

## **INDUSTRY WORKING GROUP**

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# **POSITION PAPER ON HAZARDS AND FURTHER IMPLICATIONS OF MULTIPLE TAXATION AND REGULATION OF THE COMMUNICATIONS INDUSTRY IN NIGERIA**

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## Introduction

This brief is provided by the Sub-Committee on Legal and Judicial Reviews of the Industry Working Group (IWG) on Multiple Taxation and Regulation.

It is noteworthy that the challenges of multiple regulation and taxation faced by the communications industry has existed and been ventilated severally over the years. The phenomenon limits the ability of telecommunications as an economic enabler and social overhead capital to impact positively on the attainment of the country's developmental goals.

The twin issues (multiple regulation and taxation) fall squarely with Government who is in the best position to address same. The implications and hazards of multiple regulation and taxation are discussed in the following sections.

### 1. Executive Summary

The successes recorded by the telecommunications industry in the last 10 years have reinforced the internationally acknowledged perception that communications is a powerful, progressive tool of socio-economic development. The continued boast to socio-economic development (e.g. in terms of job creation, security, social cohesion), the impact upon culture and quality of life and the contribution to Gross Domestic Product (GDP) are gains which have been recorded by the industry as a direct result of the advent of mobile telephony in Nigeria.

Sadly however, while this sector has been a major catalyst for socio- economic development it has become apparent that majority of our national stakeholders have failed to recognize the pivotal role played by mobile communications to the long-term socio-economic development of the nation. These sections of stakeholders instead continue to perceive the successes of the industry as opportunity to generate short term and other immediate pecuniary benefits. This skewed perception results in undue interference in the operations of communications networks by various strata of society, and particularly agencies of government.

Predominantly, the industry has witnesses' untoward intervention and actions from various Ministries, Departments and Agencies (MDAs) of Governments (at the 3 tiers) who see an opportunity to generate revenue from the operations of telecoms operators through the imposition of Multiple, illegitimate levies and taxes. The failure of the industry to submit to these illegitimate regime and demands often results in disruptive enforcement actions by these MDAs. Network operators continue to witness harassment, forcibly sealing of telecoms sites or removing components of site installations in their bid to compel compliance. These continued intervention in telecoms operations by MDAs results in a disruptive of services, degradation of service quality, a major increase in operating expenses and the general cost of carrying on communications business in Nigeria. While we note that the untoward consequences of Multiple and illegitimate levies/taxes is not born solely by the telecommunications industry, it is our cogent believe that the critical nature or services provided by the telecommunications sector

requires urgent action to address these challenges before a total collapse of the telecommunications sectors is witnessed. This paper seeks to provide an analysis on the current problem and associated risks to the industry.

## 2. Illegal and Inappropriate Taxation and Regulation

The Taxes and Levies (Approved Rates for Collection) Act, 1998 provides the taxes and levies collectible by the various tiers of Government. The incidence of multiple taxation and regulation evidences disregard of the provisions of the above Act by various Ministries, Departments and Agencies (MDAs) of the Federal, State and Local tiers of Government. These acts culminate in the imposition of illegal and inappropriate taxes and levies in the following ways as discussed in detail below: (a) illegal taxes and levies; (b) excessive quantum of taxes demanded when the tax is legal; (c) extra-legal mode of collection of such taxes; (d) use of consultants for assessment and determination of taxes and levies, viz:

- A. **Illegal Taxes and Levies.** The 1998 Act provides a list of taxes and levies to be collected by all tiers of government: federal, state and local. Any tax or levy outside of what the Act provides is illegal. Judicial confirmation of this is given in the case of *Eti-Osa Local Government V. Jegede* [2007] 10 NWLR p. 537 see specifically from page 545. It is notable that in a bid to shore up internally generated revenues, MDAs consistently impose taxes and levies unknown to law on telecommunications operations. For instance, in 2009, the Imo State Ministry of Petroleum and Environment introduced an Environmental Audit Review and Certification Fee of ₦30,000 per site without the backing of any known law. It is noted that statutory responsibility for the conduct of an Environmental Audit under the Environmental Impact Assessment (EIA) Act rests with the Federal Ministry of Environment (FME) or the enforcement agency, the National Environmental Standards and Enforcement Regulations Agency (NESREA).
- B. **Arbitrary Increases:** Where the taxes or levies are legal, the amount demanded is typically arbitrary and without recourse to the provisions of law. Increases are also usually imposed annually or otherwise, without a known parameter for their determination. For instance fees for Aviation Height Clearance Certification (AHCC) of masts and towers erected by telecommunications companies were increased by as much as 1000-4000% in 2005. The new AHCC regime was expanded to cover masts and towers all over the country irrespective of their proximity to airports as was the previous regime, so that the increase was even more impactful than as depicted by a rate increase.
- C. **Illegal and Inappropriate Assessments:** Government at all tiers tend to use Consultants for the purposes of improving internally generated revenue. These consultants are paid a percentage of what they are able to generate. Unfortunately, the end result is that consultants dream up taxes or levies that are unknown to law and utilize thugs and unscrupulous security

personal and indeed draw on Task Forces employing state security services to enforce their collection.

- D. **Illegal Enforcement and Extra-Judicial Activity:** It is to be noted that the collection of taxes and levies, legal or illegal, is usually done by applying unsophisticated and legally unsanctioned methods. This includes arbitrary site or office closures, physical attacks, intimidation and arrest of personnel or threats of these and seizure of equipment, among others. Several States have across the country have employed and continue to exploit this approach to extract monies from operators. For telecommunications companies, this is particularly damaging because they deny the affected operators access to their facility sites for routine maintenance and fuelling. This invariably results in network outages, congestion and exacerbation of the quality of service situation as facilities run out of fuel or otherwise fail for lack of maintenance or fault rectification.
- E. **Inappropriate legislation:** Governments, especially at the State and Local levels, come under the guise of federalism to insist on exercising authority within their locale. While they should ordinarily have authority to exercise such powers, the law places a limitation to the extent that where a federal legislation has covered the field, State or Local Governments can no longer legislate on the same issue. Proceeding still to do so leads to inappropriate, typically excessive legislation and an abuse. The Lagos State Infrastructure Maintenance and Regulatory Agency (LASIMRA) Act, 2004 which sought to regulate telecommunications infrastructure in Lagos State was declared illegal by the Federal High Court.

*The incidence of multiple regulation or taxation invariably constitutes illegal and inappropriate taxation and legislation.*

### 3. Burden of Multiple Regulation

Multiple-regulation (of the same aspects of telecommunications operations) by two or more MDAs presents the hazard of regulatory intervention by these entities working at cross purposes to the detriment of the affected operator. It is common place for instance to have a telecommunications operator receive a **Stop Work Order** from a State or Local MDA over a Right of Way (RoW) approval granted by a State or Federal MDA. It is indeed common place to have State and Local Environmental MDAs reject an EIA Certificate issued by the Federal Ministry Environment (FME) to insist instead on the telecommunication operator processing same with them. This occurrence is typified by the demands in Kaduna State by the Kaduna State Urban and Property Development Authority (KASUPDA) who insisted on conducting its own EIA.

The associated setbacks and bureaucratic bottlenecks usually lead to project implementation delays that unduly increase the project cost, while occasioning network downtimes and quality of service issues among others. Besides multiple-taxation which ultimately results, the situation presents significant regulatory discord that can ground telecommunications operations for months in severe cases with unsavoury implications for the national socio-economy.

#### **4. Imposition vs Appropriation and Public Accountability**

Taxation by its very nature, involves the state appropriating the resources of citizens, both private and corporate. The reasons and the basis for such appropriation must not only be clear, but where the citizen exercises his constitutional right to question the appropriation, the issue is fundamental enough to be referred to the courts for adjudication. In reality, what obtains is that Government arbitrarily imposes a tax or levy as discussed in (1) above and then forcibly collects it using coercive means, amounting to an imposition rather than an appropriation. As due process is not followed and there is no allowance for recourse to the constitutional responsibility of the courts to adjudicate on the case, the rights and powers of citizens is usually ignored in the enforcement of such levies. Public accountability is thus jeopardized. This negates the democratic ideals and principles of public transparency and accountability, thwarting requisite industry and democratic development of the country.

#### **5. Regulatory Propriety, Certainty and the Investment Climate.**

The regime of taxes and levies ought to be ascertainable in order to assist planning and forecasting for business endeavours and the economy. While it is accepted and common practice that taxes and levies form a veritable source of revenue for government, it is imperative that citizens should be able to determine or know in advance what taxes they are liable to pay. The computation of taxes and levies should therefore be predicated on clearly defined criteria. The absence of these as discussed earlier, negates regulatory propriety and certainty which negatively impact investor confidence and subsequent investment decisions by telecommunications operators. The phenomenon affects the perception of Nigeria as a preferred investment destination, with unfavourable consequences for the national economy.

#### **6. Relegation of the provision of requisite Public Services.**

As acknowledged above, taxes and fees ought to be predicated on clearly defined criteria. Where their collection presupposes that government is providing a Public (Regulatory or Administrative) Service, it is imperative that relevant MDAs provide that service. However, because the objective is typically to enhance internally generated revenues, the provision of the underlying regulatory or administrative service is usually relegated. For instance, State and Local environmental authorities are quick to impose and collect fees for effluent discharge, fumigation, pest control and other environmental related services, without ever providing such services or only partially doing so.

Indeed, it is typically the case that telecommunications operator self-provides the said service while the MDA merely collects fees without render any service. Alternatively, the MDA commissions a Consultant and mandates the operator to make exorbitant payments to, with the attendant deficiencies of unreliable and poor quality service rendered by the singular, monopoly rent-seeking consultant. By virtue of the commission, a service level agreement that could incorporate clauses within the contract to incentivise effective and efficient service delivery cannot be put into effect. A case in point was the 2011 appointment of a National Project Management Consultant (PMC) by the National

Environmental Standards and Regulations Enforcement Agency (NESREA) to undertake Base Station Enumeration, Verification and Certification (BS EVC). The BS EVC exercise was in the first place unknown to law but mandated by NESREA. NESREA had previously mandated an Environmental Audit of all telecommunications Base Stations in the country. The Base Station Environmental Audit (BS EA) exercise, which is known to law, was already in progress pending the review of the EA Reports submitted to NESREA. But for unclear reasons, NESREA kept the BS EA, failed to undertake the review and proceeded to mandate the BS EVC at a cost of ₦143,000 per Base Station stipulated by the PMC. The fees included components for the setup of office(s) for the PMC and translated to an industry-wide cost of over ₦3bn for the telecommunication operators. This is as opposed to the BS EA exercise for which operators freely negotiated with certified Environmental Consultants accredited by NESREA to get rates as low as 20% of the PMC charge per Base Station. NESREA eventually aborted the unlawful BS EVC exercise following concerted engagement by the telecommunications operators and other stakeholders. It is instructive to note that NESREA is yet to follow through with the lawful BS EA exercise which it had initiated.

In the case of fees for effluent discharge, for instance, MDAs merely collect levies without any action to ascertain or curtail the level of impurities discharged into the air or ground, leaving the public to suffer the dangers so posed. Ordinarily, the thresholds of safe or acceptable limits of human exposure to such effluent discharge should be specified and action taken by MDAs to measure and ascertain whether companies are in compliance. MDAs ought to compel defaulting companies to take corrective action or otherwise penalise them where the safe limits have been unduly exceeded without remedy. It is however the case that the MDAs do not provide such important public services to mitigate the risk, thus abandoning the public to the environmental perils. Indeed, it is the case that as long as telecommunications companies make regular payments, MDAs are unmindful of the environmental degradation carried on by such companies. The MDAs thus completely relegate their environmental protection responsibilities provided the fees are paid. It is thus an open cheque for affected companies to continue to degrade the environment provided payments are made to the authorities. This is very harmful to public health.

Overall, it is the case that the underlying public good to be addressed is left unattended.

## 7. Network Outages and Quality of Service Deficiencies

Multiple regulation and taxation usually leads to inappropriate regulatory intervention, as the MDAs resort to extra-legal means to enforce such interventions. As noted earlier, MDA employ coercive means such as facility lock-outs to enforce compliance by telecommunications operators. Operators are denied access to such sites for refuelling, maintenance or fault resolution, leading to congestion and other quality of service deficiencies. Indeed, to ensure that operators feel the squeeze, it is the case that the agents of the MDAs ‘go for the jugular’ by targeting **Hub Sites** to which anywhere between 20 to 100 or more sites are parented. This effectively paralyses a good section of the network, causing complete network outage for the affected communities over an area that could stretch across as many as 2 or more adjoining States with quality of service deficiencies across a much wider area.

It is instructive to remark that the impacts of such network outage are not restricted to the affected telecommunications network but could indeed spread to others. The fact that the telecommunications infrastructure is a web of interconnected elements means that failures on one service provider's network will often unduly burden, congest or otherwise compromise service quality and availability on other networks, negatively affecting users on the other networks. While it has not happened in Nigeria, it is the case that a domino effect of such network disruption has brought down the national network in some countries with disastrous socio-economic consequences on the.

## **8. Threat to Public Safety and Security.**

Network outages and poor quality of service as indicated in (7) above present a great threat to national safety and security and indeed to the overall maintenance of law and order; these incidents constrain the ability of emergency response, law enforcement and security agencies to respond appropriately to emergency and distress situations, prevent crime and secure our society as follows.

**Security services:** Network outages occasioned by site closures will render security agents in the vicinity powerless to communicate whilst criminals perpetrate their heinous activities. Of particular concern is the high likelihood of the failure of specialised security devices and applications occasioned by these shutdowns and the jeopardy to which intelligence provided to security agencies will be placed.

**Emergency and Distress situations:** Emergency medical or other intervention cannot be readily summoned or coordinated to attend to life-threatening incidents including heart attacks, accidents and disasters, such as fire and flooding, etc. These cases and more will not receive urgent attention owing to the unavailability of telecommunications services occasioned by site closures.

*These facts further emphasise the Critical Nature of Telecommunications networks*

## **9. Business Losses and Socio-economic Disruption**

Network outages disrupt socio-economic activities as dependent services (such as banking, airline ticketing, government e-payments and a host of other activities) become unavailable or constrained. Businesses both traditional and in particular, online that rely on telecommunications infrastructure and services are pulled down whilst the outages last. The disruption of social and economic activities in this manner will accrue huge economic losses for telecommunication operators and other businesses, the Government and the nation as a whole

In its 2010 Research Study<sup>1</sup>, Pyramid Research reports that by 2009, mobile had created 8,000 in direct employment and a total of 3m in indirect employment relating to vendors, PR agencies, operators call center employees, and security personnel (tier 1) as well as minicall center operators, “umbrella people”, street hawkers and phone ladies (tier 2). This value chain supports several verticals in rural connectivity, agriculture, education, finance, health, transport and entertainment, etc. These verticals are impacted by network outages by way of business and economic losses. Such losses exacerbate the unemployment situation and incentivize criminal activities and other social vices that precipitate a vicious cycle of societal problems and underdevelopment. It is pertinent to note that Government is also a major direct and indirect beneficiary of in terms of taxes paid directly by the industry and other payments from citizens employed indirectly by the industry.

## **10. Inhibition of Telecommunication industry contribution to Economic Growth, Tax Revenues and National Development**

It is settled that a positive correlation exists between GDP and mobile telephone penetration as follows:

*“In 10 short years, what was once an object of luxury and privilege, the mobile phone, has become a basic necessity in Africa” - Paul Kagame, President of Rwanda, 2008;*

*“A 10% increase in mobile penetration boosts GDP by 1.2% in a typical Sub-Saharan African country” - Deloitte for the GSMA report “Global mobile tax review 2006-07.”*

In terms of contribution to the economy, it is noted that more than 3.5 million people in Sub Saharan Africa (SSA) are employed directly or indirectly by the mobile industry and tax revenues from the mobile sector form an increasingly significant portion of Governments budgets. This is easily corroborated by developments in Nigeria in which the telecommunications sector is now only second to the Oil and Gas sector in terms of tax revenues to Government and GDP contribution to the national economy. A 2005 Report<sup>2</sup> by Philips Consulting finds that the mobile sector in Nigeria paid over ₦205.94bn in tax and duties to the state treasury by 2005. Same report indicates that the telecommunication sector recorded the highest percentage increase in contributions to the GDP in 2002.

In its 2007 study<sup>3</sup> of the taxation regime in Africa, The GSMA recommended that mobile-specific taxes on airtime, handsets and equipment, etc (non-VAT taxes) should be phased out because they make mobile services less affordable and limit the value creation potential of the industry. The report

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<sup>1</sup> The Impact of Mobile Services in Nigeria: How Mobile Technologies are Transforming Economic and Social Activities.

<sup>2</sup> Philips Consulting Report commissioned under the auspices of the Joint Economic Development (JED) Framework with the Mobile Telecommunications Industry in relation to the National Economic Empowerment and Development Strategy (NEEDS), 2005.

<sup>3</sup> GSMA Tax Study on Sub-Saharan Africa, 2007.

indicates that there is a negative correlation between tax and mobile penetration and as such, countries like South Africa with low tax burden per connection (17.5%) enjoy high penetration (97%). The converse is also true such that countries like Madagascar with high tax burden (23.5%) have low penetration (9%). The report provides clear evidence that by removing mobile specific taxes: (i) mobile ownership and use will rise, stimulating wider economic growth; and (ii) the total tax receipt from the industry and indeed the wider economy will increase. The Report specifically indicates that:

- Tax receipts would increase by \$930 million, rising from \$28.9 billion to \$29.9 billion, if the governments of some African countries including Nigeria, Kenya, Tanzania, Cameroon, Ghana, and Malawi removed all non-VAT mobile ownership taxes in 2007; and
- By 2012, Chad's tax receipts would be approximately 30% higher, Ghana's 20% and Nigeria's 15% higher, etc.

***From the foregoing, it is evident that multiple-taxation of telecommunications operations presents a number of hazards thus: inhibits growth and penetration; stifles the telecommunication industry growth; and limits the creation of a value chain that is beneficial to socio-economic development. These invariably combine to limit or constrain tax revenues to Government from direct and indirect value-addition as well as the wider economic impact of the sector on the economy.***

## **11. Threat to Broadband and future development of the industry**

At 68.7% teledensity<sup>4</sup> as of January 2012, telephone penetration in Nigeria is impressive with potentials still for continuing growth. Raising the teledensity from about 0.05% in 2001 to this impressive position was a combination a favourable policy and incentive regime in which operators were granted tax holidays for a period of 5 years. Basic telephony is reasonably sorted and operators are pushing aggressively to realise rural coverage. Access to Internet has significantly reduced the barriers to learning and citizens are engaging in the digital economy as the number of Internet Users hit 44 million as of 2010, according to a report<sup>5</sup> by BuddeComm. At the moment, most Internet Users in Sub-Saharan Africa access the Internet using narrowband access via Internet Cafes<sup>6</sup>. Broadband is the next frontier for Nigerian telecommunications. While the landing of international submarine cables in 2010 has improved international Internet bandwidth and connectivity. Spreading the benefits of these developments across the entire country, requires massive investments in broadband infrastructure by telecommunications operators supported by favourable public policy and regulatory regimes.

The mobile industry is expected to be directly affected by the combination of expanding urban population and rising disposable income with mobile population penetration of 73%. The GSMA

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<sup>4</sup> Industry statistics published by the Nigerian Communication Commission ([www.ncc.gov.ng/industry-statistics/subscriber-data.html](http://www.ncc.gov.ng/industry-statistics/subscriber-data.html)).

<sup>5</sup> 2010 African Fixed and Wireless Broadband and Internet Markets: Report published by BuddeComm ([www.budde.com.au/Research](http://www.budde.com.au/Research)).

<sup>6</sup> GSMA Report: The benefits of releasing spectrum for mobile broadband in Sub-Saharan Africa. December, 2011.

estimates that there will be 65m effective mobile broadband (MBB) subscribers by 2020. This will have risen to 94m in 2015. A 1.1% point increase in non-oil GDP growth amounting to ₦1,283 billion (US\$8.5billion) is forecast by 2020 with resultant creation of 6.3million more jobs. However, these projections will only be met if the resources required such as spectrum is available, and the obstacles of multiple taxation and multiple regulation are eliminated from the operating environment.

The GSMA also reports<sup>7</sup> that wire-line and wireless broadband penetration in Nigeria currently stands at 0.1% and 6% respectively. The report notes that with positive policy action, mobile broadband can enhance Nigeria's GDP by over 1% (and 1.7% of non-Oil GDP) in 2015, supporting diversification of the economy. Same report finds however that at 35%, the proportion of revenues paid in various forms of tax (2005-7) by telecommunications operators in Nigeria is double the global average of 17.4%.

***Multiple and inappropriate regulation and taxation of telecommunication operation remains a major threat to Broadband realisation and the development of the future potential of the industry. It further has negative impacts on Internet penetration and other applications such as mobile payments.***

## Conclusion

Multiple taxation and regulation of telecommunications operations occasion illegal and excessive taxations and extra-judicial enforcements; it brings about regulatory discord that does not assist business planning and forecasting and do not make for healthy investment decisions; it contributes to the degradation of quality of services that are not conducive for socio-economic activities whilst also compromising public safety, security and the maintenance of law and order; it diminishes the utility of telecommunications as an economic enabler and social overhead capital by precipitating business losses that inhibit economic development and disrupt social cohesion; it limits tax revenues to Government by constraining the potential of the telecommunications sector to contribute through direct and indirect value addition to the national economy. It is a major threat to broadband realisation for Nigeria and it is imperative that the menace which falls squarely with Government be promptly addressed for the overall socio-economic benefit of Nigeria.<sup>90</sup>

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<sup>7</sup> Assessment of economic impact of wireless broadband in Nigeria, February, 2011: GSMA Report.