DUALE, OVIA & ALEX-ADEDIPE

Abuse of Dominance in Nigeria Broadcasting Industry: The DSTV Compulsory Licensing Case

www.doa-law.com

Abuse of Dominance in Nigeria Broadcasting Industry: The DSTV Compulsory Licensing Case

1. Introduction

In modern broadcasting, content is of paramount importance to consumers. This is particularly prominent in the world of pay television (**"Pay-TV"**), which relies on a subscription fee to be watched. Since premium content is a decisive factor for consumers to make purchasing/ subscription decisions, exclusive rights to premium content such as sports content is a vibrant area of interest for competition law. This is because industry players with established relationships and exclusive rights to premium content make it difficult for newer entrants to markets to gain access to content that appeals to consumers on acceptable commercial terms.

It is against this backdrop that the 6th edition of the Nigeria Broadcasting Code (the "**Code**") was launched on 4th August 2020. The Code was enacted by the Nigeria Broadcasting Commission (the "**NBC**") to prevent monopolistic and anti-competition tendencies on the part of the players in the broadcast industry and to ease conditions and circumstances of access to content, channels, and programs by industry players.[1]

The NBC Code and Nigerian Broadcasting Act set the legislative background for the decision of the Court of Appeal in the case of ***Metro Digital Limited v Multichoice Nigeria Limited & 2 Ors***[2] ***("the DSTV Case")*** where the Nigerian Federal High Court and the Court of Appeal had the opportunity to pronounce on the perceived abuse of dominance in the Nigerian broadcasting industry.

2. Metro Digital Limited v Multichoice Nigeria Limited & 2 Ors

Metro Digital Limited ("**MDL**") is an indigenous company licensed by the NBC as a Pay-TV service provider and possess a Direct-to-Home (DTH) license while Multichoice is also a DTH Pay-TV service provider licensed by NBC as content provider and signal distributor. However, unlike MDL, Multichoice is a Nigerian subsidiary of an African Pay-TV giant domiciled in South Africa with exclusive right to premium sports, news and entertainment contents such as the English Premier League ("**EPL**"). In 1993, Multichoic launched Digital Satellite Television ("**DSTV**") in Nigeria, becoming Nigeria's pioneer Pay TV service provider. Over time, Multichoice has stayed ahead of improvements in technology, infrastructure, and user experience to accommodate consumer tastes and behaviour changes. The Nigerian market accounts for a large size of Multichoice operations in Africa.

Multichoice's grip on Nigerian Pay TV subscribers is chiefly driven by its exclusive rights for sporting broadcasts. This exclusive right presents barriers to entry for competitors. For example, in 2005, an indigenous firm, Entertainment Highway Limited ("**HiTV**") started a Pay TV service. HiTV started with 24 channels including CNN, Al Jazeera, BBC World, LBC International, God Africa, MTV Base, Fox

[1] However, despite its noble intentions, the launch of the Code was met with criticism by stakeholders with a general feeling that the new amendments of the Code present an overreach of the statutory powers of the NBC and posed serious challenges which could undermine democratic norms in the broadcasting industry. Media experts and scholars showed their resentment at the public presentation of a publication titled "Question Marks on the 6th NBC Code Amendments", organized by the International Press Center.

[2] CA/PH/188/2021.

Sports, and Nickelodeon. Even though HiTV offered movies and news channels, it had its eyes on the EPL which it considered a cash cow. Its strategy was to provide subscribers with lower rates, and it planned to obtain EPL rights to drive that process. In 2010, it bided for the right to EPL at about $100M and paid an initial ₦40M non-refundable. It was granted a certain period to complete the money, but it could not meet up and the right was given to the second bidder, Multichoice. The loss created operational difficulties for HiTV.[3] Other Pay TV networks such as StarTimes and DaarSat are operating quietly without trying to compete against DSTV.[4]

To discourage monopoly in the broadcasting industry, the Code prohibits exclusivity of sport rights. Following the issue of the Code, MDL wrote Multichoice requesting Multichoice to sub-license certain channels and contents. Multichoice replied that it had no sub-licensing rights in the channels requested by MDL and stated that there are, inherent in the channels requested, third-party rights that do not envisage the sub-licensing of the same. Multichoice opined that it is itself a sub-licensee with no power and authority to sublicense the channels. The rights it acquired are not capable of being transferred to the MDL in view of existing contractual obligations which had been in existence prior to the launch of the Code. Upon Multichoice's refusal, MDL applied to the NBC as the regulator, for intervention and arbitration which NBC allegedly neglected to intervene or arbitrate. Consequently, MDL instituted an action by originating summons at the Port Harcourt Division of the Federal High Court ("**FHC**") seeking inter alia whether in the light of the provisions of the Code Multichoice is not under statutory obligation to offer sports and news programs and/or channels to MDL for retail to residential without any undue discrimination and on a non-exclusive basis and thus prayed the Court of Appeal for (a) a declaration that the continued failure/refusal of Multichoice to offer sport and news programs to MDL for retail to residential customers is anti-competitive, discriminatory and a flagrant breach of the Code; and (b) declaration that the continued failure of the NBC as a regulator to issue directives and/or impose sanction on Multichoice in regard to (a) is a breach of NBC's duty. While the FHC held in favour of Multichoice, on further appeal to the Court of Appeal, the Court of Appeal, inter alia, held that Multichoice had failed to prove the existence of the third-party contracts which made it impossible for Multichoice to sub-license the requested channels to MDL and granted the prayer of MDL by giving an order that NBC give a directive to Multichoice to offer channels and programs to MDL.

3. Intersection of Competition and Intellectual Property Issues in Broadcasting

Multichoice argued that the request of MDL was a contravention of its fundamental right to property enshrined in Section 43(1)(a) and (b) of the 1999 Constitution and the fact that an order of the Court of Appeal in favour of MDL will occasion an infringement to its copyright in broadcast as contained in the Copyright Act. In this regard it is important to note that the relationship between competition law and intellectual property rights ("**IPRs**")

[3] Daniel Obi "Pay TV Market: Can CONSAT break DSTV dominance?" Business Day, June 22, 2014

[4] Ibid.

legislation usually presents some friction. On the one hand, both systems are seen as constituting complementary components of a modern industrial policy, with a common aim of improving innovation and consumer welfare. IPRs provide inventors and creators with the incentive to keep creating and inventing for the ultimate benefit of consumers, and competition law ensures that consumers have access to quality and innovative products at cheaper prices. On the other hand, while competition law seeks to prohibit entities from indulging in anti-competitive agreements that will distort the competitive process, IPRs may erect barriers to entry to a market and effectively create hindrances to competition. One area of IPR that has been the subject of consistent tension between these two legal regimes is exclusive IPRs. Intellectual property protects proprietary creations. Licensing of IPRs helps to disseminate new technology, helps bring new competitors onto the market, and increases the rewards for innovation – therefore, the effects are generally pro-competitive and beneficial to consumer welfare.[5] By its nature, IPR grants the holder of the right an exclusionary, and sometimes exclusive right to the exploitation of the product of human intellect.[6] IPRs are typically granted by national laws and enforced on a national basis, conferring protection within national territories.[7] However, IPRs can also be created through agreements between the holders and a beneficiary, whereby the holder licenses (or assigns) the rights to the beneficiary, often for a stipulated timeframe and within a given territory. The terms of such licenses may involve restrictions on competition, including territorial restrictions which divide the internal market.[8]

Licenses can be exclusive, sole, or non-exclusive.[9] Since IPRs are territorial in nature, some licensees can be conferred with absolute territorial protection ("**ATP**"). For example, an open exclusive license relates to the contractual relationship between the owner of the IPR and the licensee, whereby the owner undertakes neither to grant further licenses in respect of a territory nor compete himself with the licensee on that territory. Closed exclusive license involves an exclusive license with ATP, under which the parties as regards the IPR and the given territory, propose to suppress competition from third parties. On this wise, closed exclusive licenses contain provisions that affect third parties and which create ATP.

A classic example of exclusive licenses is found in the exploitation of sporting rights. For most sports organisations, a huge chunk of their revenue comes from broadcasting and media licenses. Consequently, media organisations pay steep sums for the exclusive license of broadcasting rights. For instance, football clubs in England give the English Premier League ("**EPL**") the mandate to license broadcasting rights centrally to potential buyers. In this manner, sports broadcasting is considered a lucrative business. DSTV, a direct broadcast

[5] Alison Jones and Brenda Sufrin, "EU Competition Law: Text, Cases, and Materials" (Oxford University Press; 6th Edition) pp 821.
[6] Ibid. pp 809.
[7] Ibid. pp 810.
[8] Ibid. pp 810.
[9] With regard to a particular territory, exclusive licenses provide that the licensor will not grant further licenses for that territory to any third party and will not itself exploit the licensed IPR in the territory – thus, only the licensee can exploit the IPR in that territory. Sole licenses cover situations where the licensor undertakes not to grant other licenses for the territory but remains free to exploit the IPR itself – thus, the licensor and the licensee but no third party can exploit the IPR. A non-exclusive license covers situations where the licensor remains free to grant other licenses to third parties (besides the licensee) and to exploit the license in the territory itself.

satellite service owned by MultiChoice, has owned the right to broadcast the EPL in Nigeria since 1992 and would remain the official broadcaster of the EPL until 2025. The deal worth about £168 million a year includes rights to air all the league's 380 matches per season.[10]

From the foregoing, license agreements in respect of IPR which grants the right-holder ATP or exclusive licenses to broadcast protected subject matter and consequently prohibit its transmission by others in a specified territory within a given timeframe would translate to having an anti-competitive object.

The inherent tension in the enforcement of both legal regimes is adequately demonstrated in the DSTV case. One of the arguments raised by Multichoice was the fact that the channels and programs sought by MDL are governed by licenses which prohibit sharing and sublicensing of same and that Multichoice acquired rights to the programs and channels for a fee and on terms to which neither MDL nor the NBC are parties. Hence, that Multichoice had no power to sub-license the requested channels and programs. However, Multichoice failed, omitted and/or neglected to adduce the said contracts in evidence pursuant to Section 128(1) of the Evidence Act and the Court of Appeal held that it was Multichoice that entered into contracts or licenses and claimed immunity thereunder to prove the contents of the contract, a burden which Multichoice failed to adduce.

Assuming for the purpose of this article that Multichoice adduced the license in evidence and the contracts contained exclusivity obligations, it is expedient to note that in the EU case of ***Football Association Premier League v QC Leisure*** the EU court of justice was requested to decide whether clauses of an exclusive license agreement concluded between the Football Association Premier League ("**FAPL**") and a broadcaster which restricted the broadcaster from supplying decoding devices giving access to FAPLs protected IPR outside the territory covered by the license agreement was not in contravention of Article 101 of the Treaty for the Enforcement of the EU ("**TFEU**"). The court held that the said terms were contrary to Article 101. In this regard, it is important to note that Section 59 of the Federal Competition and Consumer Protection Act ("**FCCPA**") prohibits agreements which have the purpose of actual or likely effect of preventing, restricting or distorting of competition such as dividing markets by allocating customers and territory or agreement which limit or control the production or distribution of service. Hence, had the license agreement between Multichoice and the third-party licensor been adduced in evidence, such license may have been held void under Section 59 of the FCCPA. In fact, Article 6.2.9. of the Code provides that exclusivity shall not be allowed for sporting rights in the Nigerian territory as such broadcaster or licensee are proscribed from acquiring foreign sporting rights in such a manner as to exclude persons, broadcasters or licensee in Nigeria from sub-licensing same.

It is however imperative, at this point, to note that the Lagos division of the Federal High Court (FHC) in the case of

[10] The EPL also expanded its free-to-air (FTA) television coverage in sub-Saharan Africa ahead of the 2020/2021 campaign with 25 broadcasters to show one game per week in more than 20 territories. See https://www.sportspromedia.com/news/supersport-extends-with-the-premier-league/

Femi Davies v NBC[11] ruled that NBC acted beyond its powers as it lacks the power to prohibit content exclusivity in relation to privately acquired IPR in programme contents, and that it cannot compel the rights holder to sublicense acquired broadcast rights as such is against the Constitution of the Federal Republic of Nigeria and the Copyright Act. The FHC in this case held that the acquisition of exclusive rights to broadcast a particular program is an investment for returns and no one should be forced to surrender the same when lawfully acquired. The FHC also granted a perpetual injunction restraining the NBC from further implementing the Code. As at the time of this article, we are unaware of an appeal in respect of this FHC decision and it would be interesting to see how the question of content exclusivity is settled in the Nigeria broadcasting industry. In this regard, it is our submission that the provisions of the Code was intended to maintain a competitive market for the ultimate benefit of the consumers. Furthermore, the pro-competition thrust of the NBC Code is in furtherance of the Fundamental Objectives and Directive Principles of State Policy in Chapter 2 of the 1999 Constitution which proscribes that aggregation of wealth and means of production in the hands of a few. As such, the Code can be interpreted as a public interest subsidiary enactment for a general welfare of the viewing public which warrants recognition, protection and justifies government regulation.[12]

The Code

One of the most important statutory duties of the NBC is to maintain a competitive market in the Nigerian broadcasting industry, including the Pay-TV market. Hence, the Code prohibits exclusivity for sports rights and states that to ensure fair and effective competition on all platforms at an agreed fee, owners of rights to live foreign sporting events shall offer the rights to broadcasters on different platforms including (a) Satellite (DTH); (b) Multipoint Microwave Distribution Systems (MMDS); and Cable (Fibre Optics); (d) DTT (Terrestrial); (e) Internet; (f) Mobile; (g) Internet Protocol Television (IPTV); and Radio.[13] The Code further provides that in the event that the broadcaster acquires sports rights for a live sporting event for the Nigerian territory, that does not take cognizance of the available broadcast platforms, the right shall be made available to broadcasters on other platforms at commercially agreeable terms.[14] Another salient provision of the Code is the prohibition of abuse of dominance by dominant broadcaster. the Code defines a dominant broadcaster as one which the NBC opines is able to act without significant competitive constraints from competitors. Pursuant to Article 9.0.6., a dominant broadcaster shall on the order of NBC cease any conduct in that market which has or may have the effect of substantially preventing, restricting, and/or distorting competition in the broadcast industry and to implement appropriate penalties and/or remedies. That is, the dominant broadcaster shall obey an order prohibiting any conduct on the part of one or more broadcast licensees that amounts to the abuse of a dominant position in, or any part of, the broadcast media industry in Nigeria if at the discretion of the NBC, it may or would

[11] FHC/L/CS/1152.2020

[12] Centre for Oil Pollution Watch v NNPA (2019) 5 NWLR (Pt 1666) 518 S.C.

[13] See Article 6.2.5. of the Code.

[14] See Article 6.2.6. of the Code.

adversely hinder the maintenance and preservation of competition in the media industry in Nigeria.[15]

The Court of Appeal found that Multichoice was in breach of the Code and directed that the NBC issue a directive to Multichoice for sublicense of the requested content. Acting on the Court order, the NBC wrote Multichoice on 25th October 2022 with a directive to comply with the Code in relation to MDL's request for channels sublicensing as ordered by the Court of Appeal. At the time of this work, there has been no reaction from Multichoice in relation to the directive by NBC and there is no confirmation whether Multichoice has filed a notice of appeal in respect of the decision of the Court of Appeal. Regardless of the next steps of Multichoice it is imperative to note that the MDL can approach the Federal Competition and Consumer Protection Commission ("**FCCPC**") under the FCCPA – Abuse of Dominance Regulations 2022 ("**Abuse of Dominance Regulations**")

4. Abuse of Dominance Regulations

The perceived dominance of Multichoice has been discussed in our Article titled "*Abuse of Dominance – The Multichoice/DSTV Excessive Pricing Case*".[16] Furthermore, Multichoice's domination of the Nigerian broadcasting market has continued as it released its annual full-year results which ended on 31 March 2022. The report shows the domination of the subscriber base – standing at 12.8 million, 5% year-on-year growth of its subscription revenue, slight growth in the increase in local content met, and strong advertising performance.[17]

Section 72(2)(b) of the FCCPA prohibits a dominant undertaking from unilaterally refusing to supply essential goods, services and facilities in the interest of fostering a competitive market and for the ultimate benefit of consumers. However, MDL must prove:

a. That the facility goods and services are essential in the sense that the goods, services and facilities are objectively necessary if the party requesting is to compete effectively on a downstream market. That is, the services, goods and facilities must be considered indispensable because there are no other alternative solutions which will enable an equally efficient competitor to counter (at least in the long-term) the negative effect of the refusal. In this regard, MDL will have to establish that it operates in a downstream retail of content, but most especially will have to adduce that the requested channels and programs are premium content in the sports and news genre to generate effective competition at the wholesale level for such services. MDL must establish that access to this content is not merely desirable or convenient, but rather the channels are premium content critical to MDL's competitive vitality. Furthermore, that the services are difficult to duplicate as they are covered by IPRs between Multichoice and the IPR owners

b. That the refusal to supply the goods and service will eliminate and/or prevent competition in the relevant downstream market, in this case, retail market for content.

[15] See Article 9.0.7. of the Code.
[16] https://lnkd.in/dsbHtD7b
[17] Anthony Udugba "Multichoice Annual Report in Five Charts", Business Day, June 16, 2022.

c. That the refusal will result in consumer harm especially where the refusal will prevent innovation or limit technical development or where refusal results in increased price, decreased market output. Hence, a refusal by Multichoice negates the provisions of the Code which is for the purpose of ensuring the widest possible distribution and viewership of content it is considered critical to the success and sustainability of new entrants in the Pay-TV market, broadcasters shall ensure access by all Pay-TV platforms to premium content.

d. That there is no objective justification for refusal such that an order compelling the dominant undertaking to deal will not deter the incentive of the dominant undertaking to invest. Multichoice must not be able to objectively refuse the sublicense by adducing reasons such as (i) that Multichoice also suffers from capacity constraints which make it impossible to sublicense (ii) that MDL is a bad debtor etc. Given the fact that the exclusivity of their license with IPR owners is already contrary to Section 59 of the FCCPA, same cannot be used as an objective justification for a refusal.

Oluwaseye Ayinla
Partner
s.ayinla@doa-law.com

Tracy Idemudia
Associate
t.idemudia@doa-law.com

Amanze Izundu
Associate
a.izundu@doa-law.com

Vincent Wasini
Associate
v.wasini@doa-law.com

LAGOS
Plot 1B, Block 129,
Jide Sawyerr Drive,
Lekki Phase I
Lagos State, Nigeria

ABUJA
4th Floor, Abia House,
Plot 979, 1st Avenue,
Off Ahmadu Bello Way,
Central Business District,
Abuja FCT, Nigeria

Tel.: 0700 DOALAW (0700 362529)
Email: info@doa-law.com
www.doa-law.com