

THE NIGERIAN JURIDICAL REVIEW

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LEGAL REMEDIES FOR CONSUMERS OF TELECOMMUNICATIONS SERVICES IN NIGERIA*

Abstract

With the deregulation of the telecommunications sector in 2002, the sector has remained one of the fastest growing sectors of the Nigerian economy. Deregulation and the introduction of the Global System for Mobile Communications (GSM) have revolutionized telecommunications in the country. The consequent expansion of the industry and its consumer base has been followed by consumer complaints in various forms. The Nigerian Communications Act, which regulates the telecommunications industry, established the Nigerian Communications Commission and provides for licensing of operators, quality of services and dispute resolution in the industry. This paper examines the remedies available to a consumer who suffers loss or damage as a result of poor quality services. It is argued herein that there is adequate mechanism for redress for consumers of telecommunication services in Nigeria.

1. Introduction

Since its deregulation in 2002, the telecommunications industry in Nigeria has witnessed a phenomenal growth. Major telecommunication services in Nigeria include telephony, internet and other forms of data transmission. Two of these services, telephony and internet, have had tremendous boost with the introduction of the Global System for Mobile Communications (GSM) in the country. From less than 500,000 connected lines before deregulation in 2002 the number of connected lines rose to over one hundred and forty-one million as at August 2012. Out of this number over one hundred and five million lines are active.¹ This means that much more people in Nigeria now have access to

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¹ A breakdown of the active lines shows that Mobile (GSM) accounts for 101, 404,011 million lines; mobile Code Division Multiple Access (CDMA) accounts of 3,347,716 million lines while fixed wired and wireless lines account for only 488,088 lines. This puts the country's teledensity at approximately 75.17 per cent based on an estimated population of 140 million. See "Subscriber Data 2010" <http://www.ncc.gov.ng>, retrieved October 25, 2012. Teledensity is a measurement of how many telephones are available, expressed as the number of telephone lines for every 100 people in a country.

telecommunication services than was the case a decade ago. Consequently, consumers of telecommunication services in Nigeria have become diverse and include all categories of persons: politicians, businessmen and women, civil servants, petty traders, farmers, artisans and students.

The growth of the industry and the consequent expansion of its consumer base have been followed by intense consumer complaints.² Consumer complaints in the telecommunication industry in Nigeria relate mainly to tariff charges and quality of services. Complaints relating to tariffs include over-charging for services or excessive deduction of credits, inappropriate billing, multiple charges and charging for services not rendered, such as for text messages not delivered. Major complaints relating to quality of services include inability to re-charge due to defective recharge card or network failures; call setup failure including service interruption, cross talk, dropped calls, voice impairment; disconnection or suspension of telephone and internet lines. Other complaints include misleading advertisements and scam messages sent to subscribers; faulty, substandard or defective equipment supplied by service providers or their agents; proximity of sites or masts to residential building or offices and pollution by generators.

Generally, consumers of goods and services are entitled to certain basic rights under the law. These rights include the rights to basic needs, safety, information, choice, representation, redress, education, healthy environment and not to be exploited.³ A very important aspect of consumer right is the right to redress.⁴ The ability of the consumer to obtain redress for loss, injury or damage suffered as a result of defective products or shoddy services is the hallmark of any consumer protection system.

² See K. A. Apori and M. E. Ibanga, "Regulatory Agencies in the Telecommunications Sector and the Protection of the Nigerian Consumer" *The Calabar Law Journal*, Vol. VII, IX & X, 2004 – 2006, p. 162.

³ See the United Nations General Assembly, Guidelines for Consumer Protection, Resolution 39/248 of 9 April, 1985.

⁴ See Ahmedou Ould-Abdallah - "Implementation of the Guidelines for Consumer Protection" in *Consumer Protection for Africa: Report of the Africa Conference on Consumer Protection, Harare, Zimbabwe, 28 April - 2 May 1996* (New York: United Nations, 1997).

2. The Legal Framework for Consumer Redress in the Telecommunications Industry in Nigeria

Consumers of telecommunication services in Nigeria can obtain redress under statute or under the general law. The statutes identified as relevant in this regard include the Nigerian Communications Act, 2003,⁵ the Consumer Protection Council Act, 1992,⁶ the Utilities Charges Commission Act, 1992⁷ and the Public Complaints Commission Act, 1975.⁸ The relevant provisions of these statutes are discussed hereunder. Under the general law, the relevant areas include the law of contract and tort of negligence.

2.1 The Nigerian Communications Act 2003

This is the principal statute that regulates the provision and use of telecommunications services and networks in Nigeria. The stated objectives of the Act which came into force on the 28 July, 2003 include to provide a regulatory framework for the industry and to protect the rights and interests of service providers and consumers within Nigeria.⁹ It established the Nigerian Communications Commission (NCC) charged with the responsibility of regulating the telecommunications sector in Nigeria.¹⁰ The functions of the Commission in relation to consumer protection include:

- a. protecting the interest of consumers against unfair practices and generally promoting the interests of the consumers of telecommunications services;
- b. ensuring that licensees implement and operate at all times the most efficient and accurate billing system;
- c. developing and monitoring performance standards and indices relating to the quality of telephone and other communications services and facilities supplied to consumers in Nigeria having regard to the best international performance indicators;
- d. examining and resolving complaints and objections filed by and disputes between licensed operators, subscribers or any

⁵ No. 19 of 2003.

⁶ No. 66 of 1992 now Cap. C25, Vol. 4, *Laws of the Federation of Nigeria, 2004* (herein LFN 2004).

⁷ Cap U17, *LFN, 2004*.

⁸ Cap. P37, Vol. 14, *LFN, 2004*.

⁹ See ss. 1 and 2 of the Act.

¹⁰ S. 2(1).

other person involved in the communications industry, using such dispute-resolution methods as the Commission may determine from time to time including mediation and arbitration.¹¹

Of importance to this discourse are the provisions of the Act and its subsidiary legislation relating to resolution of consumer complaints and consumer redress. The Act makes detailed provisions for the resolution of consumer complaints through Alternative Dispute Resolution (ADR) processes.

The Commission is conferred with powers to resolve disputes between persons who are subject to the Act¹² regarding any matter under the Act or its subsidiary legislation.¹³ However, an attempt shall first be made by the parties to resolve any dispute between them through negotiation before the involvement of the Commission.¹⁴ The Commission may publish guidelines setting out the principles and procedures that it may take into account in resolving disputes or a class of disputes. Subject to the objectives of the Act and any guidelines issued by the Commission, it may resolve the dispute in such manner including but not limited to ADR processes and upon such terms and conditions as it may deem fit. In carrying out its dispute resolution functions, the Commission is to be guided by the objective of establishing a sustained dispute resolution process that is fair, just, economical and effective and shall not be bound by technicalities, legal forms or rules of evidence and shall at all times act according to the ethics of justice and the merits of each case.¹⁵

Under Chapter VII, Part I (sections 104–106) of the Act dealing with consumer protection and quality of service, all service providers are required to meet such minimum standards of quality of service as the Commission may from time to time specify and publish; deal reasonably with consumers, and adequately address consumer complaints. The Commission is

¹¹ S. 4 (1) (b), (c), (h) and (p).

¹² Persons subject to the Act include service providers and consumers. "Consumer" is defined in the Act as "...any person who subscribes to and uses a communication service" while "communications" means any communication, whether between persons and persons, things and things, or persons and things, in the form of sound, data, text, visual images, signals or any other form or any combination of those forms; see section 157.

¹³ S. 73.

¹⁴ S. 74 (1).

¹⁵ S. 76 (1) and (2).

empowered to use any of its powers under the Act in the resolution of complaints received from consumers in relation to matters of customer service and consumer protection including but not limited to quality of service or the failure by a licensee to comply with a consumer code. The Commission shall establish procedures or guidelines for the making, receipt and handling of complaints of consumers regarding the conduct or operation of licensees and may, at its discretion, institute alternative dispute resolution processes for the resolution of the complaints or disputes provided that the licensee's dispute resolution procedures shall first have been exhausted by the consumer before presentation of the complaint to the Commission.¹⁶ Under section 106, the Commission may designate an industry body to be a consumer forum and to prepare a consumer code, and the consumer code prepared by such body shall be subject to the prior approval of and ratification by the Commission. The Commission may require licensees to prepare individual consumer code for their respective customers, and such consumer code shall be subject to the prior approval of and ratification by the Commission. A consumer code prepared by a consumer forum, the Commission or licensees shall include model procedures for reasonably meeting consumer requirements, the handling of customer complaints and disputes including an inexpensive arbitration process other than court, and procedures for the compensation of customers in case of a breach of a consumer code, and the protection of consumer information. Other matters which the consumer code shall address include, but are not limited to, further recourse available to a consumer who is dissatisfied with the licensee's complaints-handling procedures together with specific details of compensation and refund schemes offered by licensee to its customers, the provision of information to customers regarding services, rates and performance, and any other matter which, in the opinion of the Commission, may be of concern to consumers.

In the exercise of the foregoing powers, the Commission has made and published a number of regulations and guidelines to protect the interests of consumers of telecommunication services in Nigeria. These include:

- (a) Dispute Resolution Guidelines 2004;
- (b) Consumer Code of Practice Regulations 2007;¹⁷

¹⁶ S. 105 (1) and (2).

¹⁷ S.I. No. 32 of 2007.

- (c) Enforcement Processes, etc Regulations 2005;¹⁸
- (d) Competition Practices Regulations 2007;¹⁹ and
- (e) Quality of Service Regulations 2012.²⁰

Suffice to say that the guidelines and regulations are intended to better secure that the interest of the consumer, the Dispute Resolution Guidelines and the Consumer Code of Practice Regulations are considered most germane to the discourse here.

2.1.1 NCC Dispute Resolution Guidelines 2004

Pursuant to sections 4 (p) and 75 (2) of the Nigerian Communications Act, 2003, the Commission has established procedures or guidelines for the making, receipt and handling of complaints of consumers regarding the conduct or operation of licensees. The Dispute Resolution Guidelines, 2004 incorporates the procedure for the resolution of small consumer claims not exceeding One Million Naira and which do not involve complicated issues of law or examination of witnesses. The main objective of the Guidelines is to obtain fair resolution of disputes by arbitration without unnecessary delay and expense. Therefore, the procedure is designed to provide a forum for inexpensive, fair, impartial and effective arbitration as a means of resolving consumer-related disputes in the telecommunications sector. The Commission administers arbitration under the procedure independently, and not under the Arbitration and Conciliation Act.²¹ Arbitrators are selected by appointment from the Commission's panel of experienced arbitrators. The rules provide for a "documents only" determination.²² However, an application for arbitration under these Rules does not relieve either party of any obligation to pay any amounts, which are due to the other party and are not in dispute.

An arbitrator appointed under the Guidelines may issue an interim ruling where a dispute directly affects the ability of a party to continue to provide uninterrupted services to its customers. The arbitrator shall issue final decision and file same with the Commission not later than six months after the filing of the petition for arbitration which period may be extended by the arbitrator after due consultation with the Commission. The

¹⁸ S.I. No. 7 of 2005.

¹⁹ S.I. No. 39 of 2007.

²⁰ S.I. No. 3 of 2012.

²¹ Cap A18, *LFN*, 2004.

²² See Chap. 2 paras 5 and 6 of the Guidelines.

Arbitrator's decision must be reasoned and ensure the resolution of issues presented by the parties such that the resolution meets the requirements of the Act, NCC regulations and guidelines. It should, where appropriate, indicate schedules for the implementation of the decision.²³ The Commission shall review the arbitrator's draft decision with a view to ensuring that same complies with the requirements of the Act and NCC regulations and guidelines. No decision shall be rendered by the Arbitrator until it has been approved by the NCC. The decision of the arbitrator as approved by the Commission is final and binding until set aside by a competent court of law.²⁴

Fixing deadlines for the conclusion of proceedings under the procedure is proper so as to prevent delays that could prolong proceedings reminiscent of adjudication. However, the requirement that the arbitrator's decision should be submitted to the Commission in draft for approval may not make for independence of the arbitrator or arbitral tribunal. It would have been better if the arbitrator or tribunal is allowed to hand out a decision which is made subject to review by the Commission if any of the parties expressed dissatisfaction with same.

2.1.2 Consumer Code of Practice Regulations, 2007

The Consumer Code of Practice is a general consumer code which serves as minimum requirements for any individual consumer code to be prepared by a licensee. All licensees are bound by the Code until their individual consumer codes have been approved by the Commission. Rights of Consumers under the General Code include free information on services to be provided including detailed information on complaints handling processes of licensees. Part VII (paragraphs 39–49) of the Code deals with complaints handling. The Code mandates licensees to provide, and from time to time review and update their consumer complaints handling procedures. Information on their complaints handling processes, in various media and formats and in easily to understand language, should be made available, including as specifically directed by the Commission from time to time. They are to ensure that consumers can easily identify how a complaint may be lodged, either at a licensee's premises or using identified forms of telecommunications. The information on the complaints handling processes shall contain information to consumers about

²³ Chap. 3, para 10.

²⁴ *Ibid.*, para. 11.

their rights to complain; how licensees can be contacted in order to make a complaint and the types of supporting information including documents a complainant needs to furnish when making a complaint. Licensees are required to record all complaints and their outcomes and to categorise and analyse complaints to allow for the identification of recurring problems.²⁵

Licensees are enjoined to make adequate provision to ensure that people with physical disabilities or other special needs are able to access their complaint handling processes, and to provide reasonable assistance where a consumer specifically requests assistance in lodging a complaint.²⁶ Written complaints are to be acknowledged by the licensees and non-written complaints shall be taken as acknowledged at the time the complaint was communicated to the licensee. No consumer complaint shall remain unresolved for more than three (3) months and consumers shall be advised of the outcome of their complaint and any resulting decision by the licensee. Where a consumer is not satisfied with a decision on his or her complaint, the licensee shall give the consumer the option of pursuing a suitable escalation process within the licensee's organisation. Where a complaint and any resulting escalation process is not resolved to the consumer's satisfaction within sixty (60) days of its initial communication to the licensee, the licensee shall inform the consumer of his right to refer the complaint to the Commission.²⁷ Complaint handling processes shall be provided free of charge except in certain specified circumstances where a licensee is authorised to impose a reasonable charge which shall be identified and agreed to by the consumer before being incurred.²⁸ Licensees are prohibited from imposing any disconnection or credit management action regarding any service which a complaint or billing dispute relates while the complaint or dispute is being investigated.²⁹

The Commission oversees compliance with the General Consumer Code and any other applicable consumer codes. The penalty for the breach of an applicable consumer code is the imposition of administrative fines as provided in Chapter IV of the NCC Enforcement Regulations 2005. In imposing penalties for such breach the Commission is enjoined to consider the

²⁵ Paragraphs 39, 45 – 47.

²⁶ Paragraph 40.

²⁷ Paragraph 41.

²⁸ Paragraph 42.

²⁹ Paragraph 44.

seriousness of the breach, past conduct of the licensee with respect to compliance with the code and any compensation offered by the licensee to affected consumers for the breach.

Section 128 of the Nigerian Communication Act vests the NCC with powers to regulate numbers and number portability in Nigeria. Number Portability allows subscribers to change their service providers without changing their telephone numbers. This provides immense benefits to subscribers as they can more easily change service providers without having to notify all their friends and contacts of a number change.³⁰ Pursuant to this power and in furtherance to the NCC's objectives of protecting consumer interest through the development, monitoring and enforcement of compliance with regulations by telecommunications service providers in order to ensure better quality services, fair pricing and competition, the Commission developed a framework for Mobile Number Portability (MNP) in Nigeria.³¹ The document provides the regulatory, legal and technical framework for the implementation of MNP in Nigeria. It sets out the business rules to manage the processes for porting mobile numbers between mobile service providers and subscribers, licensed by the Commission to provide mobile telecommunications service in Nigeria, and covers such consumer related topics as charging and billing, customer care, customer complaints, dispute resolution and fraud prevention. However, the practical implementation of the MNP is yet to commence.

2.1.3 Nigerian Communications Act Provisions: Bar to Recourse to other Avenues for Redress?

A cursory look at some of the provisions of the Nigerian Communications Act and its subsidiary legislation relating to complaints handling may give the impression that the Act procedure is intended to constitute a bar to recourse to other avenues for redress. For instance, section 74 (1) provides that an attempt shall first be made by the parties to resolve any dispute between them through negotiation before the involvement of the Commission. And where a dispute is eventually taken to the Commission as prescribed in the Act, section 78 (1) provides that the decision of the Commission shall be binding on the parties and the Commission may direct a party to a dispute to abide by the

³⁰ It will also be of great importance to business subscribers and organisations who need consistency for their contact details.

³¹ See Nigerian Communications Commission, *Nigerian Mobile Number Portability Business Rules and Port Order Processes*, March 2012.

decision of the Commission. A decision made by the Commission may be enforced by the Court as if the decision is a judgment of such Court provided that the Commission had issued a certificate to the complainant for leave to proceed to the Court for the enforcement of the decision.³² Then sections 86–88 provide that a person who is aggrieved or adversely affected by any decision of the Commission made pursuant to the exercise of the powers and functions under the Act or its subsidiary legislation may request in writing to the Commission for a statement of the reasons for the decision and subsequently for a review by the Commission of the decision. Thereafter, an aggrieved person can only appeal to the court for a judicial review of the Commission’s decision or other action. “Decision” includes any action, order, report and direction.³³ The decision or direction of the Commission that is the subject matter of an application for judicial review shall subsist and remain binding and valid until it is expressly reversed in a final judgement or order of the Court. A person shall not apply to the Court for a judicial review unless that person has first exhausted all other remedies provided under the Act.³⁴

It is humbly submitted that the above provisions which essentially introduce, Alternative Dispute Resolution (ADR) processes of negotiation, arbitration and mediation, do not constitute an absolute bar to recourse to other avenues of redress such as the courts or the Consumer Protection Council. The requirement that for a person to apply for judicial review he or she must first exhaust all other remedies provided under the Act applies where a person from the onset decides to follow the Act procedure. The provisions would not be applicable where an aggrieved consumer decides at the onset to sue in contract for breach of contract or in tort for negligence. That is to say, that the conditions apply to determinations by the NCC and not to suits in which the Commission is not a party and its decision is not up to review. The provisions are not adequate to oust the jurisdiction of the courts as provided in the 1999 Constitution of the Federal Republic of Nigeria.³⁵

Similarly, the procedure does not constitute a bar to recourse to bringing a complaint to the Consumer Protection Council. In recognition of the possibility of regulatory overlaps in the telecommunication sector, the Commission and the Council

³² S. 78 (1) and (2).

³³ S. 86 (4).

³⁴ See generally, ss. 86 – 88.

³⁵ See s. 6, Constitution of the Federal Republic of Nigeria, 1999.

executed a Memorandum of Understanding (MoU) in 2005 by which they agreed to “fully co-operate and collaborate with each other in the discharge of their functions as it relates to the protection of consumers of products and services in the telecommunications sector”. The MoU covered specified issues of which consumer complaints is not one. The issues covered by the MoU include sales promotion, registration of products and services and provision of information relating to standards, grades and quality of telecommunication services, equipment manufactured or sold in Nigeria and approved tariffs.³⁶

2.2 The Consumer Protection Council Act

The principal purpose of this statute is to protect consumers against hazardous products and shoddy services, and to provide speedy redress to consumer complaints through negotiation, mediation and conciliation. It established the Consumer Protection Council (CPC) which is the apex consumer protection agency in the country. The Council’s mandate covers both goods and services and has direct bearing on consumer redress. The functions and powers of the Council are elaborately set out in sections 2 and 3 of the Act and include to:

- (a) provide speedy redress to consumer complaints through negotiation, mediation and conciliation;
- (b) cause an offending company, firm, trade association or individual to protect, compensate, provide relief and safeguards to injured consumers or communities from adverse effects of technologies that are inherently harmful, injurious, violent or highly hazardous; and
- (c) provide redress to obnoxious practices or the unscrupulous exploitation of consumers by companies, firms, trade associations or individual.

Section 4 of the Act provides for the establishment of a State Consumer Protection Committee to assist the Council in each state of the Federation. The State Committee, subject to the general supervision of the Council, is empowered to receive, investigate and act on complaints from consumers. A consumer or community that has suffered loss, injury or damage as a result of the use or impact of a product or service may make a complaint in

³⁶ See Memorandum of Understanding (MOU), available online at <http://www.ncc.gov.ng> retrieved on February 8, 2010.

writing to, or seek redress through the State Committee.³⁷ Whereupon an investigation by the Council or State Committee of a complaint by a consumer, it is proved that the consumer's right has been violated; or that a wrong has been committed by way of trade, provision of services, supply of information or advertisement, thereby, causing injury or loss to the consumer; the consumer shall, in addition to the redress, which the State Committee, subject to the approval of the Council, may impose, have a right of civil action for compensation or restitution in any competent court.³⁸ This means that in addition to any compensation awarded by the State Committee, the consumer can institute action in court for damages against the wrongdoer. While it is clear that the consumer can bring an action in court based on breach of contract or tort of negligence, the above provision does not make it clear whether the civil action can be based solely on the breach of the Act so that the consumer will not have to prove privity of contract or negligence on the part of the wrongdoer. It has been suggested that should be amended to clearly bring out the intendment of the legislature.³⁹

Also, a cursory look at the above provisions would give the impression that consumer complaints to the Council need not be founded upon a breach of contract or negligence. However, it is submitted that, the Council would more readily oblige and grant remedy to a consumer where the wrong which caused the injury or loss to the consumer results from a deliberate wrongful act or negligence on the part of the supplier of goods or provider of services. A contrary interpretation would constitute serious disincentive to commerce and industry.

Subject to the MoU between the NCC and CPC consumers of telecommunication services can have recourse to the Council for redress. However, the CPC does not have offices in all the states of the Federation. Many states are yet to establish State Consumer Protection Committees as required under its enabling statute. The State Committee is pivotal to the effective discharge of the functions of the Council and its absence in any state might make it impracticable for the Council to fully discharge its mandate in such a state. Owing to the small nature of many consumer claims, the consumer might prefer to endure

³⁷ S. 6.

³⁸ S. 8.

³⁹ See F. N. Monye, *Law of Consumer Protection* (Ibadan: Spectrum Books Ltd., 2003) p. 63.

his or her loss than to travel long distances to lodge complaints with the Council where to reach the nearest offices of the agencies would entail considerable expense on his or her part.

2.3 The Utilities Charges Commission Act, 1992

This Act establishes the Utilities Charges Commission (UCC) to keep watch on public utilities regarding their obligations and has powers *inter alia* to:

- (a) evaluate on a continuing basis trends in tariffs charged by public utilities and determine permissible increases;
- (b) study requests from consumers, the public and private utility providers on charges in utility rates and make appropriate recommendations; and
- (c) advise the government on guidelines within which increase in tariffs should be confirmed by the scheduled utilities.

The Act does not define the term “public utilities” but “the scheduled utilities” are listed in schedule 2 to the Act. One of the scheduled utilities under the Act is the Nigerian Telecommunications Limited.⁴⁰ It is submitted that the list of utilities under the regulatory ambit of the Commission is not exhaustive because apart from those specifically mentioned, the schedule covers “any other public utility as may be determined by the Commission.” A public utility has been defined as “a company that provides necessary services to the public, such as telephone lines and service, electricity, and water.”⁴¹ A public utility is therefore, a business charged with a public interest and may be owned by the government or private individuals. As asserted by Kanyip,⁴² public utility refers to the nature of business

⁴⁰ Others are the National Electric Power Authority (now Power Holdings of Company of Nigeria), the Nigerian National Petroleum Company (NNPC), the Nigerian Airways (now Virgin-Nigeria) – domestic operations, the Nigerian Railway Corporation (NRC), Ferry Services Organisation, the Nigerian Ports Authority (NPA), State Water Boards (or Corporations), Road Transport Organisations, State Transport Organisations, the Nigerian Postal Services and any other public utility as may be determined by the Commission. See Schedule 2 to the Act.

⁴¹ B. A. Garner (ed.), *Black’s Law Dictionary*, 8th edn. (St. Paul, Minn: West Group, 2004) p. 1582

⁴² See B. B. Kanyip, “Service Liability under Nigerian Consumer Law” in F. N. Monye (ed.), *Consumer Journal*, Vol. 1 No. 1 (Enugu: Consumer Awareness Organisation, 2005) pp. 79 – 97. The author categorised public utilities into three, namely: (1) those that furnish some form of public transportation of

not ownership or operation. The regulation of public utilities is in harmony with the state's power to protect or promote the good and general welfare of the citizens. Notwithstanding the business factor or economic interest, it is the public interest in the welfare of the citizenry that is paramount.⁴³ While the Act did not generally include the telecommunications sector in the list of scheduled utilities, the Commission can make a determination to that effect. If this is done, it will enable the Commission extend its regulatory oversight to the sector and properly evaluate and regulate tariffs and charges in the industry which at present appear to be determined largely by market forces.⁴⁴

Under the Act, any scheduled utility intending to vary or increase its charges, tariffs or rates shall first seek the Commission's approval for such permissible increase.⁴⁵ A person aggrieved by any tariff or rate imposed or services provided by a scheduled utility may forward his complaint in writing to the Commission which shall inquire into the cause and circumstances of the complaint and endeavour to bring about a settlement.⁴⁶ In fixing any rate or coming to a decision the Commission is enjoined to, among other things, consider the interests of consumers by ensuring that they are not made to absorb avoidable costs. These provisions furnish an avenue for consumers to seek redress in appropriate cases through the Commission and the settlement that the Commission can procure may include payment of compensation to an aggrieved consumer.

2.4 The Public Complaints Commission Act, 1975

passengers and goods for hire, eg. for example, railways, airlines, waterways; (2) those that furnish some form of communication for hire between specific terminal points, for instance, telephone, postal services, radio messages, internet services, etc., and (3) those that furnish some form of services within the home or place of business or at least on the premises of the consumer such as supply of natural gas, electricity, water, waste and sewage disposal, etc.

⁴³ *Ibid.*

⁴⁴ It may be argued that this will create a regulatory overlap between UCC and NCC. But since the mandate of the former extends beyond the telecommunications sector while that of the latter is restricted to that sector, the two bodies can always work out an effective collaboration to ensure maximum protection of consumers in that sector. This is what happened between NCC and CPC.

⁴⁵ S. 7.

⁴⁶ S. 8.

This Act establishes the Public Complaints Commission. A Commissioner appointed under section 2 of the Act shall have powers to investigate, either on his own initiative or following complaints lodged before him by any other person, any administrative or other action taken by:

- (a) any department or ministry of the Federal of any state government;
- (b) any statutory corporation or public institution set up by any government in Nigeria;
- (c) any company incorporated under or pursuant to the Companies and Allied Matters Act,⁴⁷ whether owned by any government or private individuals in Nigeria; or
- (d) any officer or servant of any of the aforementioned bodies.⁴⁸

After the investigation, the recommendations that the Commissioner may make to the appropriate person or responsible agency include further consideration of the matter and modification or cancellation or alteration of the offending administrative, ruling or other act.

This provides an important avenue for pursuing consumer redress against public enterprises, especially where such enterprises enjoy immunity of action. But apart from government ministries and departments, its jurisdiction extends to incorporated companies. Most telecommunications service providers in Nigeria are companies incorporated under the Companies and Allied Matters Act and therefore, subject to the Act. In appropriate cases, the Commissioner can recommend payment of compensation to a consumer by a service provider. However, the Commission's jurisdiction is limited, as it cannot investigate certain matters.⁴⁹ Even where a matter falls within the jurisdiction of the Commission, it has no powers to enforce its decision but can only make recommendations to the appropriate person or administrative agency.⁵⁰ Such recommendations are not binding on the recipient who may decide to ignore it without incurring any legal sanction.

⁴⁷ Cap. C20, Vol. 3, *LFN*, 2004.

⁴⁸ S. 5.

⁴⁹ S. 6 (1). These include matters in which the complainant has not, in the opinion of the Commissioner exhausted all available legal or administrative procedures and matters in which the complainant has no personal interest.

⁵⁰ S. 7.

2.5 Law of Contract

The law of contract pervades all spheres of human activities, the provision of services inclusive. Consumer protection under the law of contract is concerned with the entitlements of persons who enter into a consumer transaction. It focuses on the provision of remedy for consumers where there is a breach of any of the terms of the contract by suppliers of goods and services. It would appear that consumer protection under the law of contract is more evident in the case of sale of products where in addition to the express terms of the contract, the consumer can rely on the terms implied under the Sale of Goods Laws.⁵¹ The shortcomings of the law of contract in relation to consumer protection generally lie in certain inherent principles of law including the doctrines of privity and freedom of contract. By the doctrine of privity of contract, subject to certain recognised exceptions, only a person who is a party to a contract can sue or be sued on the contract. In other words, only a person who is a party to a contract can acquire a right or assume an obligation under it.⁵²

In consumer protection, the implication of this principle is that if a consumer who has suffered loss, injury or damage as a result defective goods or shoddy services was not privy to the contract for the supply of the goods or services, he would not have any contractual remedy against the supplier. A right of action in contract will only avail a consumer, if he or she is the purchaser of the goods or services in respect of which loss, injury or damage was sustained. Thus, a gratuitous donee or casual borrower cannot recover in contract. This rule poses a severe limitation on consumer protection.⁵³

The Nigerian Communications Act seems to strongly uphold the doctrine of privity by its definition of “consumer” as any “person who subscribes to and uses a communication

⁵¹ Such implied terms include conditions as to description, merchantability, fitness for purpose and correspondence with sample. See, for example, ss. 542–544, Contract Law of Enugu State, Cap. 26, Revised Laws of Enugu State, 2004.

⁵² See *Price v Easton* (1833) 4 B & Ad 433; *Tweddle v. Atkinson* (1861) 1 B & S 393; *Dunlop Pneumatic Tyre Co. Ltd. v. Selfridge Ltd.* [1915] AC 847; *Shuwa v. Chad Basin Authority* (1991) 7 NWLR (Pt. 205) 550;

⁵³ See F. O. Ukwueze, “Consumer Protection under the Law of Contract in Nigeria” *Nnamdi Azikiwe University Law Journal*, (2008) Vol. 7, No. 1, pp. 1 – 18.

service”.⁵⁴ This is very restrictive and excludes persons who use communications services but are themselves not subscribers. For example, the Act definition excludes a person who uses a GSM phone with a line which he received as a gift since such a benefactor would not be the subscriber. In the absence of any contractual relationship, such persons may only have right of action in tort where they suffer harm, loss or injury as a result of such services. This is not in consonance with the widely accepted definition of the term “consumer” which includes a person who purchases, uses or is affected by a product or a service. For example, the Consumer Protection Council Act defines the term “consumer” to mean “an individual who purchases, uses, maintains or disposes of product or services.”⁵⁵ It is therefore suggested that the phrase “person who subscribes to and uses...” in the definition of consumer in the Nigerian Communications Act be amended to read “person who subscribes to or uses...”.

Freedom of contract generally means that a person is free to enter into a contract with any person he or she chooses and that parties to a contract are free to contract on any terms they want.⁵⁶ Presumably, it could also be said that every person has the freedom to refuse to contract if either the term or the other party is not suitable to him. This philosophy presumes that the parties are able to negotiate on an equal footing, have equal bargaining powers, are equally able to look after their own interests and have full understanding of the consequences of their actions and the terms of the contract. In reality, this is not always the case. Businesses often find it more convenient to use pre-printed (standard form) contracts rather than negotiate each contract on an individual basis. Such standard form contracts often contain exclusion, exemption or limiting clauses. The present position of

⁵⁴ S. 157. This definition applies to the General Consumer Code of Practice which in paragraph 2 provides that all terms used in the Code are either defined in the Code or have the meanings ascribed to them in the principal Act. The Code does not define the term “consumer” and therefore, the Act definition applies.

⁵⁵ Section 32, Consumer Protection Council Act. It has been suggested that the word “disposes” in the definition should be understood to mean “making use of” and not “selling”. See B. B. Kanyip, “Overview of Consumer Protection Law and Policy in Nigeria” in E. S. Nwauche and F. I. Asogwah (eds.), *Essays in Honour of Professor C. O. Okonkwo* (Port Harcourt: Jite Books, 2000) pp. 191 – 224 cited in Apori and Ibanga, *loc. cit.*, p. 166.

⁵⁶ This is, however, subject to the principles of illegality, incapacity, duress, undue influence, mistake and misrepresentation, the presence of which can vitiate the contract.

the law in Nigeria in relation to exclusion or limiting clauses does not in any way enhance consumer protection.⁵⁷

2.6 Tort of Negligence

The principle of negligence holds a person who does any act without exercising reasonable care liable for damages to all those it is reasonable to say he had in contemplation while doing the act or omission in question, for any damage it is reasonable to say he should foresee as arising from his conduct. It has three vital ingredients: duty of care, breach of duty and consequential damage. Generally, for a claimant to succeed in an action for negligence he must not only show that the defendant owed him a duty of care but also that the defendant is in breach of the duty. This he has to do by showing that the defendant did not exercise reasonable care in the matter that is in issue as a result of which he has suffered the damage sought to be redressed.⁵⁸

In relation to consumer protection, the problem posed by the doctrine of privity of contract can be overcome through the law of tort. A gratuitous donee or an innocent bystander who suffers injury, loss or damage as a result of a defective product or the negligent act of another can sue in negligence without being weighed down by the requirement of contractual relationship. The tort of negligence, however, has its limitations which constitute serious difficulty in consumer protection. For example, liability arises only where the plaintiff can prove fault against the defendant, and he cannot recover for pure economic loss unaccompanied by physical injury to person or property. He must prove the particular act or omission of the defendant that amounts to a breach of duty of care, and will fail if there is no causal link between his injury, loss or damage and the act of the defendant complained of. This makes the tort of negligence an inappropriate head of claim for consumers of telecommunication services except perhaps for cases where personal injury or damage to property is caused by defective product supplied by a service provider or his faulty operational equipment.

3. Forms of Consumer Redress in the Tele-communications Industry

The remedies available under the law for consumers of telecommunications services in Nigeria are diverse. They include monetary compensation, repair, refund and replacement of articles such as faulty recharge cards and equipment. Such remedies can

⁵⁷ On this, see, F. O. Ukwueze, "Unfair Terms in Consumer Contracts in Nigeria: The Need for Stricter Statutory Control" in F. N. Monye (ed), *Consumer Journal*, (2007) Vol. 3 pp. 41 – 57.

⁵⁸ *Adeosun v. Adisa* [1986] 5 NWLR (Pt. 40) 227.

be obtained through the relevant regulatory agencies and public bodies discussed above. For example, under section 53 (1) of the Nigerian Communications Act, the Commission has powers to issue directions to any person regarding the compliance or non-compliance with any licence condition or provisions of the Act or its subsidiary legislation. And in its powers to resolve consumer disputes under section 105 (1) of the Act, the Commission may use any of its powers under the Act. Under the NCC Act procedures, therefore, the types of remedy an aggrieved consumer can obtain is very wide indeed. It is entirely at the discretion of the Commission and may range from compensation to refund, repair and replacement. The Commission also has powers to impose administrative penalty for non-compliance under the NCC (Enforcement Processes, etc) Regulations 2005. Similarly, the redress which the State Consumer Protection Committee can, subject to the approval of the Consumer Protection Council, impose includes compensation, refund, repair and replacement.

Redress under the general law includes damages for breach of contract and for negligence, rescission, repudiation and specific performance of contract and injunction against breach of contract. These judicial remedies are obtainable only from the court following successful litigation by a claimant. Litigation in Nigeria is frustratingly time-consuming, technical and expensive. Considering the low level of literacy in the country, it is doubtful that the average Nigerian consumer of telecommunication services knows his rights under the law and how to enforce them. Even if he knows his rights, he may not have the financial wherewithal to pursue claims in court to enforce the rights in court. This accounts for the paucity of decided cases or consumer claims against service providers in the telecommunications industry. But there is a glimmer of hope in this direction as claims for poor quality services against telecommunication service providers have begun to emerge.

Recently, a human rights activist and lawyer filed a suit against the NCC and MTN Communication Ltd. at the Federal High Court Abuja claiming ₦2 million damages. The claim of the Plaintiff is that from December, 2009 – April, 2010, a period of about four months from when the Plaintiff began the subscription of the MTN Fast Link Internet Service there was no time the Plaintiff really got value for his money as the service provided was erratic and unreliable and of the poorest quality; that he would load a ₦500 voucher which was supposed to last for 24 hours but the service would work for some thirty minutes or one or two hours and then pack up; that the service which was most of the time bad almost always frustrated the work of the Plaintiff

who is a Legal Practitioner and used the Internet to research national and international trends in legal practice.

The Plaintiff alleged that he lodged a complaint against the erratic, poor quality, and unreliable service of the MTN with the NCC on the 22nd February, 2010, and the NCC promised to commence investigation and get back to the Plaintiff but that NCC never investigated the complaint as required by its enabling statute. Instead of addressing the averments of the Plaintiff, MTN filed a preliminary objection to the effect that the Court has no jurisdiction in the case. The court dismissed the preliminary objection and held that it has jurisdiction by virtue of Section 251 of the Constitution and Section 138 of the Nigerian Communication Act, which provides that the Federal High Court shall have exclusive jurisdiction over all matters, suits and cases arising out of or pursuant to or consequent upon the NCC Act.⁵⁹

4. Channels of Redress for the Consumer of Telecommunications Services

It has been argued that the redress procedure under the Nigerian Communications Act and its subsidiary legislation does not constitute a bar to other avenues of redress through the courts or other regulatory agencies. The following steps are therefore recommended for consumers who have suffered loss or damage to access the remedies available under the law in the telecommunications industry.

First, the consumer should lodge a complaint with the service provider and then follow and exhaust the complaints handling procedure of the service provider. In the event that the consumer's complaint is ignored or not resolved to his or her satisfaction, such a consumer should report to the Nigerian Communications Commission (NCC). The Commission has powers to order a licensee or service provider to pay compensation to a consumer in appropriate cases and to give directions to any person regarding the compliance or non-compliance with any licence conditions or provisions of the Nigerian Communications Act or any its subsidiary legislation. The Commission receives consumer complaints through, letters, e-mail and orally by physical visits to its offices by consumers as well as at the Telecom Consumer

⁵⁹ See *Okoi Obono-Obla v. Nigerian Communications Commission and MTN Communication Nig. Ltd.* (unreported), Suit No. FHC/ABJ/382/CS/2010, Federal High Court Abuja, ruling delivered by Hon. Justice S. E. Chukwu on Friday, 16 November 2012. See <http://www.nairaland.com/newpost?topic=1100441> last accessed 16 November, 2012.

Parliament (TCP) and Consumer Outreach Programmes (COP) organised from time to time by the Commission.⁶⁰

A consumer who has suffered loss, damage or injury owing to a defective product or service of a telecommunication service provider can also lodge a complaint with the Consumer Protection Council or a State Consumer Protection Committee, the Public Utilities Charges Commission or Public Complaints Commission, as discussed above.

Finally, a consumer can before or after exhausting the procedure for complaints to the service provider, regulatory agency or public bodies, institute a civil action in court either in contract or tort as may be appropriate. This option should be the last resort because of the problems inherent in our court system such as high cost of litigation and technicalities which usually delay court proceedings.

Where a consumer needs advice or assistance in pursuing his or her rights under the law he or she can approach any non-governmental consumer association many of which are in existence in the country.⁶¹

5. Conclusion

From the foregoing, one can safely conclude that save for a few observable lapses, the law has made adequate provisions for redress for the consumer of telecommunications services in Nigeria. The provisions of the Nigerian Communications Act and the Consumer Protection Council Act in this respect are far-reaching. The vibrancy of the Nigerian Communications Commission in using the powers conferred on it by the enabling statute to make the necessary subsidiary legislation is quite commendable.

Remedies under the law of contract and the tort of negligence are obtainable essentially through litigation. In this regard, delay and high cost of litigation can constitute impediments to consumer redress in the telecommunications

⁶⁰ See "Consumer Complaints" at <http://www.ncc.gov.ng> last accessed on 8 February, 2010.

⁶¹ Prominent among these are the Consumer Protection Organisation of Nigeria (CPON), the National Consumers of Nigeria (NCN), the Consumer Rights Association of Nigeria (CRAN), the Public Interest Law Organisation (PILO), the Consumer Organisation of Nigeria (CON), the Consumer Campaign Foundation (CCF), the Consumer Awareness Organisation (CAO), the Consumer Advocacy Firm (CAF), the Consumer Protection Association of Nigeria (CPAN) and the Poverty Alleviation and Consumer Protection Network (PACPN). See Monye, *Law of Consumer Protection, op. cit.* p. 9 and The Nigerian Law Reform Commission, *Working Paper on the Reform of Consumer Protection Law*, 2006, pp. 43-44.

sector. This makes resort to the regulatory agencies and public bodies more suitable alternatives. Thus, resort to the courts for redress under the general law should be the last option and should be embarked upon only when it is inevitable, such as where a dispute involves a question of law or where the service provider involved proves recalcitrant.

Commendable as the provisions of the relevant statutes are, however, there are a few problems which hamper consumer access to redress through the agencies. For example, NCC like the CPC does not have offices in all the States of the Federation. This situation may affect the number of consumer complaints made to the Commission when compared with the volume of telecommunication business and the number of consumers of telecommunications in Nigeria. Presently, the level of consumer satisfaction with the industry is quite low as one constantly hears complaints of frustrations encountered by the consumers in making and answering calls. It is therefore, recommended that to ensure effective coverage of the grassroots, the relevant regulatory agencies: NCC and CPC, should establish offices in all the States of the federation and have outposts in every local government area.

A measure that will greatly enhance consumer satisfaction in the telecommunications industry in Nigeria is the implementation of Mobile Number Portability (MNP). When fully and effectively implemented, the programme will remove barriers to free choice of service provider by a subscriber, ensure further increase in the level of open competition among network operators and act as an incentive for service providers to improve their quality of service and consumer satisfaction. The Federal Government approved the implementation of the programme since 2010 but its implementation has not gone beyond paper works.⁶² It is recommended that NCC should pursue the MNP project with vigour to ensure that it is implemented without further delay.

Finally, there is need to constantly educate the Nigerian consumer on his rights under the law and the need to enforce those rights. It is only when this is done that the consumers of telecommunication services in Nigeria can fully avail themselves of the remedies available to them under the law.

⁶² Following approval by the Federal Government in the 2010, the NCC set up machinery to ensure that MNP is implemented by all telecommunications operators in Nigeria before the end of September, 2010. Unfortunately, the programme is yet to commence. See NCC and the Press, "Press Release: Number Portability Project – Towards Improving Quality of Telecommunication Services in Nigeria" at <http://www.ncc.gov.ng> retrieved January 31, 2011.