



The Regulation of Social Media and OTT Services: Is #TwitterBan the Catalyst?

Across the globe, there have been debates on the regulation of over the top (OTT) services and by extension digital content. In various jurisdictions, OTT service providers continue to deflect attempts by regulators to bring their services within regulatory purview either by way of mandatory operational licences or content censorship. Nigeria, one of the world's largest consumers of OTT services has not been any different.

On 4 June 2021, the Federal Government of Nigeria (the 'FGN') announced the indefinite suspension of social media and microblogging platform Twitter from operating in Nigeria (the 'Ban'). Additionally, the FGN directed the National Broadcasting Commission ('NBC') to immediately commence the process of licensing all OTT services and social media operations in Nigeria (together the 'Directive').

Apart from the constitutional question of whether the Ban amounts to an infringement of free speech, the Ban has intensified the debate on OTT regulation and reignited the need to revisit the position of the law in Nigeria on the regulation of OTT services and social media generally. In this newsletter, we highlight some of the legal and commercial implications of the Ban on the business operations of OTT services and social media platforms in Nigeria.

FIRST – THE CONSTITUTIONAL TWIST

Further to the Ban, there were reports that the Attorney-General of the Federation (“AGF”) had instructed that persons who, despite the Ban, continue to use Twitter via Virtual Private Networks would be prosecuted. However, it was later reported that the AGF stated they did not intend to prosecute Twitter users. Instead, the AGF will be prosecuting individuals and corporate organisations that enable Twitter to circumvent the Ban.

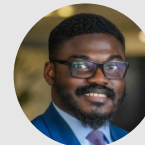
It is unclear what kind of conduct would amount to circumventing the Ban but in the event that Twitter users are prosecuted, it will be difficult for the FGN to justify how both the Ban and the prosecution, do not violate the constitutional rights of Nigerians as guaranteed under the 1999 Constitution of the Federal Republic of Nigeria (as amended). For example, the Ban conflicts with section 39 (1) of the Constitution which guarantees the citizens' right to freedom of expression and the right to receive information without interference.

¹<<https://ncc.gov.ng/docman-main/industry-statistics/policies-reports/713-overview-of-provision-of-over-the-top-ott-services/file>> accessed 1st June 2021

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Relatedly, an attempt to prosecute users who continue to use Twitter post the Ban would also conflict with section 36(12) of the Constitution which provides that no person shall be convicted for a criminal offence unless that offence is defined and the penalty thereof is prescribed in a written law (being an Act of the National Assembly or a law of a State, any subsidiary legislation or instrument properly enacted under the provision of such law).

NEXT – WHAT EXACTLY ARE OTT SERVICES?

OTT services – including instant messaging services, Voice over IP, streaming video and music services – generally refer to the direct offering of content to end users via the open internet without the use of traditional content distribution channels, such as satellite television, cable etc.

According to a research paper published by the Nigerian Communications Commission ('NCC'), OTT services are essentially services carried over the networks, delivering value to customers without any carrier service provider being involved in planning, selling, provisioning, or servicing them.

As a matter of Nigerian law, the distinction between OTT services and traditional broadcast services is not express on the face of the law, as the primary statutes appear not to have contemplated OTT services. However, the distinction is more practical and appear to be largely based on the medium or the technology through which they transmit content.

THE LEGAL BASIS FOR THE REGULATION OF OTT SERVICES IN NIGERIA

Based on current regulation, OTT services would arguably fall under the scope of regulated activities either under the NCC Act 2003 or the NBC Act 2004. Historically, both the NCC and the NBC have sought to exercise control over the regulation of OTT services.

In generic terms, the NCC Act applies to the provision and use of all communications services and networks, in whole or in part, within Nigeria. On this basis, the NCC has cited its broad powers under the NCC Act as the basis for the regulation of OTT services. As Nigeria's telecoms regulator, NCC is empowered under the NCC Act to make and publish guidelines on any matter for which the NCC Act expressly provides and such other matters as are necessary for giving full effect to the provisions of the Act.

It appears that in spite of the non-express mention of OTT services in the NCC Act, the NCC has continued to assert its power to regulate OTT services on the basis of its ability to make regulations on any such matters that are necessary to give effect to the provisions of the Act.

Whilst it could be inferred that by expressly mentioning the NBC in the Directive, the FGN has recognized the NBC as the appropriate OTT regulator, it is plausible that the NCC could on grounds similar to that of the NBC i.e., based on the broad wording of their enabling legislation, make a case for itself as the appropriate regulator of OTT services. Ultimately, the FGN will have to settle this jurisdiction dichotomy sooner than later.

On its part, the NBC constantly references its powers under the NBC Act – to regulate and control the broadcasting industry – as the basis for NBC's drive to regulate OTT services in Nigeria. The NBC Act also provides that no person shall operate or use any apparatus or premises for the transmission of sound or vision by cable, television, radio, satellite or any other medium of broadcast from anywhere in Nigeria except under and in accordance with the provisions of the NBC Act.

The NBC's attempt to regulate OTT services could also be based on its powers under section 2(1)b(i) of the NBC Act to issue licenses to TV stations and ANY other medium of broadcasting. On this basis, the question becomes whether or not media services offered over the internet qualify as “*other broadcasting medium*”.

More recently, the NBC sought to regulate OTT services through the amendment of the 6th NBC Code (the '**New Code**'), which, amongst other things, appears to suggest that OTT service providers should be registered with the NBC and comply with the provisions of the New Code.

Apart from administrative law arguments that the New Code was issued without adhering to the procedure for issuance of guidelines or codes under the NBC Act, it appears that even if the New Code were to be considered as properly issued, it would conflict with other existing primary legislation, such as the Copyright Act.

In any event, there appears to be a misconception in terms of the fine distinction between (i) traditional broadcasting services and (ii) online streaming platforms that provide OTT services without the use of the traditional content distribution channels (such as satellite television, cable etc.) with the former being what is contemplated under the NBC Act.

For example, the NBC Act does not define broadcasting or broadcasting services, but the NBC code issued prior to the amended code (the '**Old Code**') defines broadcasting as the “*transmission of programmes, whether or not encrypted, by radio waves or other means of telecommunication for reception by the public by means of a receiving apparatus*”.

The Old Code also defines broadcasting services as “*any service which consists of the unidirectional transmission and distribution to television and/or sound broadcasting material by cable or wireless means from anywhere in Nigeria for reception by the public*”. Under the New Code, reference is also made to broadcasting mediums such as the internet, mobile, internet protocol television (IPTV), etc.

Whilst the above definitions and scope of broadcasting media could be considered broad enough to cover OTT services, the prevailing argument is that the regulatory purview of the NBC appears to be limited to traditional broadcasting services. This is based on the purposive rule of statutory interpretation which seeks to look at the purpose of the legislation before interpreting the words.

The NBC Act makes no express mention of the use of OTT services and whilst the absence of express mention does not necessarily place OTT services outside of the regulatory purview of the NBC, a more assertive view will be that the regulation of OTT services was never contemplated by the NBC Act. Thus, seeking to regulate OTT services could be interpreted as an attempt by the NBC to expand the scope of its powers that are not expressly given to it by the NBC Act.

From an administrative law perspective, a subsidiary legislation derives its authority and validity from and subject to the provisions of the enabling statute. Therefore, a subsidiary legislation, such as the various codes of the NBC, cannot expand the provisions of the substantive statute, which, for all intent and purposes, does not provide for or contemplate OTT services.

While it is not clear where the coin will fall, based on the state of the law today, *there appears to be no express power or provision that mandates the NBC or NCC to regulate OTT services.*

THE COMMERCIAL IMPLICATIONS OF THE DIRECTIVE ON OTT SERVICE PROVIDERS AND SOCIAL MEDIA PLATFORMS

Further to the Directive, the NBC has published an advertorial calling on all online broadcast service providers and social media platform operators to apply and obtain a broadcast licence from the NBC pursuant to section 2(1)(b)(i) of the NBC Act.

The first and the most apparent consequence of this attempt at regulating OTT services and social media (regardless of the merit of the NBC's vires to do so) is that OTT service providers will be required to obtain a licence from the NBC to provide OTT services and to maintain access to social media platforms in Nigeria.

If there was any doubt as to how NBC intends to practically enforce non-compliance if a comprehensive licensing framework is rolled out, the Ban provides an insight on how far the FGN could be willing to go.

Another consequence of being licensed and effectively regulated by the NBC is that the NBC would likely attempt to have some control over the content that OTT and social media platforms can offer. This would mean that OTT services will be subject to the same broadcasting standards as traditional broadcasting platforms. This could inevitably lead to a high degree of content censorship on abstract grounds subject to executive discretion, ranging from sound public policy concerns to mundane political ideologies.

Further, OTT messaging and voice calling platforms, such as Facebook, WhatsApp, Telegram, Viber etc. may also be required to retain and disclose encrypted data on flimsy grounds.

The Minister of Information has stated that OTT service providers and social media platform providers will now be required to be incorporated as Nigerian entities and maintain physical offices in Nigeria with the knock on effect of bringing these establishments within the tax net of the Federal Inland Revenue Service (FIRS).

GLOBAL TRENDS AND THE NIGERIAN TRAJECTORY

If the Directive is implemented, Nigeria will be amongst the countries that have aggressively moved to regulate OTT services by way of issuing operational licences.

Discussions on the appropriate model of regulation for OTT services have taken place in the United States, the European Union and other parts of the globe. Whilst some countries prefer to regulate OTT services on the principles of net neutrality, others have taken a step further to introduce licensing frameworks for their operation.

In Singapore, for example, OTT service providers are mandated by the country's regulator to obtain an operational licence and comply with the content code which essentially sets out content restrictions for OTT services.

In the US, there have been discussions on the need to introduce a new regulatory framework to regulate OTT services from an online safety perspective while voices within the European Union have called for the adoption of 'more convergent rules'.

In Germany, the Administrative Court of Cologne has held that OTT services qualify as electronic communication services (ECS) and are therefore subject to telecommunications regulation. While in India, OTT services are currently not regulated in the strict sense but there has been a constant push for self-regulation as the most sustainable regulatory model that strikes a fair balance between regulation and incentivizing investment.

Conclusion

In Nigeria, there have been previous albeit unsuccessful, attempts to regulate OTT services and social media platforms directly or indirectly. From the Protection from Falsehoods and Manipulation and other Related Matters Bill 2019 (SB 132) (the so-called Social Media Bill) to the Independent National Commission for the Prohibition of Hate Speeches Bill, it is evident that the regulation of OTT services and social media remains a top agenda for the government of the day. Rather than focus on a broad-based regulation as means to censor or overly control content, perhaps the FGN could properly evaluate its position and opt for a model that incentivizes innovation and investment that could promote Nigerian content.

That said, OTT service providers and social media platforms must pay close attention to regulatory developments in Nigeria to navigate through OTT regulation without necessarily jeopardizing their commercial objectives and core values.