfair billing and other malpractices by Mobile Network Operators (MNOs) in the industry, ranging from anti-competitive behavior, charging of varying rates from local IDA operators and International Operators; refusal to receive International SMS Traffic from IDA operators; refusal to provide requisite number of SIP Trunk channels requested by IDA operators; refusal to route outgoing International Voice, Data, Video or any kind of message via IDA operators to international destinations, etc.

DETERMINATION OF I.T. RATES UNDER THE NEW REGIME

In exercise of its powers under the Nigerian Communications Act (NCA), the NCC issued a Determination of Mobile (Voice) ITR on the 25th of November, 2021, thereby ushering in a new ITR regime for voice services paid by IDA operators for terminating international calls on local networks. As per the new regime, $0.045 was set as the floor price and was made mandatorily to be paid in USD.

IMPACTS OF THE NEW I.T.R. REGIME ON THE NIGERIA TELECOMMUNICATIONS INDUSTRY

Since it took effect on the 1st of January, 2022, the new regime has been criticized and alleged to have presented impediments to the operations of IDA operators, who made a case that they, who have been licensed by the NCC to transport international voice calls into Nigeria, have been forced to stop operating as a result. This has reportedly led to significant loss of jobs for Nigerians and needless unease in the industry. Possible grounds on which the above arguments are hinged include the following:

1. Foreign telecom operators do not factor in 7.5% Value-Added Tax (VAT) when they pay Nigerian IDA operators, citing that their calls do not originate from Nigeria; hence, the inability of Nigerian IDA operators to charge VAT from them.
2. Upon receipt of the funds in (1) above, Nigerian banks charge IDA operators' accounts the following fees:
    - Charges (fees) to receive the funds.
    - 7.5 VAT
    - Commission on turnover (COT)

3. On the other hand, where IDA operators transfer the funds in USD to any other operator within Nigeria, they are mandated to pay the following charges:
   - Foreign currency wire transfer fees by the bank
   - 7.5% VAT on the fees
   - Commission on turnover (COT)
4. In all instances of (3) above, the recipient operator in Nigeria, mostly MNOs, will in turn charge IDA operators the following:
   - 0.062 USD per minute
   - 7.5% VAT on (i) above.
5. Overseas-based telecom operators are charged a lower rate of 0.053 USD per minute by MNOs as against the rate of 0.062 USD per minute which Nigerian IDA operators are charged by the MNOs for terminating the same calls.

The impacts of the above has placed a heavy toll on IDA operations and, by extension, the telecommunications industry especially in light of the floor price pegged at $0.045 by the new NCC's Determination regime. For obvious reasons, the ITR under the new regime seems unbearable and capable of constituting an unprecedented hindrance to ease of doing business and the financial viability of the Nigerian telecommunications industry.

By the NCC's determination, the Nigerian-based IDA operators have been locked out of the market because of the higher rate per minute issued to them by MNOs, not to mention the mandatory 7.5% VAT and sundry bank charges incurred from the receipt and transfer of foreign currency within Nigeria.

Collectively, the above have made it largely impossible for IDA operators to price their termination services in a way that will attract patronage from overseas telecoms operators, since the rates issued by the MNOs to the overseas operators are already lower at $0.053 than that issued to IDA operators at $0.062 per minute.

DOLLARISATION OF THE INDUSTRY THROUGH THE DENOMINATION OF ITR IN USD

Notably, the pricing and denomination of ITR in USD has constituted a needless punishment on local IDA operators due to foreign exchange fluctuations resulting in fiscal and operational challenges. The new regime has created room for a massive currency substitution and dollarization of the Nigerian economy having been denominated in USD.

Dollarization, which is the use of foreign currencies as a medium of exchange, store of value, or unit of account, has emerged as a key factor occasioning vulnerabilities and currency crises. It is so frowned at by law that the Central Bank of Nigeria (CBN) had threatened to prosecute anyone found transacting business in the country with foreign currencies as medium of payment. Dollarization contributes to the weakness of the Naira exchange rate and distorts monetary policy transmission despite increased efforts by the Central Bank of Nigeria (CBN) at strengthening the Naira through interventions by way of forex control and development finance initiatives.

The CBN Act of 2007 states inter-alia that *"the currency notes issued by the Bank shall be legal tender in Nigeria...for the payment of any amount."* Furthermore, the Act stipulates that any person(s) who contravenes this provision is guilty of an offence and shall be liable on conviction to a prescribed fine or six months imprisonment.

Dollarization can present significant difficulties for decision-makers, according to the International Monetary Fund (IMF). Additionally, it limits the monetary authorities' ability to serve as a lender of last resort, hinders banks' ability to manage their liquidity and weakens the financial sector's stability because it may amplify the impact of exchange rate fluctuations on banks' balance sheets, raising the risk of contractionary effects and bank failures. There is thus a need for a better understanding of dollarization in Africa. This understanding may help in the assessment of potential vulnerabilities and in making a case for the implementation of policies in order to mitigate the risks that may result from it.

THE LAW ON DOLLARISATION OF THE ECONOMY IN NIGERIA

Extant provisions of the Nigerian laws make it impossible to consummate transactions of any nature within Nigeria in currencies other than the Naira. Section 15 of the Central Bank of Nigeria Act recognizes only the Naira as the legal tender in Nigeria for the purpose of all transactions. In the same vein, the combined provisions of Section 20 (1) and (5) of the CBN Act recognize the Naira as the currency notes issued by the CBN as legal tender in Nigeria at their face value for the payment of any amount; and make it a criminal offence to decline acceptance of the Naira as a means of payment for any transaction.

The NCC as apex regulator may need to revisit subsisting regime and set a Mobile (Voice) ITR that is legal, fair, favorable and Naira-denominated. Doing so will be the most honorable regulatory decision in the circumstance and is in line with the NCC's mandate of regulating tariffs and charges for the availability and quality of communications services, equipment and facilities under Section 4 of the NCA.

In addition, the pegging of ITR in foreign currency negatively affects inflation rate and interest rate in the market. It does not only exert far-reaching effects on the economy but also has policy implications for emerging market economies like Nigeria in areas such as monetary policy management and financial system stability. The rapid trend of dollarization of the Nigerian telecommunications market erodes the purchasing power of the Naira, distorts monetary policy management and renders it ineffective. As a result of this rising dollarization of the Nigerian Telecommunications Market, IDA operators' monetary aggregates may become unpredictable and more sensitive to expected exchange rate depreciations. This is due to the fact that interest rates on the dollar and quantity of dollar inflows are not under the control of even domestic monetary authorities, let alone IDA operators.

The NCC, accordingly, needs to intervene with a view to ensuring that licensees implement and operate at all times the most efficient and accurate billing system in line with Section 4(c) of the NCA. We implore the NCC to issue a new Declaration of Mobile (Voice) ITR that is fair, Naira-denominated and a product of extensive inputs of MNOs who are stakeholders in the market. In the alternative, if the USD must find its way to the market, there is need to place a restriction on the flow of foreign currencies within the financial system and only allow for some restricted window for licensees with genuine foreign transactions.

ANTI-COMPETITIVE BEHAVIOUR AND UNFAIR MARKET PRACTICES IN THE INDUSTRY

One of the thrusts of the NCA is the mandate of the NCC under Section 4(d) of the NCA, to wit: the promotion of fair competition in the communications industry; protection of communications services and facilities providers from the misuse of market power, or anticompetitive and unfair practices by other service, or facilities providers.

Sadly, the new ITR Regime presents opportunities that might be exploited by some licensees, including MNOs, to display a flagrant disregard for extant anti-trust rules and regulations through acts ranging from discriminatory intent in providing network capacity, indiscriminate pricing, etc. Some of the particulars of the behaviors include:

Indiscriminate Pricing

As stated earlier, MNOs have consistently charged lower rates of $0.053 USD to international operators and $0.062 USD to Nigeria-owned IDA operators per minute.

This can be seen to be discriminatory and, as such, constitutes a wanton violation of Section 91 (1) of the NCA which prohibits licensees from engaging in acts aimed a substantially lessening competition in any aspect of the Nigerian Communications market. It goes without saying that the disproportionate rates paid by IDAs and overseas operators to terminate the same calls over the same minutes substantially lessens competition and leaves no competitive edge for IDA operators in a market where they are already weak.

Refusal to Receive International SMS Traffic from IDA Opearators

Some MNOs have in the past consistently failed to receive International SMS Traffic from IDA operators against copious provisions of regulations and licenses issued by the NCC.

By Condition 18 of their Licenses, IDA operators are:

> "authorized to provide and operate International Data Access (IDA) connectivity whether one-way or two-way, point-to-point, point to multipoint for voice, data or vision or any other kind of message for reception within Nigeria or any other international destination".

In the same vein, Condition 28 of the IDA License also mandates IDA operators to provide and demand interconnection to and from Network Operators as the case may be.

If, in utter disobedience to the above, MNOs have refused to provide requisite number SIP Trunk Channels requested by IDA operators and also consistently refused to route outgoing International Voice, Data, Vision or any other kind of message via IDA operators to international destinations, then that might amount to a violation of their Conditions of License as to warrant heavy regulatory sanctions.

The implications of these acts are not farfetched. The Telecommunications sector suffers congestion on the international trunk, low Answer Seizure Ratio (ASR), high Post Dial Delay (PDD), low Average Call Duration (ACD), poor Quality of Service (QOS), loss of goodwill, loss of revenues by IDA operators and other operators, and deliberate de-marketing of IDA operators in the International Telecommunications marketplace.

From the onset, Regulation 1(1) of the Interconnection Regulations imposes on a telecommunications operator on receipt of a request for interconnection from another licensed telecommunications operator an obligation to interconnect its telecommunications network with that licensed telecommunications operator's network in accordance with the principles of section 97 of the Act, these Regulations and any guidelines on interconnection adopted by the Commission. In addition, Regulation 10 (b) of the Interconnection Regulations enjoins operators to:

> "adhere to the principle of non-discrimination with regard to interconnection offered to other licensed telecommunications operators, in particular, it shall apply similar conditions in similar circumstances to interconnected licensed telecommunications operators providing similar services and provide interconnection facilities and information to other licensed telecommunications operators under the same conditions and of the same quality as it provides for its own services or those of the group of companies or partners;"

Therefore, it is humbly posited that MNOs have the obligation to interconnect with IDA operators on the principles of neutrality, equality of access and equal terms and conditions as required by Regulation 3 (3) of the interconnection Regulations. Any refusal of MNOs to receive traffic laid out above is an abuse of market power and a violation of the NCA, Interconnection Regulations and Competition Practice Regulations; an infraction which the Commission has the powers to decisively address and even direct for fines, sanctions and penalties as the NCC may deem fit.

The Competition Practices Regulation under Regulation 23 further empowers the NCC to direct any licensee in a dominant market position to cease and desist henceforth from any acts that portends to be discriminatory to IDA operators or any market operator. Worrisomely, it is hinted from some quarters that MNOs insist that IDA operators insist that MNOs bear the full cost of interconnection for links that generate revenues to both parties. In addition, MNOs were said to have insisted that that IDA operators raise and furnish bank guarantees prior to interconnection against previous directives of the commission.

CONCLUSION

The above practices, if entrenched in the industry, have the ability of rendering IDA operators helpless against the growing injustices of the juggernauts of the market, supported by an unfair regulatory and market regime. If IDA operators are unable to operate at scale, then it goes without saying that the Federal Government Policy for the Promotion of Indigenous Content in the Nigerian Telecommunications Sector in particular, and the administration's commitment to provide the environment for Nigerians to actively participate in key sectors of the economy, including a drive to institutionalize a mechanism that will ensure that certain categories of telecommunications services are reserved for indigenous players; are ultimately defeated.

We are of the opinion that the NCC as a responsible regulator of the Nigerian telecommunications market and leading implementer of the Federal Government's laws and policies is urged to do the needful in the circumstance in order to ensure the stability of the Nigerian telecommunications market.

LIST OF ABBREVIATIONS

- ITR (International Termination Rate).
- NCC (Nigerian Communications Commission).
- IDA (International Data Access).
- SIP (Session Initiation Protocol).
- COT (Commission on Turnover).
- MNO (Mobile Network Operator).
- CBN (Central Bank of Nigeria).
- IMF (International Monetary Fund).
- NCA (Nigerian Communications Act 2003).
- ASR (Answer Seizure Ratio).
- PDD (Post Dial Delay).
- ACD (Average Call Duration).
- QOS (Quality of Service).