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Telemarketing and Consumer protection in Nigeria: A Case for the Domestication of the U.S. Telephone Consumer Protection Act, (TCPA, 1991)

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Abstract

The Resolution of telecommunications regulatory issues that affect consumer protection with a view to adopting world best practices for enhanced Consumer Protection calls for a case by case review and appraisal of such topical and vexed issues that affect consumer protection in the telecommunications subsector. Consumer Protection issues in telecommunications revolves around matters of poor services, billing cost, lack of network, drop calls, telemarketing, unsolicited adverts *etc.* The problems of telemarketing and unsolicited advertisements have been endemic enough to attract criticism and calls for a legal framework to regulate or check the trend. In the USA, the issue of telemarketing and unsolicited adverts has since been addressed by the enactment of the U.S Telephone Consumer Protection Act, 1991. This work seeks to address the issues of telemarketing unsolicited advertisements in the telecommunications regulatory framework with a view to improving consumer satisfaction in the sector. A case for the domestication of the U.S.A experience is been made by an analysis of the USA TCPA, 1991, showing its relevance, shortcomings and grey areas and amendments for application in Nigeria. It is opined that the U.S TCPA 1991, when domesticated in Nigeria *mutatis mutandis* will cure the viral virus of unsolicited adverts in the Nigerian telecommunications regulatory environment.

Keywords: consumer protection, U.S Telephone Consumer Protection Act, 1991, Telecommunications, Advertisement, Regulatory, customers, Lotteries, The Telemarketing Industry, Global Systems of Mobile Telecommunications (GSM), Value Added Services (VAS), National Coordinator of Wireless Application Service Providers of Nigeria (WASPAN), The Nigerian Communications Commission, Federal Communications Commission (FCC), Consumers Protection Council (CPC), Nigerian Communications Commissions (NCC).

Introduction

Every human society, from the most primitive to the most advanced, depends on some form of telecommunications network. It is virtually impossible for any group of people to define their collective identities or make decisions about their common and binding interests, without telecommunications. Communication networks make society a reality (Alabi 2012). It makes it possible for people to co-operate, produce and exchange commodities, to share ideas and information and to assist one another in time of need. Every facet of basic rights is dependent on telecommunications. Such basic rights of the individual as the right to life, the right to personal liberty and dignity, the right to freedom of expression and information and the right to free movement, all of which enhance the quality of life of the individual are facilitated by telecommunications.

It is therefore, widely acknowledged that no modern economy can be sustained today without an integral telecommunications infrastructure. A robust telecommunication infrastructure network is important for the economic growth of nations and supports the world economy.

Communications is a vital aspect of human existence and effective telecommunications services enhance living standards and improve productivity and efficiency in other sectors. Thus, communication and technologies that support it, occupy a strategic position now more than ever in every aspect of human existence, and nations and businesses would become less competitive and lag behind others if they fail to avail themselves of this vital infrastructure of the information age (. Tooki 2011).

The telecommunications revolution of 2005 necessitated by the enactment of the NCC Act 2003 (LFN 2004), gave birth to the Nigerian Communications Commission. The Commission being an independent National Regulatory Authority for the telecommunications sector in Nigeria among other functions is saddled with the responsibility of the implementation of the provisions of the Act for effective and efficient service delivery for enhanced consumer protection.

Consumer rights and consumer protection set out the legal regime or protective legislation as a way for consumers to fight back against abusive and oppressive business practices. These laws are designed to hold sellers of goods and services accountable when they seek to profiteer, by making advantage of a consumer's lack of information or weak bargaining power.

The consumer protection issues in telecom are many and diverse. The growth in the industry since the de-regulation era has been followed by serious consumer complaints, which relate to high tariffs, brazen sharp practices, and a litany of poor unsatisfactory services as false billing, arbitrary disconnection of service, poor service delivery, drop calls, nonchalant attitude towards genuine complaints, supply and installation of substandard equipment and devices, and unsolicited and deceptive advertisements, credit depletion, inability to recharge, inability to check credit balance, network failure, sending/charging of multiple text messages in place of a single one among others (Enyia 2014). Of all the irksome practices, unsolicited advertisement has currently dominated the telecommunication space which has alternatively multiplied the spate of consumer's complaints. This work is a review of the issue and proffers solutions for enhanced consumer protection in the telecommunications industry sector.

The Regulation of Sales, Games and Competition Promotion

The quest for a larger share of the telecommunications market in Nigeria has prompted GSM operators to embark on value added packages, promos, among others, to woo subscribers. As attractive as these may be, the issue of improved quality of service still needs urgent attention. Fierce competition abounds, as the various companies seek to secure a market share for their services through the instrumentality of advertisements. MTN Nigeria has indeed provided additional benefits by advertising information in cheaper ways to lure clientele. The following are some typical incentives offered by the company (mtnnigeria 2017).

- "MTN fifty fifty", 'pay as you go' and the 'call me back alert' which are quite popular with the youth.
- 'Yello Night!': This is one of a number of free offer packages by MTN. Yello Night is simply an offer of 'free' calls for consumers, to be able to make free calls from midnight to the early hours of the morning.
- Other offers are the 50% discount on calls to three registered family and friends mobile lines. While the first three registrations are free, subsequent registrations cost fee for each.

The legal implication of these advertisements is that they can be considered valid offers which can result in a contract with the consumer who acts on them. The issue of 'free' offer is a fiction because even with the 'Yello Night' advertisement, the consumer often provides consideration by making the phone calls, the first minute of which is usually charged.

Sales Promotion

Sales promotions are defined as promotional marketing techniques which generally involve the provision of a range of direct or indirect additional benefits, usually on a temporary basis and which are designed to make goods or services more attractive to purchasers (Spilsbury 1998). Such motivations could include free gifts and samples, a reduction of the prices of the product or service (bargain offers), games and competitions or lotteries. Also included are incentive schemes like supermarket bonuses or loyalty schemes (ibid). Some examples of promotional propaganda in Nigeria are as follows: Text and win promo to MTN 4034, Celtel 35373, Glo 31373 and receive life transforming success. Also, win 2.4KVA, 950KVA Gen x 10 and lots of recharge cards (Daily Sun 2007). Discernible from the above are the techniques of sales promotion which include free gifts, price reduction and games and competition.

Gifts

Quite often in Nigeria, free gifts are recoverable only upon proof of purchase and/or answering correctly certain questions, with or without the casting of lots. The relevant legal issues for consideration here include that of the ownership or possessory rights of the consumer, as well as whether or not contractual rights exist. If they do, what happens when a consumer sustains injury from the "free" gift? It has been contended (Kanyip 2005) that where one willingly accepts a free gift in a promotion, it becomes the property of the donee without the necessity for further action. But the relevant question is whether in such circumstances, the gift is actually free, given that the consideration for it can be said to exist. The purchase of another item is the condition precedent to obtaining the gift, thus, it is not free. With regard to whether the free gift forms a part and parcel of the contract the case of *Esso Petroleum Ltd v. Customs and Excise(*IALL 1976*)* is instructive.

In that case, a number of coins bearing the likeness of members of the English football team which went to Mexico in 1970 to play the World Cup Competition were produced and sold to retailers for three pounds per

thousand. The retailers in turn offered a coin "free" to consumers who purchased at least four gallons of petrol. The plaintiff retailers were subsequently assessed for purchase tax on the distribution of the coins. The question which arose for determination by the House of Lords was whether or not the coins were being "sold" for tax purposes. Pennycuick, J. held that the transactions were within the description of the relevant statute and that the word 'sale' may, in some circumstances acquire a wider meaning than its ordinary contractual meaning. On appeal to the Court of Appeal, the decision was overruled. On further appeal to the House of Lords, it was held, by a majority of three to two, that the coins were not supplied under a contract of sale because the consideration for the coins was not money payment but an undertaking to enter into a collateral contract to purchase petrol.

Following this line of argument, it means that the "free" gift was received by the consumer without furnishing any consideration for it. But Atiyah (Atiyah 1976) has argued that to get the coin, the consumer was obliged to buy four gallons of petrol. And to buy four gallons of petrol means to pay cash consideration, which means that to get the coin, the buyer had to pay for petrol. Therefore, the payment goes not only to feed the contract for the sale of the four gallons of petrol but the coin as well. It does not therefore, make sense to assume that the coin is not an integral part of the contract for the sale of petrol. It has been argued further, (AII 1976) that "too shortsighted a view is taken by stressing that the price of the petrol was unaffected by the promotion. Esso would plainly expect their outlay to be covered by increased sales and to that extent, the price of the fuel would be the price of fuel and coin." The House of Lords judgment that the consideration supports the four gallons of petrol and not the coin goes to show that promotional offers will generally not be governed by the Sale of Goods Law. Consequently, the strict obligations imposed on the seller by the Sale of Goods Law (Sale of Goods Act 1993) will be inapplicable to the benefit of the consumer where he is injured by the promotional article. At best, the consumer can only make his case in negligence under the rule in *Donoghue v. Stevenson (*Supra*).* This being the case, the consumer has an uphill task to establish the fault of the defendant, coupled with the other hedging devices which are often raised in actions based on the tort of negligence.

It is hereby preferred that given the pitfalls that await the consumer in contract and tort, it can be deduced from the above analysis that the consumer enters a sales promotion at his own risk and the norm is *caveat emptor*. Yet, if one considers the fact that a business would hardly operate at a loss, it can safely be assumed that the manufacturer would have subsumed the price of the "free" gift into the price of the article on sale. This means therefore that the idea of a "free" gift would often be a fiction. The House of Lords did not address their mind to this likelihood in the *Esso Petroleum's case.* The decision arrived at in the case works injustice to the innocent consumer and the advertiser ought to take responsibility for any effects in his promotional article which cause injury to the consumer. If the courts will not depart from this position, consumers are forewarned to be wary of commercial enterprises which cajole the public into purchases with promise of "free" gifts because the enterprises stand to take the benefit of increased sales, but not the attendant risks that go with it.

Regulations of Sales Promotion

Of all the mechanics of consumer protection in existence in Nigeria, none regulates sales promotions. The reason could be that since sales promotions are a form of advertising, therefore their regulation is implicit in schemes that regulate advertising in general. But it has been pointed out (Kanyip, op.cit., p.248) that sales promotions have distinct characteristics and peculiarities which merit a separate treatment if the protection of the consumer is to be meaningful. The drawbacks of submitting sales promotions in advertising in general lie in the fact that these peculiarities are lost sight of and hence not provided for. It is the Code of Advertising of the Advertising Practitioners' Council of Nigeria (APCON) (Duru 2010) which contains provisions regulating sales promotions. The Code prohibits certain activities in relation to sales promotions. For instance, Article 3(6) provides that gift items promoting alcoholic beverages must not be directed at children and pregnant women as well as at sportsmen and women. The aim of this provision could be to discourage the consumption of alcoholic beverages by these classes of persons, (but not prohibited to all consumers in general), given the attendant dangers to their health and professions respectively. However, it must be admitted that it is different to adhere to this rule. Except in cases of direct personal selling, sales promotions are often propagated *via* the mass media and available for public consumption.

However, the APCON Code has attempted to limit the time for airing such advertisements to these classes of persons in Parts 3, 4 and 9 of the Act which prohibits advertisement of alcoholic beverages having alcoholic content of 5 per cent and below before 8pm and 9.45pm for those having about 6 percent. It is noted that no provision has been written concerning beverages having alcoholic content of between 5.5 and 5.9 per cent. Does this mean that the advertisement of beverages containing these amounts of alcohol can be publicize regardless of the time or day? Second is the issue of gift items, since the Act otherwise permits that free gifts can be directed to all other consumers falling outside the prohibited classes. The *Esso Petroleum Case* has shown the dangers associated with promotional gift items. Third, the effectiveness of the limitation periods for airing the

advertisements depend largely on their implementation, both by parents and adults who must ensure that children and others affected retire for the day before these time frames and more importantly, by the media organs themselves. But whether this can always be achieved remains a matter for conjecture.

The second prohibition relates to advertisement which encourages customers of other banks to switch over through competitions, lotteries and other such promotional techniques. Advertisers offering better incentives than competitors must ensure that they supply the public with all relevant facts necessary for a proper assessment of their claims. The anxiety which often surrounds sales promotions compromises the average consumer's ability to exercise a free and independent will in the market place based on his economic means. Moreover, games and competitions essentially require the consumer to spend money in circumstances where he is not certain to win the prize at stake. This seems to amount to a form of gambling, a factor which motivated the UK to consider games and competitions as illegal lotteries.

It seems that the average consumer will fare better if games and competitions as a form of sales promotions are outlawed in Nigeria. It is trite to note that the control of advertisements is by and large, a measure which should ensure that the consumer does not fall prey to advertising which may adversely affect his/her socio-economic and psychological wellbeing, or which may result in the purchase of goods or the use of services which could turn out to be defective. Where a consumer purchases goods or services, whether pursuant to an advertisement or on his own motion and the goods or services turn out to be defective in one way or another, the liability of the manufacturer or service provider could lie either in contract, tort or criminal law.

The telecommunications industry regulator – the NCC has expressed concern over the increasing promotional activities and their exploitation of the consumers. In Nigeria, promos by GSM operators surely qualify as lottery. But is there any contribution to national development from the fall-out of these promos? It is hardly perceptible in the public domain. Such degree of insignificance is an incontrovertible indication that there is something wrong somewhere.

All over the world, for years, lotteries have been used by government to further developmental initiatives. In American Colonies, lotteries were authorized by colonial legislatures to raise funds for such public purposes such as paving of streets, the construction of wharves and erection of churches. Lotteries were also used to finance buildings for Yale and Harvard Colleges in 1750 and 1772. Proceeds from lotteries also built the Great Walls of China.

Today, countries have continued using this strategy to raise funds. For instance, the Gamlot National Lottery makes well over 24 billion pounds annually for Great Britain and it footed 80 percent of the bill for the 2012 London Olympic Games. In Nigeria, the public is usually short-changed. There is also usually much bickering over who should regulate the 'promos'. If the NCC is to show any concern about the promos run by GSM operators, a good recourse will be to direct this development to the National Lottery Regulatory Commission (NLRC) which was set up on March 30, 2005. It is a legitimate Agency responsible for all lottery matters in the country and the law setting up the NLRC also states that *50 percent* of all monies realized from such lotteries must go back to the consumers, while *20 percent* must be sent to the Lottery Trust Fund, while the remaining 30 per cent goes to the operators to cover cost and profit. This has largely not been complied with.

The 55th edition of the Telecoms Consumer Parliament organized by the NCC in Lagos in March 2010 with the theme "problems and prospects of ICT promotions", espoused the dilemma of consumers over their exploitation through careless sales promotions (Aginam, Elebeke 2010) Osa Owadiae (Owadiae 2010) maintains that there has to be a line between lottery, reward and sales promotions being run by various service providers in the telecom market. He noted further, that consumers have the right to be protected against fraudulent, misleading and deceitful information, advertisements or promos, and that on no account should telecoms operators claim that they are rewarding customers in the name of promo whereas they are ripping them off. Thus, operators should not tell customers they are in fact rewarding them when they are in fact doing sales. A reward scheme should not have entry requirements. A customer need not be told to load certain amount of money with a certain code to qualify for a particular scheme. What many service providers are doing is a game of chance.

Supporting this assertion, Ernest Ndukwe has urged operators to draw a line between sales promotions and reward schemes which every consumer is entitled to without necessarily paying anything to get something. There must be a symbiosis between the operator and the consumer. The consumer does not need to pay to be rewarded. The reward schemes must be transparent and should not attract an extra burden on the consumer. The scheme should not have entry requirement. It has to be part of the loyalty scheme.

The multiple regulations may be a source of confusion. NCC is to regulate service provision and not sales promotions but the NCC, CPC, Lottery Commission need to clearly determine who regulates what. Operators should have a code that can allow consumers not to receive unsolicited SMSs. Telecommunications regulators should no longer look at every promo as a reward scheme designed to make millionaires out of subscribers. It can therefore be said that the NCC has not done much in controlling the exploitation of consumers through sales promotion, games and other promotional strategies.

The U.S Telephone Consumer Protection Act, 1991

The Telephone Consumer Protection Act (TCPA) has become a potent issue of discourse around the world, as there has arisen a plethora of lawsuits alleging violation of the TCPA *vis-à-vis* consumers' rights and protection in the telecommunications sector. This is so especially as statutory damages may be awarded under the TCPA for each violation and without any cap, such lawsuits of course threatens collectors with potentially ruinous liability through class action litigation (Foreman v. Data transfer 1995).

The Telephone Consumer Protection Act of 1991 (TCPA) was passed by the United States Congress in 1991 and signed into law by President George H. W. Bush as Public Law 102-243. It amended the Communications Act of 1934. The TCPA is codified as 47 U.S.C 227. The TCPA restricts telephone solicitations (i.e., telemarketing) and the use of automated telephone equipment. It limits the use of automatic dialing systems, artificial or pre-recorded voice messages, SMS test messages, and fax machines. It also specified several technical requirements for fax machines, auto dialers, and voice messaging system- principally with provisions requiring identification and contact information of the entity using the device to be contained in the message.

In the late 1980s, spurred by advances in technology, the telemarketing industry began aggressively seeking out consumers by the hundreds of thousands. Companies began using machines that automatically dialed consumers and delivered pre-recorded messages ("rebocalls"). With the fax machine, marketers could send tens of thousands of unsolicited advertisements ("junk fax") each week to consumers across the nation. Consumers and business became overwhelmed with unsolicited telemarketing calls and advertisements. Calls for action grew louder. States enacted laws, but could not stem the interstate malpractices of telemarketers. After reviewing and debating ten different pieces of legislation, Congress enacted the Telephone Consumer Protection Act of 1991 ("TCPA").

The TCPA was born out of abusive telemarking practices, made more intrusive by advances in technology. Originally, the TCPA imposed restrictions on the use of telephones for unsolicited advertising by telephone and fax (U.S.C 227). The TCPA has since been expanded and adapted by administrative rules, judicial interpretation, and Congressional amendments. Since 1991, Congress has enacted other statutes relevant to the discussion of the TCPA. Despite common justifications and purpose, congress determined that certain media would be regulated differently. For example, the TCPA originally banned the practice of sending "junk fax". The justification for the ban was that the practice shifted the cost of advertising from the advertiser to the recipient. However, the practice of sending unsolicited commercial e-mails, which also shifts the cost of advertising from the advertiser to the recipient, was not banned but instead was regulated with certain "identification" requirements. The original purpose of the TCPA was to regulate certain uses of technology that are abusive, invasive, and potentially dangerous. The TCPA effectively regulates these abuses by prohibiting certain technologies altogether, rather than focusing specifically on the content of the messages being delivered. The expansion of the TCPA into areas outside telemarketing and new technologies over the years is consistent with its original purpose.

Private parties are largely responsible for the enforcement of the TCPA, and have done so primarily through the class action mechanism. While this has drawn some criticism because of the provision of high statutory damages, the threat of class action has provided a significant deterrent to violators. Historically, the government has only enforced the TCPA to a limited extent, yet the statute has been relatively successful in reducing the conduct it was enacted to regulate. Technology is again rapidly changing and a number of trends are emerging. The number of entities that are operating in intentional disregard of the TCPA are growing, and they are using technology to help evade detection and enforcement. According to the Federal Trade Commission ("FTC"), about 59% (www.gpoaccess.gov.castaccesses 15/8/2017) of phone spams cannot be traced or blocked because the phone calls are routed through "a web of automatic dialers, caller ID spoofing and voice-over-internet protocols". Although the traditional scheme of TCPA enforcement, with its strong reliance on the private right of action, has been successful in the past, two main issues are becoming clear. The private right of action is limited to both incentivizing lawsuits against and deterring the actions of, intentional violators; and FCC

enforcement is limited by its slow process. In order for the TCPA to stay relevant after more than twenty years, certain modifications and improvements can be made. Improving government enforcement efforts and increasing the uniformity of interpreting the statute, the FTC's recent contest for a technical solution to robocalls is necessary, and should be followed with respect to other types of media currently exposed to unsolicited commercial messages such as text messages and e-mails. In order for the TCPA to continue to remain relevant going forward, it is necessary to increase government enforcement of the TCPA by providing State Attorneys General with a larger incentive to bring TCPA cases, and empowering the FTC to bring suit under the TCPA: Increase uniformity of application of the TCPA by encouraging more frequent and quicker FCC rulemaking procedures.

The Telephone Consumer Protection Act of 1991 continues to protect cell phones by requiring prior express consent for any communication (call or text) made to a cell phone; Place a time limit on the Junk Fax Established Business Relationship; Create incentives for fax broadcasting companies to determine whether the faxes they are sending on behalf of clients are in violation of the TCPA; Rebuff efforts to remove or other modify the private right of action; and Place additional restriction on entities that enable caller ID manipulation. Furthermore, the Telephone Consumer Protection Act TCPA creates a private right of action for consumers who are injured by violations of the TCPA. It has been a source of significant class action activity in recent years as businesses seek to navigate the law and plaintiff' lawyers seek to exploit its many ambiguities.

Encouraged by uncapped aggregate damages, plaintiff's lawyers have seized on this opportunity and have taken to targeting any arguable infraction in the hope of reaching settlements with businesses. Last year, we saw a huge spike in TCPA-related class action. Settlements have ranged anywhere from $6 million to upwards of $70 million and have involved companies in a wide variety of industries, such as banking, financial services, pharmacies, fitness services and medical device manufacturing (http://www.gpoaccess.gov.accessed in 18th Aug. 2017). The TCPA, like any other legislative enactments, is not without blemishes or wrinkles. Inevitably, there are obvious Achilles heels in its provisions. There is no gainsaying the fact that the potency of an enactment is not in its grandiloquence or verbosity, rather it is in its interpretation, compliance and enforceability. In 2016, TCPA lawsuits remained one of the most filed types of class actions.

The U.S. TCPA, 1991 & the Nigerian Telecommunications Environment

The utility of the provisions of the TCPA cannot be over emphasized in relation to our Nigerian Telecommunication environment. Promotional adverts in the Nigerian Telecoms Industry have become prevalent with the advent of the Global Systems of Mobile Telecommunications (GSM). Telecom companies promise subscribers various items and gifts with a view to out-do each other.

Most of the time, a subscriber receives an unsolicited commercial call, or a text message at odd hours trying to sell a product or urging subscribers to participate in a promotion or a text message offering many products and services. All of these unsolicited commercial and nuisance calls and messages can be very frustrating and annoying.

The relationship between a subscriber and a telecoms operator is contractual. The case of *Njikonye v MTN Nig*. *Telecommunications* Ltd (NWLR 2OO8), is relevant in this regard. Once a subscriber purchases a SIM Pack from any of the telecoms operators, a contractual relationship is established. The contractual relationship between the subscriber and the telecoms operators is subject to the terms and conditions contained in the SIM pack issued to the subscriber at the point of purchase. The subscriber, through the regular purchase of airtime and calls, keeps the above contractual relationship alive. The said telecoms operator, by crediting the value of the airtime so purchased to the SIM card of the subscriber, also acknowledges the existence of the contractual relationship. Section 3 (1) Nigerian Communications Act,(LFN, 2004) established the Nigerian Communications Commissions (hereinafter the "NCC") with the responsibility of operating licenses, *etc*. The protection and promotion of the interests of consumers against unfair practices, including unfair advertisement or promotion by telecoms operators, is one of the core functions of the Commission. The Nigerian Communication Act and the Nigerian Communications Enforcement Processes etc regulations 2005 empowered the NCC to make guidelines for minimum standard and requirements in respect of advertisements and promotions of products and services by the telecoms operators in Nigeria (Article 8, 2005).

Pursuant to the above regulatory powers, the NCC made and published the Nigerian Communication Commission Guidelines on Advertisements and Promotions (hereinafter referred to as "the Guidelines") (Article 4, 2005) Article 2 of the Guidelines defined advertisement thus: "Advertisement" means any message, the

content of which is controlled directly or indirectly by the advertiser, expressed in any language and communicated in any medium with the intent to influence their choice, opinion or behaviour." While promotion is defined in the said guideline as:

> *"…any message, the content of which is controlled directly or indirectly by the advertiser, expressed in any language and communicated in any medium with the intent of influence their choice, opinion or behavior in order to receive a reward or benefit."*

It is clear from the above definitions that the contents and forms of an advertisement and promotion are solely for the telecoms operators carrying out the promotional advertisement. However, in line with the regulatory and supervisory powers of the NCC in prescribing minimum standards and requirements for promotional advertisements in the Nigerian telecoms industry, article 3 of the guidelines lays down the minimum standards and requirements of promotions and advertisements that the telecoms operators must comply with. These minimum standards and requirements are made mandatory and must be complied with at all times if the promotional advertisement must be approved by the NCC.

The minimum standards and requirements oblige operators to attach detailed reports of the advertisement clearly specifying the good and/or services and the target consumers. A telecoms operator wishing to make a promotional advertisement after complying with the minimum standards and requirements shall apply, attaching a detailed report of the promotion clearly specifying the goods and/or services and the target consumers to the NCC within seven days for approval before going public. The approval if granted must be registered with the Consumers Protection Council (CPC) within three days of the launch of the promotions in accordance with Article 4 (v) of the Guidelines.

The philosophy behind the above is to enable the NCC and the CPC prevent exploitation of consumers of the operators' products and services. The vending powers of the regulatory agencies are to prevent any abuse such operators may perpetrate on consumers and the general public. It is to enforce complete disclosure of information, free flow of truthful information and prevent unfair practices, fraud and misrepresentation about the prizes and goods to be won. The regulatory agencies must approve the contents of the advert before it is aired, published and advertised to the public.

However, in cases where operators wish to give out prizes ranging from cars, houses, aero planes, cash prizes, etc., the existence or availability of these prizes must be ascertained and verified by the NCC and the CPC before approval is granted. For example, for an advertised promotion promising subscribers a brand new aero plane to be approved and registered with the relevant government regulatory agencies, the necessary documentation must be exhibited to the application for approval. In the above example, the NCC and the CPC must see to the availability of the aero plane, or request for the production of contractual documentations between the telecoms operator involved in the promotion and the aviation company engaged to manufacture the aero plane. The specification, grade, nature, size, type and Operating capacity of the aero plane must be certain, and genuine efforts must be in place to produce and/or manufacture it. The NCC and the CPC must liaise with the Nigerian Civil Aviation Authority in this regard before approval and registration respectively because matters of aviation are within the statutory supervision and control of the NCCA. The above procedure is not always the case as all kinds of telecom promos are aired without the necessary approval and clearance from the NCC and CPC. The Advertising Practitioners Council of Nigeria Regulations, Procedures and Monitoring Regulations stipulate that: "All consumer promotions are required to be verified by the Advertising Standards Panel (ASP). When applications are made for the verification of any consumer promotion, the promotional items offered prospects in the promotions is/(are) to be assembled for the ASP'S verification, to ascertain that what is being promised consumers by the advertisers/promoters are actually on ground before approval is given to any promotion. This ensures that the consumers are not deceived." It is clear from the above quotation that the existence of the promotional items must be verifiable and certain. This is to prevent fraudulent, dishonest and untrue promotional advertisements.

Consumers of telecoms services are entitled to the right to be given the facts needed to make an informed choice, the right to be protected against dishonest or misleading advertisement and the right to get truthful and honest information about the promotional items. This is aimed at preventing fraudulent and unwholesome practices by the advertisers/promoters of these services. A subscriber winner in an advertised telecoms promo is entitled to sue for the "prize" in the event that the "promoter" fails, refuses and neglects to hand over the "prize" to the winner(s). The subscriber winner can base his action on breach of contract and enforce performance on the part of the "promoter". The promotional advert is tantamount to an offer made to the whole world and acceptance of the offer is participating in the promo, see *Carlill v. Carbolic Smoke Ball Company*. It should be noted that these promotional advertisements are also made vide unsolicited telemarketing

calls and text messages to subscribers urging them to participate in a telecoms promotional advertisements. These uncontrolled unsolicited telemarketing calls and text messages have been a source of nuisance to subscriber as they constitute of privacy. A subscriber or an owner of a telephone is entitled to his privacy, and receiving unsolicited commercial calls, text messages, or nuisance marketing calls or promotional calls at odd hours is tantamount to a violation of this right. A right to privacy carries with it a right not to be unduly and unnecessarily disturbed. In the United States of America, the Telephone Consumer Protection Act of 1991 (TCPA) which was passed in 1991 restricts telephone marketing or solicitations. The TCPA 1991 prohibits telemarketers from unsolicited commercial calls and/or text messages if the recipient asked not to be called or sent a text message. In the event of violation of the TCPA, a subscriber may sue for damages for violation and may also seek an injunction against the telemarketer(s). The constitutionality of the TCPA was upheld in the case of *Moser v. FCC* and also in the case of *Destination Ventures Ltd. v. FCC (*Cir.1995*)*.

In the USA, unsolicited commercial calls and text messages are unlawful and a breach of the law. In this regard, anybody whose right to privacy has been violated by unsolicited commercial calls or text messages ¡s entitled to sue under Section 227 (3) (a), (b), (c). (Pubic Law No. 102-243; 105-227). In India, the Telecom Regulatory Authority of India (TRAI), under the Telecom Unsolicited Commercial Communications (Regulations 2007) amended by the Telecom Unsolicited Commercial Communications, (Second Amendment) Regulations, 2008, (Regulations, No. 3 of 2008) barred unsolicited commercial calls and text messages between 9pm and 9am and has also barred Tele-marketing firms from making commercial calls or sending commercial text messages to Subscribers who had registered their numbers with a "national do not call" (NDC) list. The India Regulatory Authority imposes substantial fines on defaulters.

However, in Nigeria, there are no specific regulatory guidelines in respect of unsolicited commercial calls and texts messages and Tele-Marketers and Telecom Providers bombard subscribers with unsolicited commercial and nuisance calls and text messages even at odd hours. These calls and text messages, as stated earlier are annoying and frustrating due to their frequency and timing.

In the United Kingdom, companies and organizations are permitted by law to make live marketing calls to customers and would-be-customers. However, such companies and organizations cannot make such live marketing calls if the customer had previously warned against such calls or the customer registers his number with the Telephone Preference Service (TPS) or Corporate Telephone Preference Service (CTPS).

The issue of unsolicited calls and text messages is not peculiar to Nigeria. In the US, the Telephone Consumer Protection Act of 1991 (TCPA) is the law that restricts telemarketing (telephone solicitation) and the use of automated telephone equipment. The TCPA also limits the use of automatic dialing systems, artificial or pre-recorded voice messages, SMS text messages, and fax machines. The TCPA further makes it imperative that the prior express consent of the recipient (customer) should be sought before sending any of such messages.

Under the TCPA, the Federal Communications Commission (FCC) plays a crucial role in helping consumers stop unwanted calls and text messages. FCC rules under TCPA requires anyone making a telephone solicitation call to your home to provide his or her name, the name of the person or entity on whose behalf the call is being made, and a telephone number or address at which that person or entity can be contacted. It also prohibits telephone solicitation calls to your home before 8 am or after 9 pm and requires telemarketers to comply immediately with any do-not-call request you make during a call.

Even though the TCPA in the US has come under some scrutiny before the US courts as to the essence of the Act in relation to the rights of consumers ¡t has nonetheless imposed some form of restrictions on unsolicited text messages and phone calls. One of such cases before the United States District Court for the Northern District of Illinois, involving Capital One Financial Corporation and three (3) collection agencies where the companies entered into a settlement agreement to pay the sum of $75.5million in order to put to an end a consolidated class action law suit against them in an allegation that the companies used an automated dialer to call customers' cell phones without their consent and in violation of the TCPA. The United State National Law Review in August 2014 reported this case as one of the largest proposed cash settlements under the TCPA. In another case of *Destination Ventures Ltd. v. FCC*, (Cir. 1995) where the United States Court of Appeal for the Ninth Circuit effectively held that the restrictions imposed in the TCPA were constitutional.

In the US, the law and decided cases indicate that one can say there is a system in place to checkmate violations of consumer rights but the same cannot be said of in Nigeria. In Nigeria, the Consumers' Protection Council Act of 1992 which is similar to the TCPA apparently appears not to address the issue of unsolicited phone calls and text messages and the rights of consumers flowing therefrom. The CPC Act is not a specific legislation on this subject like the TCPA. The operational phrase to note here is 'consent of the consumer'. It

follows therefore that a consumer who subscribes to a mobile network service should as a basic principle of service contract determine how and the kind of service he would prefer to receive throughout the pendency of the said contract.

In other words, telemarketing should be conducted with any "call" or "do not call" preferences recorded by the consumer at the time of entering into the contract for service, or where no preference had been indicated from the onset a notice requesting consent of the consumer before such messages are sent or phone calls made should be sent. Given the dearth of specific laws and decided cases on this subject, the task facing the NCC might prove cumbersome, it is thus foreseeable that given the cases in the US, consumers here in Nigeria might decide to pursue their own rights in court rather than wait on the NCC for sanctions that may never come. The Courts would then begin to have consumer rights where cases are instituted against these MNOs and perhaps a class action rather than an individual suing might be preferable.

Domesticating the U.S TCPA Act, 1991

The desirability and urgent necessity of the adoption of the Telephone Consumer Protection Act of the US.A, 19991 in Nigeria far outweighs its undesirability in view of the oppressive and vexatious unsolicited communications we have been made to bear. This has caused great displeasure on the parts of the unfortunate consumer. This is regrettable in that consumers are made to inadvertently subscribe for offers not intended for since they are induced to press one code or the other by way of advertisement. It comes in form of a beast that seems to respect no one. Both the rich and the poor in the country suffer from its pangs, yet the menace of unsolicited text messages has refused to be tamed, as series of regulatory efforts fail to end the suffering. And as those behind the messages rejected the regulator's attempt to bring them under control, there seems to be no hope that this suffering by the mass of telecom customers will go away anytime soon (TCPA Act, 1991). However there is no doubt as to the achievements recorded in Nigeria since the liberalization episode of our telecom sector. In Nigeria the telecommunications industry has experienced telecoms revolution. The tremendous growth that saw the country moving from less than half a million connected lines in year 2000 to now over 150 million, has made the country become a reference point for telecommunications development in Sub-Saharan Africa. Of course, the story of the successful telecom revolution is has indeed affected lives of the people and the nation's economy positively. Aside making communications easier and cheaper than ever before, millions of jobs have been created through the telecom sector. And this is capped by robust and increasing contributions to the country's Gross Domestic Product (GDP) every year.

These achievements become more profound, when placed side by side with the realities of the pre liberalization of Nigeria. This was a country where international mobile operators were afraid to do business mainly due to the reports commissioned to telecom research agencies and the global financial institutions like the World Bank and the International Monetary Fund (IMF) which had forecast that in the Nigerian telecom sector, the average Nigerian cannot afford to own a mobile phone as the per capita income of the citizens was below the internationally recognized average and the daily income was below the $100 mark.

Based on this reports, the telecom research agencies had forecast that it would take 12 months for any operator to reach 100,000 subscribers, 3 years to connect 300,000 lines and 5 years to hit the half a million mark subscription. This conservative report peddled to mobile operators about the market in Nigeria and other emerging markets put off many operators that would have entered the GSM clime. However, against the odds, the course of Nigeria's telecom sector changed in January 2001 with the auction for Global System for Mobile Communications (GSM). This move liberalized the sector, bringing in mobile operators like MTN Nigeria, Econet Wireless Nigeria (Now Airtel), the comatose MTEL), and Globacom to provide digital mobile services. The GSM licensees companies paid $285 million each to obtain the Digital Mobile License (DML). They were later in 2008 joined by Etisalat, which though it came last, could not be described as the least as it garnered huge subscribers within a very short period of its entry into the market, which of course, proved the IMF forecast totally wrong. The telecom auction which led to a revolution brought in a liberalized sector, striping NITEL of its monopoly and making the private telephone operators to sit up. The success of the licensing process attracted international praise from as far as the International Telecommunications Union (JEW) and Commonwealth Telecommunications Union (CTO). Thereafter, Nigeria has not remained the same in terms of telecommunication; the figures of connected lines continue to grow, even as every other sector of the nation's economy keys into the mobile telephony success to improve their respective sectors. The telecoms have helped to promote mobile banking, e-commerce and virtually all businesses in the country. Interestingly, along the telecoms growth line sprang a sub-sector known as the Value Added Services. It all began with mobile number operators' efforts to generate more revenue from their none core services and it began to evolve from simple text

messaging (SMS), to advanced functions such as mobile entertainment caller ring back tone, push-to-talk, payments, email, instant messaging and m-Commerce, among others. Value added services are supplied either in-house by the mobile network operators themselves or by a third-party service provider also known as content providers.

Thousands of short codes had been activated by the telecoms networks to provide all sorts of services on their own and while also working with licensed VAS providers to provide contents for the use of the short codes. More worrisome is the new trend of telcos and VAS providers forcing their products and services on consumers for a fee deducted from their airtime. These unwanted services and products were enumerated as unsubscribed caller tune, SMS, fashion, love, health tips and airtime borrowing among others.

On realizing that the use of the short codes is being abused, the industry regulator, Nigerian Communications Commission (NCC) had assumed the responsibility of licensing the codes. Unfortunately, that has not stopped the abuse, rather, it's getting worse and the consumers have been at the receiving end of unsolicited messages, fraudulent deduction of consumers' credit for VAS not subscribed for, among others. And subscribers are asking if the Telcos and their third parties are giving 'value' or 'pain' services?

Indeed, the NCC just recently announced that it has received an avalanche of complaints from the public in respect of service providers who use short codes assigned for Value Added Services to perpetuate fraud, the menace of unsolicited text messages that flood customers' phones, fake bank credit alerts, anti-competitive activities *etc.* This was why the Commission recently announced plans to commence regulation of the VAS segment, "consequent upon the complaints and the fact that the Value Added Services industry is beginning to approach maturity, the Commission is of the opinion that it is time to regulate the industry in order to protect, balance and reconcile stakeholders' interests" the Commission said. Unfortunately, that has not gone down well with the telecom operators as well as their VAS content providers counterparts, who rubbished the entire regulatory framework designed by the regulator and would rather embrace 'self-regulation' which is unable to stop the insanity.

Since April when the service providers kicked against the draft regulation, the issue of VAS regulation has become stalemated and it does seem the regulator is not bold enough to go ahead with its planned regulation. Rather, it announced the enforcement of a 'Do Not Disturb' code on the networks as a way of curbing the menace of unsolicited text messages. Unfortunately, that has not really assuage the pains of the consumers, who, have opted out of unsolicited messages through the '2442' code, but are still getting unsolicited messages from their network providers and still experiencing illegal deductions.

Before the Nigerian Communications Commission (NCC), the telecom regulator could come up with a regulatory framework for the VAS sector; it was convinced that bringing the service providers under regulation would bring sanity; end fraudulent activities and bring reprieve to the consumer who has been at the receiving end of all atrocities being committed through VAS platforms. But the service providers did not see it that way, and would rather prefer the *status quo* while believing that a self-cleansing, which had failed to lessen the burden of the consumers would suffice for them.

Recently, the regulator had held a consultative forum in Lagos to intimate the value added service providers, which included the MNOs and the core VAS (www.vanguardng.com August 17, 2016) providers, with the draft regulation and also get their inputs. But rather than make inputs or seek adjustments in the regulatory framework, the service providers requested for a stand down of the regulation. They claimed it would stifle innovation and lead to loss of jobs.

While a few of the operators had registered their displeasure over some provisions of the regulation through comments made on the regulator's portal before the interactive forum, the meeting afforded them the opportunity to say it to the regulator's face and they minced no words in doing that. According to them, the regulation does not recognize the current category of players in the sector that should benefit from the policy.

Specifically, Mr. Chika Nwobi, the Managing Director of M-Tech Nigeria Plc, noted that the objective of the regulator in coming up with the regulation in the first place, which is to address the problem of unsolicited text messages, was wrong. "Why should that lead to the creation of a new structure for the sector? Besides, the issue of unsolicited message is a technical problem that requires technical solution, not regulation" he said.

But the National Coordinator of Wireless Application Service Providers of Nigeria (WASPAN), Mr Chijioke Ezeh opined that, it was not about the local VAS operators but about the thousands of Nigerians that would lose their jobs if the regulation, which he described as favouring foreign players, comes into effect. "We (VAS operators) employ about 9000 people directly and about 85,000 indirectly, what we need is protection, not

a regulation that will push us out of operation". According to him, the regulation would also stifle innovation in the country. But Eze did not end his comment without making one critical request: "The draft framework should be set aside and let the stakeholders sit and brainstorm for better solutions". Other players were also of the opinion that the regulator should put the regulation on hold and allow the players continue with their efforts at addressing the industry challenges.

Meanwhile in a joint statement presented by its Chairman, Engr. Gbenga Adebayo, the Association of Licensed Telecom Operators of Nigeria, ALTON, which is the umbrella body of all the MNOs, also expressed concerns over the new policy framework for VAS. According to the Association, the NCC had come up with the new regulation to address the complaints from the public, prevent "service users" from using short codes to perpetuate fraud and address the menace of unsolicited text messages that flood customers' phones. He said:

> "ALTON members are more severely impacted by the problems listed above than any other group of stakeholders in the industry. Why? For anything that affects our customers' satisfaction affects the sustainability of our investments. It affects our ability to attract new investments required to meet growth objectives. It affects the reputation of operators and further affects our goodwill and it affects the future of our industry. We are of full accord with the Commission that these problems must be solved as quickly and efficiently as possible. Therefore, the NCC can count on our 100% support on this."

While listing some of the efforts already put in place to address the problem, ALTON frowned at the NCC regulation, saying, it has "made very sweeping provisions, with very severe implications for overall industry sustainability. This makes us wonder what the true objectives of the Guidelines are." For instance, on the new structure being proposed, ALTON said: "A new industry stricture is being proposed. The Commission has however not done any comprehensive market study that we are aware of. This is necessary as mandatory first step to determine what faults there are in the market and how to intervene. In any case we find no correlation between the proposed market structure and the principal objectives of the Guidelines, which is to address issues of abuse of customer rights."

On restriction of MNOs from providing VAS, the Association said: "Contrary to the terms of our operating licenses and the Unified Access Licensing Framework, the Guidelines proposes to bar operators from providing Value Added Services and to limit them to caller ring back tones and two other VAS wish to state that this is most unacceptable to our members."

These submissions by the service providers seemingly dead locked the regulatory process started by the NCC. Whether the regulator has gone back to the drawing board to fashion out another regulatory framework, adjust the existing framework to protect the interest of the VAS providers or stand down regulation completely, is yet to be ascertained.

WAY FORWARD

VAS Regulation: The Choice Before NCC

The Nigerian Communications Commission pride itself as a consumer centric regulator and even in that consumer centrism, it has succeeded in growing the telecom sector for the benefit of both the consumers and the operators/investors, who continue to enjoy huge returns on investment. With that knowledge, it is not expected that it would 'regulate to kill' as being claimed by VAS providers. Of course, failure to regulate the VAS sector would mean that the Commission is shying away from its responsibility of protecting the consumers, more so, when the Nigerian Communications Act (NCA) confers on it, the responsibility to control and regulate other related services offered in addition to the basic voice communications, which include data services, internet and other value added services.

Interestingly, the NCC commenced the process of regulating the VAS sector since 2014, when it held an interactive session with the operators and VAS providers in Lagos over the lingering problem of unsolicited messages and calls. The Commission also pointed out it discovered a number of irregularities in the VAS segment, where a number of unlicensed are colluding with the MNOs to offer services. "Following the compliance monitoring activities carried out on Value Added Service licensees from January and December, 2013, the Commission directed all the network operators to disconnect all unlicensed VAS providers. However, subsequent monitoring exercise carried out in March 2014 showed that mobile service providers still have some

unauthorized VAS Providers on their networks including MTN, Globacom, Airtel and Etisalat," the Commission had noted.

According to the NCC, the session was held with all stakeholders to present the Commission's findings of some unethical conducts in the VAS provision and chart a way forward in the VAS segment of the Nigerian telecoms industry. Part of agreements at the session was to have a proper regulation of VAS business to bring sanity to the segment. And that gave birth to the regulatory framework, which was bluntly rejected by the service providers. Obviously in search of temporary reprieve, the regulator had to begin the enforcement of 'Do Not Disturb' code. Although the code has been in existence before then, NCC had not deemed it necessary to enforce its implementation, until subscribers threatened to seek redress in court. Again, the old existing DND code was not uniform and each operator had to introduce different codes on their networks for DND the facility, a situation that made it difficult for NCC to supervise, hence the introduction of unified code: 2442.

DND has failed

Unfortunately, the introduction of DND code has not stopped the shenanigans of the telcos and their VAS provider collaborators in unsolicited text messages. Two months after, instead of enforcing the code that would give the consumers freedom to opt out of all unsolicited messages, the regulator only to issued warning to the service providers as there was no compliance. In a warning statement issued in September, NCC's Director of Public Affairs, Tony Ojobo, had reiterated the regulatory agency's resolve to protect subscribers from the nuisance and irritations of unsolicited text messages and calls from mobile network operators (vanguard.ngr.com/2016/09/ncc-monitor-network, 2017).

Ojobo noted that inspite of earlier warnings to telecommunication service providers to activate their Do-Not-Disturb facility which gives subscribers the freedom to choose the messages they receive, the Commission was still inundated with complaints by subscribers of continuing text harassment by operators. The NCC spokesman explained that the direction mandated the operators to take immediate action which would allow subscribers to take informed and independent decisions on what messages to receive from the networks.

He observed that industry compliance did not seem to have matched the seriousness of the direction thus, compelling the commission to issue a final warning to the operators. According to Ojobo, the direction takes into cognizance the broad range of services, which include banking/insurance/financial products, real estate, education, health, consumer goods, automobiles, and communication, broadcasting/ entertainment/ IT, tourism/leisure, sports, religion, and directed the operators to give the necessary instructions and clarifications that will enable subscribers subscribe to a particular service/services or none at all.

Ojobo called on the service providers to comply with the directives as further complaints from the subscribers would be taken as serious infractions to a major regulatory intervention by the Commission New Ultimatum even when July 1, 2016 was the deadline given to the mobile network operators to compulsorily implement the DND code, as worrying as it was that the regulator had to issue warning two months after, that was not enough to deter the service providers who seem to have been blinded by the need to generate more revenue to see the need for compliance. Surprisingly, when it was expected to wield the big stick against the disobedient operators, the regulator again in November came up with another one week ultimatum for the telecom operators to comply with the directive of DND or face sanctions. A statement issued by Mr Tony Ojobo to that effect indicated that MTN, Airtel and others might face sanctions over Unsolicited Telemarketing for failing to comply with the NCC directive on the "Do Not Disturb" (DND) directive, issued to them. He said that: "13rn network operators risk severe sanctions by the commission. "The network operators are Airtel Network Ltd., MIN Nigeria, Globacom Nigeria, Smile Communication, Visafone Communications, Ntel, Etisalat, Multi links, Starcomms, Danjay Telecoms, Gamjitel Ltd. and Gicell wireless" He added: "they are however given another one-week ultimatum from Monday, Nov. 14, to remedy the situation or face the sanctions enshrined in the directive."

According to Ojobo, worried by the non-compliance by the operators occasioned by deluge of complaints by subscribers across Nigeria, the NCC inaugurated an eight-member committee to look into the matter. "After several meetings, including those it held with the network providers, it became necessary to issue the ultimatum to redress the menace of incessant unsolicited text messages and phone calls for telemarketing via the various networks." Ojobo added that the NCC had written to all 13 networks providers on whose networks it had received a series of complaints from subscribers

regarding the efficacy of the "Do Not Disturb" (DND) service. According to him, the commission has engaged mobile network operators on this subject. He said that NCC further directs that the phrase

"MTN generated SMS" referred to Part d of the duration issued to MIN and other network providers shall be taken to mean "messages and calls". "With respect to information on emergencies for example, national security, fire notifications on network maintenance programmes down times and notification regarding subscribers bundle usage and service renewals.

Other text messages and voice calls informing subscribers of new products and service offerings are not regarded as network generated and therefore regarded as "unsolicited marketing messages. "The NCC has therefore asked these network providers to ensure that information on the "Do Not Disturb" service should be disseminated after every revenue generating activity via the End of Call Notification (EOCN) for the period not less than 45 days within the hours of 8 a.m. to 8 p.m. daily from the receipt of the latest letter on the subject.

The operators were further admonished "to deploy this information through all their channels of communications, including websites, social media platforms, bill boards, flash messages, text messages, Interactive Voice Response Platform, radio jingles, newspapers advertisements and television commercials". Ojobo said that this notice served as a pre enforcement notice and failure to comply with the directives in furtherance of the direction of April 20 within seven days from Nov. 14, 2016 shall result in the imposition of appropriate sanctions. He also pointed out that that "the menace of unsolicited text messages has been a nightmare to millions of subscribers and the commission could no longer accept any excuses whatsoever from the network providers".

Obviously, the service providers are waiting to see if the regulator was indeed serious with its claim of ending unsolicited messages, having succeeded in blocking or suspending the attempt at regulating the VAS segment. But industry analysts have expressed concern that in as much as the Nigerian telecom regulator wants to maintain its consultative approach to regulations, it may be acting contrary to its mandates if it refuses to take the bold step to arrest the menace of unsolicited messages based on the opposition to regulation by the MNOs and the VAS providers.

The defense by operators to complaints of unsolicited text messages by subscribers, at the Consumer Parliaments, has always been that they were not responsible for those messages. Although that would sound ridiculous for the fact that some of those unsolicited messages bear the name of the MNOs and sometimes their reserved numbers, they usually blame it on some unknown spammers, who according to them are spamming the networks with their own messages.

And as mark of assurance to the consumers and the regulator, they are quick to add that they have introduced a 'filtering mechanism' to filter out those messages from the networks. On the other hand, they blame the regulator for licensing too many VAS content providers, who are pushing too many messages though their networks. But it is a known fact that as average revenue per user (ARPU) continues to drop from voice calls, the telcos are latching onto value added services to shore up their revenue. It is also a known fact that there are existing deals between the telcos and the VAS content providers who use the network to disseminate their messages, with revenue sharing arrangements.

Curiously, the VAS content providers also do not own up to the responsibilities for the messages passing through their networks, but are also quick to blame it on faceless, unidentified 'spammers'. According to them, the number of unsolicited messages received by subscribers is on the increase because of the increasing number of 'spammers' who are flooding the networks with messages. The umbrella body of all the VAS providers, Wireless Application Service Providers of Nigeria (WASPAN), has said: "Spamming remains economically viable because the abusers have no operating costs beyond the management of their mailing lists, and it is difficult to hold senders accountable for their mass mailings. The volume of unsolicited messages has become very high because the barrier to entry is low and spammers are numerous."

The question is: If these service providers believe there are some external 'unknown' forces spending these messages to consumers' phones, why would they go against a regulation that would sanitize the segment and bring every service providers under the purview of the regulator? Why would they want to remain unregulated?

In several countries of the world, telemarketing is subject to regulatory and legislative controls related to consumers' privacy and protection. The United States has restricted telemarketing at the federal level through

the enactment of the Telephone Consumer Protection Act of 1991 while many associations of telemarketers have codes of ethics and standards that members comply with.

In Canada, telemarketing is under strict regulation and it is being handled by the Canadian Radio-Television and Telecommunication Commission while in Australia, the practice is restricted by the Australian federal government and policed by the Austrian Communications and Media Authority. In Australia, telemarketing is also restricted by the government and enforced strictly by the Australian Communications and Media Authority. There is a law in the country that provides for a restriction in calling hours for both research and marketing calls. Specifically, the law stipulates that "a caller must not make, or cause to make a call that is not a research call, or attempt to make such a call, on weekday before 9 am; or a Saturday after 5 pm; or a Sunday or any of the public holidays."

Conclusion and Recommendations

Having analyzed the challenges of unsolicited advertisement by the use of automated dialing systems or pre recorders, the authors submit that the U.S TCPA Act 1991 should be adapted in Nigeria in the bid to exterminate this embarrassing menace that has bedeviled the telecommunications sector.

Furthermore, the National Assembly should expedite the passage of the Nigerian Telephone Consumers Protection Bill 2013 pending before the House of Representatives, so as to protect the privacy of consumers against unsolicited commercial calls and text messages.

The telephone companies should be required to provide easy to use and free services that enable consumers to block unwanted callers, especially rob calls. Also, effective and mandatory anti-Spoofing technology needs to be developed and adopted immediately.

We appreciate the sentiment behind Senator Nelson's introduction of Senate Bill 2558: the Spoofing Prevention Act of 2016. This bill is a good start in the battle to push for a solution to the telecom industries.

In addition, there should be a balance between protecting the interest of the subscribers and that of the telecom operators. The law should seek to provide an even playing field for the consumers and the telemarketing companies whose sole purpose is profit maximization.

More so, the proposed law should vest the jurisdiction to hear matters on this subject, not only on the Federal High Court, but also on the High Courts of the various States as .well as the inferior Courts of record. This is to avoid congestion of matters in the Federal High Court since litigation on telecommunication seems to be commonplace in our modern civilization.

Finally, the National Assembly should speed up the passage of the Nigerian Telephone Consumers Protection Bill 2013 pending before the House of Representatives, so as to protect the privacy of consumers against unsolicited commercial calls and text messages. In the alternative, the NCC should make guidelines regulating unsolicited commercial calls and text messages by telecom companies and Tele-Marketing in Nigeria.

References

* Dr. Jacob Otu Enyia, BSc., MBA, LL.B., B.L, LL.M., Ph.D. Senior lecturer faculty of law University of Calabar, Nigeria. Email: Jake.enyia@yahoo.com
* Thelma A. Abang, B.Sc., MSC., LL.B, is a Lecturer in Sociology Dept. University of Calabar.
G. A. Alabi, "Telecom in Nigeria", Africa Studies Center, Univ. of Pennsylvania, 2012.
A. Tooki, "A New Dimension to Nigeria's Telecom Revolution". 11 April, 2011.
Cap C25 LFN 2004
J. O. Enyia, "the Dynamics of Telecoms Industry Regulation in Nigeria: Perspectives on Consumer Protection" In the Dynamics of Engineering in the 21st century (Calabar Unical Press, 2014) p.168
www.mtnnigeria.net. Accessed 21/12/2017
Sallie Spilsbury, *Guide to Advertising and Sales Promotion Law* (London: Cavendish Publishing, 1998), p.167.
Ibid.
Daily Sun, July 16,2007, p.6.
B.B. Kanyip, *Consumer Protection Law, Theory and Policy* (Abuja: Rekon Books Limited, 2005) p.268.
[1976] IALL E.R. 177.
P. S. Atiyah, "Conceptual Construction", (1976) M. L. R. 335 – 336.
1 AII E.R. 117. 1976

See Sale of Goods Act. 1993ss. 12 – 15 dealing with obligations as to title, quality, merchantability and sample.
Supra. (such as proof of the existence of a duty of care, contributory negligence, voluntary assumption of risk and remoteness of damage).
Kanyip, op.cit., p.248.
S. Duru, "NCC and Promotions by GSM Operators" *The Nation*, Thurs., June 24, 2010, p. 20.
Ibid.
Ibid.
Ibid.
Ibid.
Ibid.
Ibid.
Ibid.
Ibid.
E. Aginam & E. Elebeke, "Tough Options for Telecom Operators over Promos", *Vanguard Newspaper*, 23 March, 2010, p.8.
Osa Owadiae is an Assistant Director, NLRC, during the 55th edition of TCP, Lagos, March 2010.
Ibid.
Foreman v. Data transfer, Inc.(Ed. Pa. 1995) 164 F.R.D. 400, 404-405.
47 U.S.C. 227.
http://www.gpoaccess.gov.castaccesses 15/8/17
http://www.gpoaccess.gov.accessed in 18th Aug. 2017
(2008) 9 NWLR (pt., 1092) 229
Cap N97 LFN, 2004
Article 8 (1) Nigerian Communication (Enforcement Processes) Regulation 2005
Article 4 (i) (iii) of the Guidelines; Section 8(2) of the Nigerian Communication (Enforcement Processes) Regulation 2005
(1893) Q. B. 256
Public law No. 102---, 105 227
45 F. 3d 970 (9th Cir.1995)
Pubic Law No. 102-243; 105-227
Regulations 2007 (4 of 2007)
No. 3 of 2008
46F.3d 54 (9th Cir. 1995)
The desirability and urgent necessity of the adoption of the Telephone Consumer Protection Act of the U.S.A, 1991
Recent meeting in Lagos www.vanguardng.com August 17, 2016 last accessed 5:45am 24 May 2017, www.Telecomdigest.com/Vas-operators, last accessed Guardiance.Ng/news.telecoms-operators-battle-ncc over Vas-market-regulation, last accessed.
Warning on DND www.vanguard.ngr.com/2016/09/ncc-monitor-network providers-unsolicited text messages, calls on 19 September 2019… 14th November, 2016, last accessed 6th May, 2017. 6a, premium Time: Nigeria: MTN, AIRTEL others get final warning over unsolicited messa