**The rules of fair play – “Net Neutrality in the Nigerian Telecommunications Industry”**

**March 2018**

**Introduction**

In December 2017, the Federal Communications Commission (FCC), the telecommunications regulator in the United States was reported to have reversed the net neutrality rules it had earlier adopted in 2015 via the Open Internet Order of 2015.\(^1\) This decision has been met with mixed reactions, mostly opposition.\(^2\) Given the importance of the internet to our everyday lives and its ubiquitous socio-economic impact, this decision has been the subject of global discussion and critique. Nigeria is no exception, following the recent issuance of the draft code for the Establishment of Internet Industry Code of Practice in Support of Net Neutrality (the Draft Code) in Nov 2017 by the Nigerian Communications Commission (NCC).

Net neutrality in principle refers to the equal, non-discriminatory access to the internet by all and sundry. The principle provides that internet service providers should treat all internet traffic the same and not treat content, users, platforms, applications or equipment that access the internet differently. Internet service providers are therefore not permitted to intentionally block, throttle, discriminate, prioritise or indiscriminately charge for access to specific online contents, applications or websites.\(^3\) The global debate on net neutrality has been far reaching with divergent views. Below are some of the arguments which have been canvassed both for and against the adoption and implementation of net neutrality.

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\(^2\) About 76% of Americans polled are reportedly against the decision and support net neutrality. The Mozilla Blog. New Mozilla Poll: Americans from both Political Parties overwhelmingly support net neutrality. (2017, June 6). Retrieved from https://blog.mozilla.org/blog/2017/06/06/new-mozilla-poll-americans-political-parties-overwhelmingly-support-net-neutrality/

The Arguments for Net Neutrality.

The major proponents of net neutrality comprises organisations such as consumer advocates, human right organisations, online companies, technology companies, software companies in the mould of Microsoft and major internet application companies including, but not limited to Netflix, Google, Facebook, Yahoo, EBay and Skype have at various times argued that –

i. It allows for dissenting views to be aired without any form of censorship thereby promoting freedom of speech. Paid prioritisation, could endanger free speech as political organisations in control of media houses could limit or prevent dissenting opinions from being heard, thereby providing unfair advantage to certain political opinions and leanings.4

ii. Competition is encouraged and monopolistic behaviour discouraged. Small businesses without the same financial resources as major corporations are given equal opportunity to attract traffic to their websites without having to pay internet service providers any additional fees for faster internet or prioritised services. It allows for a level playing field particularly for e-commerce websites.

iii. Without net neutrality, control of the internet will be in the hands of a few people, corporations or organisations who would determine access, content and its availability or distribution and pricing. This would create opportunistic behaviour to the detriment of others. Start-ups might be shut out completely as they may have to pay more not only for customers to access their sites but would also be unable to provide good quality customer browsing experience.

iv. To expect self-regulation, and ensure the protection of public interest from businesses set up to make a profit might be too high an expectation therefore, Governments need to impose net neutrality rules on service providers to encourage and or demand proper conduct. This is particularly important for markets where there is little or no competition for the provision of broadband services.

v. The growth and development of the internet has over the decades been through the contributions of volunteers and other stakeholders, allowing a few people to reap the rewards would be unfair and against public interest, considering that the internet as it is today was developed openly and publicly by several stakeholders.5

vi. Net neutrality is expected to some extent to bridge the technological gap between the rich and the poor as everybody is treated equally in cyberspace with the same access to information and without hindrance based on financial inequality.

The Nays to Net Neutrality

The main opponents of net neutrality are Internet Service Providers (ISPs), hardware companies, broadband and telecommunications companies. These include AT & T, Verizon, Comcast, Qualcomm, IBM, Ericsson, Intel, Cisco, -Alcatel-Lucent and others and they have in contrast argued that –

i. Service providers will be discouraged from customising and providing tailored services for specific subscribers. Service


providers are able to offer more service options and new service offerings to subscribers that desire and can afford those services, particularly online businesses that are willing to pay for faster tiers of services.

ii. Non adoption of the principle will support and encourage the development of faster internet technology as there will be a ready market for the services and contents requiring faster internet speed.

iii. The internet has developed to where it is today with little or no government regulation. Government regulation or intervention might stifle creativity, further development and growth of the internet. It is unnecessary to add another layer of regulation to an industry that is believed to be already heavily regulated.

iv. Net neutrality is an attempt to fix something that is not broken as there is no evidence that the current business practices of ISPs have adversely affected any specific group of users;

v. Imposition of net neutrality rules will discourage service providers from further investment in infrastructure as the likelihood of recouping their investments are significantly reduced. A reduction or refusal to invest in infrastructure by technology companies and ISPs will have a negative on effect on the entire economy.

vi. Organisations and persons who are regarded as heavy users of the internet and who consume a lot more than others should be charged appropriately so that there can be re-investment in infrastructure and services to continue to meet their needs.

vii. Operators continue to invest in the deployment and maintenance of infrastructure to support the internet but it is the content and application providers that reap the profits without commensurate investment or compensation to the operators. There is therefore an argument for a fairer distribution of the financial rewards.

The Nigerian Position

Pursuant to its powers under the Nigerian Communications Act (the NCA) 2003, the NCC has published the “Guidelines for the Provision of Internet Service” (the Guidelines) which applies to all ISPs. The Guidelines require all ISPs to comply with the Consumer Code of Practice Regulations 2007 (the Regulation) which provides a template for the minimum terms and conditions for the provision of telecommunications services and consumer practices in Nigeria. Where an ISP does not submit a consumer code for its operations to the NCC for approval, it will be governed by the code attached as a Schedule to the Regulation (the General Code). In addition to the information disclosure requirements in the General Code, ISPs are required to make a full and fair disclose of information regarding bandwidth (including whether the bandwidth is shared or dedicated to the user) and the bit transfer rates to consumers before the process of subscription is concluded.

Recently, the NCC called for the public review and comments on the Draft Code and intends to schedule a public inquiry on same. Clearly from its title, the NCC’s position on net neutrality is obvious and this is further reaffirmed in the preamble to the Draft Code which even though recognizes that an open internet is key to innovation, also acknowledges that other factors must be taken into consideration including “online child protection, privacy and data protection, objectionable content, unsolicited communications, and traffic management practices that are considered necessary in order

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6 Sometime in 2014 in response to the proposed introduction of the Open Internet Order, it was reported that AT & T suspended rollout of its broadband network until net neutrality issues were resolved. Hardawar, Devindra (2014, November 12), “AT&T halts fiber build-out until net neutrality rules are sorted.” Retrieved from https://www.engadget.com/2014/11/12/ATT-halt-fiber-network/.

7 Guideline 3
to maintain network efficiency”

The Draft Code is not only applicable to Internet Access Service Providers, but also to the provision of Internet Access Services within Nigeria. The Code acknowledges and provides for the consumer’s right to an Open Internet and further provides that –

a) Internet users have the right to access and distribute information and content, use and provide applications and services, and use appropriate terminal equipment of their choice;

b) No lawful content, applications or services is to be blocked or made unavailable to users of Internet services; and

c) Where traffic management practices are required for the efficient operation of the network, an Internet Access Service Provider is to be completely transparent about what practices are in place and how the end-users’ services are affected.8

In the provision of internet access services, the Draft Code requires ISPs to be transparent by providing full and accurate technical and commercial information on their services; treat all internet traffic equally without discriminating against content, application or equipment; not block or throttle any lawful content, application, service or non-harmful device and not to engage in paid prioritization under any circumstances.9 The Draft Code however acknowledges that there might be situations where it may be necessary to adopt “acceptable traffic management practices” to preserve the integrity and security of the network or service, prevent or mitigate network congestion, provided that equivalent categories of traffic are treated equally. The traffic management practice is required to be based on techniques approved by the NCC.10

In addition, one of the licence conditions for ISPs in Nigeria is the requirement to ensure that there are no undue preference or discrimination in the provision of their services either in respect of the charges or other terms of conditions for the provision of the service to any particular person or persons of any class or the connection of any equipment. Breach of this licence condition could lead to sanctions being imposed on the ISP.

The adoption by a substantial number of Nigerians of Over the Top (OTT) services like Whatsapp, Facebook messenger, Skype, Viber etc especially for international calls as opposed to traditional voice calls continues to be a major source of friction between the providers of the OTT services and network operators as a result of the impact of such services on the operators’ revenues. Sometime last year it was alleged that the operators were actively considering either blocking or throttling these services. Ironically, some operators have at various times entered into collaborations with OTT providers by providing specific bundled services to access only their services. It has however been argued that these collaborations might violate net neutrality principles as it will encourage adoption of one OTT service as against another. 11

CONCLUSION

The trend worldwide is to support and protect net neutrality as evidenced by the several countries including the EU12 that have in one form or the other, made regulations, policies or laws to ensure open, unrestricted and non-discriminatory access to the internet. Obviously Nigeria in seeking conformity with international best practices has followed the global trend with the issuance of the Draft Code, which subject to the public inquiry will be adopted. It should however be noted, that as is the norm in other jurisdictions, the right of the service provider to adopt reasonable traffic management practices is recognized and provided for in the Draft Code. It is important that this balance be maintained so as to protect the reliability and optimal performance of networks.

11 Jackson Brian (2017, February 2) Nigeria faces net neutrality crisis as carriers consider banning Skype. Retrieved from https://www.itworldcanada.com/article/nigeria-faces-net-neutrality-crisis-as-carriers-consider-banning-skype/390884. See also Agbata, Chukwuemeka Fred (2016, May 22) Net Neutrality and launch of facebook basics in Nigeria. Retrieved from http://punchng.com/net-neutrality-launch-facebook-basics-nigeria/ where the opinion was expressed that the Facebook’s Free Basics project might actually undermine net neutrality. Free Basics was eventually banned in India because it was regarded as discriminatory and unfair to other sites that were not made available for access.
12 Regulation (EU) 2015/2120