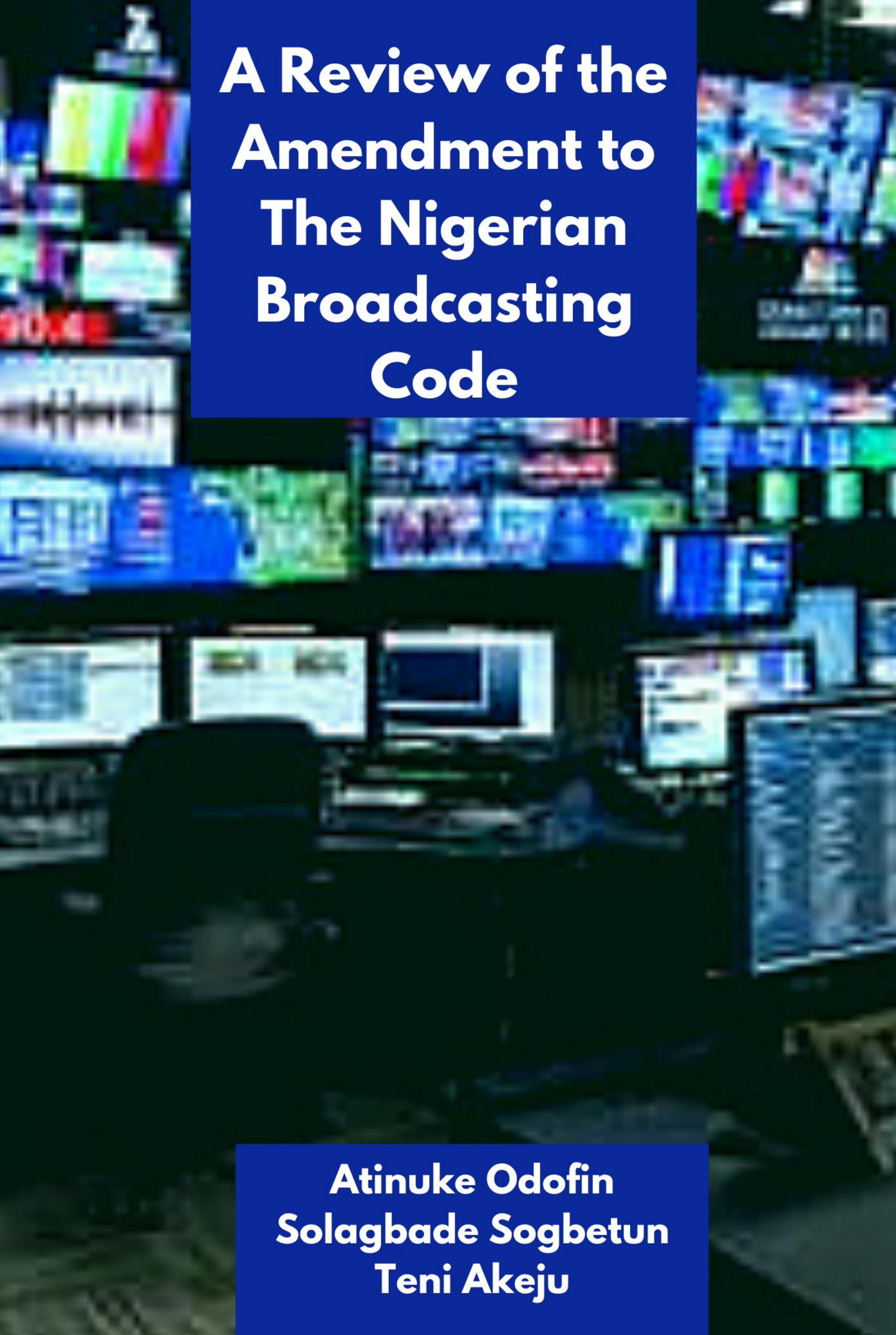

A Review of the Amendment to The Nigerian Broadcasting Code

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Introduction

The National Broadcasting Commission (NBC) recently released the Amendment to the 6th Edition of the Nigerian Broadcasting Code ("the Amendment"). The NBC, which was established in 1992 under the National Broadcasting Commission Act 1992) ("the Act"), NBC is vested with the responsibility of regulating and controlling the broadcast industry in Nigeria. In addition, the NBC is entrusted with the power to establish and disseminate a National Broadcasting Code ("the Code") for the purpose of **setting standards with regard to the content and quality of materials for broadcast**[1]. In exercise of this power, the NBC has, since 2003, published and updated editions of the Code.

According to the NBC, the Amendment seeks to promote local content in the Nigerian broadcast industry, proscribe monopolistic and anti-competition practices and provide for increased advertising revenue for local broadcast stations and content producers. Since its announcement, the Amendment has been subject to debate and criticism from business owners and operators in the broadcast industry. This article reviews the provisions of the Amendment in line with the Act and general principles of law.

Amendments to the 6th Edition of the Code

- ***Agreements in Restraint of Trade/Dominant Position***

The Amendment prohibits broadcasters and licensees, particularly broadcasters in a "dominant position", from entering into any form of agreement, contract, concerted practices or taking any decision which has as its object and intendment, the prevention, restriction or distortion of competition in, or any part of, the broadcast media industry in Nigeria[2]. Guidelines clarifying the application of dominant position to a broadcaster/licensee and the meaning of agreements or contracts the prevention, restriction or distortion of competition in, or any part of, the broadcast media industry in Nigeria are to be published by the NBC.

- ***Acquisition of Sports Rights***

Nigeria is not to be "bundled in the same basket as other countries in the sale of football rights", and the final bid for the acquisition of rights to sporting events for Nigeria must be reasonable in comparison with other territories of similar economic indices. The NBC must also ratify all sports rights acquisitions before broadcast. In addition, the NBC has appointed itself as a compulsory arbitral institution to arbitrate upon commercial disputes arising between licensees and rights owners[3].

"Prime Foreign Sports Content" are not to be transmitted into Nigeria unless the broadcaster has also acquired Prime Local Sports Content of the same category with a minimum of 30% of the cost of acquiring the Prime Foreign Sports Content. Similarly, advertisements must not be broadcast during the broadcast of Prime Foreign Sports Content unless the advertiser equally advertises such products and services during the broadcast of Prime Local Sports Content. In determining and acquiring Prime Local Sports Content, the order of preference is as follows: National, State, Local and Private Sports Content[4].

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[1] Section 2(1)(h) of the Act
[2] Article 9.0.1 of the Amendment
[3] Article 6.2.7 of the Amendment
[4] Articles 6.2.10 – 6.2.21 of the Amendment

Furthermore, exclusivity of sporting rights is prohibited under the Amendment[5].

- ***Compulsory Sub-licencing***

To promote competition, broadcasters and licensees are prohibited from entering into any form of broadcasting rights acquisition in Nigeria or anywhere in the world to acquire any broadcasting right(s) which exclude persons, broadcasters or licensees in Nigeria from sub-licensing the same[6]. Broadcasters are to ensure access by all Pay-Tv platforms to premium content in the Sports and News genre to *"generate effective competition at the wholesale level for such genres"*. Broadcasters are required to offer Sports and News programmes and/or channels to other broadcasters for retail to residential subscribers in Nigeria on terms stated in the Amendment[7]. The Amendment also prescribes standard terms and conditions upon which a broadcaster must offer its premium content to other broadcasters. These standard terms and conditions include the fees to be charged to the sub-licensees which must not exceed the Stipulated Prices (i.e. the prorated cost of acquisition of the sports and news programme and/or channels by a subscriber on the platform of the licensee). Where there is a dispute between the parties as to the Stipulated Prices, the NBC has power under the Code to give directives which directives shall be binding on all parties.

The NBC also has the power under the Code to compel any broadcaster to license its broadcast and/or signal rights in any genre of programming to another licensee or broadcaster in Nigeria if (i) the genre of programme(s) enjoys compelling viewership by Nigerians; (ii) it relates to a product or service that is objectively necessary to be able to compete effectively on a downstream market; (iii) it is likely to lead to the elimination of effective competition on the downstream markets; and (iv) the refusal is likely to lead to consumer deprivation.

Decisions of the NBC are binding on all broadcast licensees irrespective of contracts to the contrary.

Local Content[8]

The Code introduces local content requirements which apply to all categories of programming and prescribes local content thresholds as follows:

a) The producer(s), who must be responsible for creative control, monitoring and decision-making pertaining to the programme, must be a Nigerian residing in Nigeria;
b) The director(s) and author/writer of the programme must be Nigerian;
c) At least 75% of the leading actors and major supporting cast, including voice actors, or on-screen presenters appearing in the programme are Nigerians;
d) A minimum of 75% of program expenses and 75% of post-production expenses are paid for services provided by Nigerians or Nigerian companies; and
e) Where a production is a collaboration with a foreign entity, the producer(s) shall ensure that Nigerian Production locations, talents, skills set etc. shall form at least 75% of the entire production.

Also, subscription-based services are to ensure that a minimum of 15% of their channel acquisition budget is spent on channels with local content.

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[5] Article 6.2.8 of the Amendment
[6] Article 9.01 of the Amendment
[7] Article 9.1.1.2 of the Amendment
[8] Article 3.15 of the Amendment

Issues

Many of the changes introduced by the Amendment invoke several challenges for investors and call to question the extent of the powers of the NBC as a regulatory authority.

i. Overreach of the statutory powers of the NBC

It is settled law that a public body or authority vested with statutory powers must act within the law and ensure that it does not exceed or abuse its powers. The statutory authority must keep within the limits of the authority granted to it[9]. Upon a review of the NBC Act, there are no provisions of the Act which give the NBC regulatory power over the matters which it seeks to bring within its supervisory purview by virtue of the Amendment. It is an established principle of statutory interpretation that where general provisions follow the enumeration of particular classes of things, the general provisions will be construed as applying only to things of the same general class as those enumerated. The functions of the NBC are specifically listed in the Act and it can be deduced that the intention of the lawmaker was to vest the NBC with supervisory authority over licensees and operators in the industry within the context of the content and quality of the content broadcast to Nigerian consumers. The power over matters such as anti-competition, local content, and payments for advertisements and sub-licences cannot be implied merely from the NBC's general regulatory and control power.

The NBC's power to issue and disseminate the Code stems from the Act which provides that the NBC has the power to disseminate the Code **and set standards with regard to the content and quality of materials for broadcast**[10]. The clear interpretation of this provision is that the power of the NBC to issue the Code is limited to the setting of standards relating to what is published by broadcasters and the quality of such publications.

A subsidiary legislation cannot vest upon the statutory authority, powers in excess of the powers given to the statutory authority under its establishing Act. The subsidiary legislation derives its authority and validity from and subject to the provisions of the parent enabling statute, in this case, the Act. The subsidiary legislation cannot expand the provisions of the substantive statute[11]. Thus, in this case, where the powers of the NBC are limited as aforesaid, the NBC cannot surreptitiously attempt to expand its powers by inserting provisions in the Code donating powers which are not contemplated under the Act.

The Amendment includes several mandatory provisions imposing obligations on content proprietors who are not within the regulatory jurisdiction of the NBC. These include provisions relating to the nature and quantum of bids for rights acquisitions and the platforms upon which rights owners are to make their content available to licensed broadcasters. Other examples include provisions related to the payment for advertisements and the payment of royalties for artistic and musical works. Furthermore, the Code purports to appoint the NBC as a compulsory arbitrator over disputes between broadcasters and sports rights owners[12]. However, issues such as the final bid to be accepted for distribution rights and in some cases, the bundling of territories will always be determined by rights owners.

[9] Borno State Urban Planning & Development Board Ministry of Land & Survey, Borno State & Another v. BAMS Investment (Nig.) Ltd. (2017) LPELR-43290 (CA); Psychiatric Hospital Management Board v. Ejitagha (2000) 11 NWLR (Pt. 677) 15
[10] Section 2(1)(h) of the Act
[11] Olarenwaju v. Oyeyemi (2010) 2 NWLR (697) 229
[12] Article 6.2.7 of the Amendment

ii. Conflation of Exclusivity with Anti-Competition

The Amendment by expressly prohibiting the exclusivity in sporting rights appears to conflate exclusivity with anti-competition. In the sports industry, and across all forms of media distribution, exclusivity of distribution is a key factor driving contract negotiations and agreements. Exclusivity of premium content is a key promotional tool aimed at attracting consumers towards a particular broadcaster. Access to content on an exclusive basis has been defined as a necessary condition to operate in certain broadcast markets such as Pay-Tv[13].

Admittedly, there has been much discourse over whether exclusive distribution agreements in respect of premium content creates barriers to entry and lead to monopolistic markets. In other jurisdictions, such arrangements are scrutinised against relevant anti-competition or anti-trust laws.

The Amendment, by outrightly prohibiting exclusivity, does not give room for any scrutiny of the exclusive rights granted within the context of the Nigerian competition law framework. This is particularly surprising in light of the recent enactment of the Federal Competition and Consumer Protection Act ("the FCCPA"). The FCCPA established the Federal Competition and Consumer Protection Commission and specifically makes provisions prohibiting restrictive or anti-competition business practices which constitute an abuse of a dominant position of market power in Nigeria. Undoubtedly, agreements for the sale of exclusive broadcast rights can be scrutinised within the provisions of the FCCPA on restraint of trade.

iii. Intellectual Property Rights

Content is generally protected by intellectual property rights and the exclusive preserve of the content creator or right owner. By compelling broadcasters to sublicence media rights to other broadcasters, the NBC appears to mandate licensees of intellectual property rights to breach the proprietors' intellectual property rights.

iv. Free-market principles and parties' freedom to contract

The provisions of the Amendment, particularly, the provisions on compulsory sub-licensing and compulsory acquisition of local sports content where foreign sports content is acquired are not in line with established principles of freedom of contract. It is contrary to the NBC's stated intention to build and promote a competitive broadcast industry where certain broadcasters and content owners can simply compel other broadcasters to sub-licence rights to them. In addition, local sports content owners do not have to ensure that the content being marketed is attractive to investors and can rest assured that a broadcaster must acquire local sports content at 30% of the cost of acquiring foreign sports content[14]. Conversely, there may now be an unofficial cap on the licensing fees payable to proprietors of local sports content.

v. Compulsory expropriation of investors' property and rights

One of the key incentives touted by the Federal Government of Nigeria to foreign investors is the freedom from expropriation. However, the provisions of the Code contain several provisions which essentially expropriate the rights and property of investors and assign them to other broadcasters at a price to be determined by the regulatory authority. The result of this will be a

[13] A. Nicita; G. Ramello – Exclusivity and Antitrust in Media Markets – The Case of Pay-TV in Europe
[14] Article 6.2.10 of the Amendment

low-investor appetite to invest in an industry in which the investors' rights may be expropriated at the whim and caprice of a regulator.

Conclusion

The Amendment as currently drafted is disincentivising to investors in the broadcast industry. This comes at a time when the Nigerian media and broadcasting industry is starting to see investments and transactions between multi-national media giants and Nigerian content creators[15].

A majority of the provisions of the Amendment are outside the powers of the NBC and outside the realm of matters to be regulated upon in the Code. It is suggested that NBC reviews the Amendment taking into account stakeholders and investors' concerns. It is also recommended that the provisions of the Amendment highlighted in this article be revisited and revised as appropriate and that the NBC adopts a balanced approach to sports broadcasting.

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[15] For example, Netflix recently announced partnerships with Nigerian film producer, Mo Abudu to produce on-screen adaptations of Nigerian literary classics - Prof. Wole Soyinka's "Death and the King's Horseman" and Lola Shoneyin's "The Secret Lives of Baba Segi's Wives".