ISSN 0954-8890

African Journal of International and Comparative Law

Revue Africaine de Droit International et Comparé

Articles

Volume 23 Pt. 2
Tome 23 No. 2

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suite 2e page de couvertur

Published by
Edinburgh University Press

Publiée par
Edinburgh University Press

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African Journal of International and Comparative Law

Revue Africaine de Droit International et Comparé

REGULATORY FRAMEWORK OF TELECOMMUNICATION SECTOR: A COMPARATIVE ANALYSIS BETWEEN NIGERIA AND SOUTH AFRICA

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I. INTRODUCTION

Nigeria and Republic of South Africa have had chequered histories in the development and regulation of their communication sectors. These two countries now have well-developed laws regulating this crucial sector of the economy and have considerable markets for deployment of communication services in Africa, which informs the reason for comparing the regulatory regimes of the two countries. Moreover, Nigeria remains the Africa's largest democracy and the most liberalised telecommunications market in the continent of Africa.[1] Nigeria is a tropical country on the West African Coast along the Gulf of Guinea. Nigeria covers an area of some 923,769 sq. km. Nigeria, just like the Republic of South Africa, is a federal nation comprising 36 states and the Federal Capital Territory.[2] The executive power at the federal level is vested in the president of the country who, together with his cabinet, makes and implements policies for the smooth running of the polity.[3] Nigeria is widely recognised as one of the major markets for telecommunications business opportunities in the world with a population of over 160 million.[4]

Since 1999 when the democratic governance was ushered in, the attention of the world had turned to Nigeria as the country with the highest potential

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1 "An Overview of the Nigerian Telecommunications Environment," Chief Executive/Vice-Chairman, NCC, ITU Telecom Africa, (2004), available at http://www.ncc.gov.ng/archive/speeches_presentations/ EVC's %20Presentation/ NCC %20CEO %20Presentation %20on %20 Overview%20of%20Nigerian%20Telecoms%20Industry.pdf (accessd 24 January 2014).

2 South Africa is 1,127sq.km consisting of nine geographical and political entities or provinces.

3 See particularly section 5 of the Constitution of the Federal Republic of Nigeria 1999. See also Chapter VI of the same Constitution.

4 A. Tooki, 'A New Dimension to Nigeria's Telecom Revolution', available at http://businessworldng.com/web/articles/1932/1/A-New-Dimension-to-Nigerias-Telecom-Revolution/Page1.html (accessed 13 August 2013).

African Journal of International and Comparative Law 23.2 (2015): 273–290
Edinburgh University Press
DOI: 10.3366/ajicl.2015.0121

www.euppublishing.com/journal/ajicl

for Information Communications Technology (ICT) investment on the African continent. With the attainment of stable democratic rule, Nigeria has continued to attract the attention of serious local and foreign investors that have come to take advantage of the new clime of investment potentials that the nation presents.[5]

The importance that communication plays in the economic development of a nation cannot be underestimated; in fact, it serves as a valve for getting goods and services across geographical spreads. The relationship between economic development and telecommunications has been said to be so interwoven to determine which one takes priority over the other.[6] Aside the economic importance of telecommunication, its dynamic effects on health, education, tourism, socialisation, political development, commerce and other important sectors of the society cannot be overemphasised.

II. THE LEGAL AND REGULATORY LANDSCAPE OF TELECOMMUNICATIONS IN NIGERIA

Electronic communication involves the process by which messages could be sent across the globe through the use of the computer, telephone line and a modem.[7] In addition, electronic communication involves any of several forms of information exchange between two or more computers through any of several methods of interconnection such as telephone line, optical fibre, satellite or radio.[8]

Freedom of communication is a fundamental right recognised internationally, which is believed to give people the right to express themselves freely. Nigeria has also provided in its Constitution a right to freedom of expression and the press. The 1999 Constitution of the Federal Republic of Nigeria states in section 39(1) that every person shall be entitled to freedom of expression, to hold opinions and to receive and impart ideas and information without interference. The Constitution further provides that every person shall be entitled to own, establish and operate any medium for the dissemination of information ideas and opinions after fulfilling certain conditions.[9]

The above background has given the assurance that the government of Nigeria recognises the fundamental right of expression and has given legal backing to it. As no society can effectively cohabit as a unit without effectual means of communication, it is important that there should be appropriate penetration of the available means of communication. Succinctly put by Alabi:

> Every human society, from the most primitive to the most advanced, depends on some form of telecommunications network. It will be virtually impossible for any group of people to define their

5 *Ibid.*
6 G. A. Alabi, 'Telecommunications in Nigeria', University of Pennsylvania – African Studies Center, available at http://www.africa.upenn.edu/ECA/aisi_inftl.html (accessed 13 August 2013).
7 *Ibid.*
8 *Ibid.*
9 Section 39(2) of the Constitution of the Federal Republic of Nigeria, 1999.

> collective identities or make decisions about their common and binding interests, without communications. Communication networks make society a reality.[10]

Prior to the merger of Post and Telegraph Department and Nigerian External Telecommunications Limited, each of these organisations was responsible for the provision of the internal and external telecommunications services, respectively. These two bodies were wholly owned by the Nigerian government. The existence of separate organisations for the management of the internal and external telecommunications networks was not a recipe for an efficient national telecommunications network because of the lack of coordination that existed between the two operating entities in development planning, implementation, operation, project phasing, maintenance and billing.[11] It was in 1985 that these two bodies were merged to form the Nigerian Telecommunications (NITEL). Even with the establishment of NITEL, competition was only available as far as equipment supplies were concerned.[12] Moreover, there was no convergence between the three arms of communications – telecommunications, information technology and broadcasting.[13]

The Nigeria Communication Commission (NCC) was established in 1992 under a Decree, later labelled as the Nigeria Communication Commission (NCC) Act,[14] to exercise jurisdiction over the regulation of telecommunication in Nigeria.[15] Prior to this time the telecommunication sector was grossly underdeveloped. The major role of the NCC is to facilitate private sector participation in communication services delivery, coordinate and regulate the activities of the operators to ensure consistency in availability of service delivery and fair pricing. Since then, the NCC has issued various licences to private telephone operators (PTOs) that allow them to roll out both fixed wireless telephone lines and analogue mobile phones.[16]

However, the telecommunication sector of Nigeria attained full deregulation with the fully fledged democratic rule that came into being in 1999. In 2003 the then president of Nigeria, Olusegun Obasanjo, signed the new Nigeria Communications Act (NCA) into law after being passed by the National Assembly, which repealed the NCC Act of 1992 and other previous enactments.[17]

10 G. A. Alabi, *supra* note 6.

11 G. A. Alabi, *supra* note 6.

12 'Telecommunications in Nigeria – Legal framework', available at http://www.paulusoro.com/publications/LegalFramework.pdf (accessed 23 September 2013).

13 *Ibid.*

14 Nigeria Communications Commission Act, No 75 1992.

15 Note that the Nigeria Broadcasting Act No.38 1992 also replicates the same provision for the broadcasting sector of the Nigerian economy.

16 J. I. Wojuade, 'Impact of Global System for Mobile Telecommunication on Nigerian Economy: A Case of Some Selected Local Government Areas in Oyo State, Nigeria', MEd Thesis. University of Ibadan, Nigeria (2005).

17 Section 150(1) of the Nigerian Communications Act 2003 repealed the Nigerian Communications Commissions Act 1992, the Nigerian Communications Commission (Amendment) Act 1998, the Telecommunications and Postal Offences Decree No. 21 of 1995 and all subsequent amendments thereto.

Prior to the repeal of the 1992 Decree, the NCC Decree merely opened up the market to allow PTOs to compete with the incumbent service providers in all areas of provision of telecommunications services, except exchange and trunks, and international services.[18] The NCC, under the 1992 Decree, was meant to be an autonomous body regulating the telecom sector, while the Ministry of Communications maintained the policy-making function for the sector and frequency coordination. However, the Commission could not be regarded as truly autonomous as final approval for the granting of licences came from the Presidency based on the recommendation from the NCC through the Ministry of Communications. This led to a situation where licences were granted or refused based on the level of influence the applicants could wield among the powers in the government. The NCC was often compelled by powerful elements to recommend applicants for approval irrespective of whether they were qualified or not.

Further, the NCC was empowered to exercise control only over the PTOs and not the national carrier, NITEL. The Commission could merely license the private operators and type-approve their equipment but lacked the capacity to call NITEL to order and could not compel NITEL to interconnect the licensed operators. This was a major problem as most of the PTOs even with their networks in place, could not commence their operations. A strengthening of the powers of the NCC was therefore advocated in order to be able to create a level playing field and the creation of a conducive environment for growth in the telecommunications sector.

The 2003 Act strengthened the capacity of the Nigerian Communications Commission to properly carry out its activities as the independent regulator of the telecommunications industry in Nigeria.[19] Therefore, the new Act reduced the powers of the Ministry of Information and Communications to policy-making, thus giving the NCC the power to regulate the industry without intrusion. The primary objectives of the Nigeria Communications Act include, inter alia, liberalisation of the communications sector; promotion of competition; and increase in teledensity and consumer protection. The key instruments for achieving these are through licensing capacity and regulatory control.[20]

III. THE LEGAL AND REGULATORY LANDSCAPE OF TELECOMMUNICATIONS IN THE REPUBLIC OF SOUTH AFRICA

Similar to the Nigerian situation, the South African telecommunications sector was centrally regulated via the Department of Posts and Telecommunications and Telkom – the sole PTO and a state-owned entity – prior to 1996. Telkom is

18 This was one of the events in the sector that led to the advocacy for the break up of the monopoly hitherto enjoyed by the incumbent telecom operator (TO) with the immediate appointment of two (2) national carriers to compete with NITEL for local, trunk and international services during the Obasanjo regime.

19 See section 3 of Nigeria Communications Act, No.19 2003.

20 Section 1 of the Nigeria Communication Act provides that the primary objective of this Act is to create and provide a regulatory framework for the Nigerian communications industry and all matters related thereto. See also 'Telecommunications in Nigeria – Legal framework', available at http://www.paulusoro.com/publications/LegalFramework.pdf (accessed 23 September 2013).

a state-owned public company incorporated in 1991 and the sole licence-holder and regulator of telecommunications in South Africa.[21]

In 1993, the Independent Broadcasting Authority Act created an independent and impartial regulator to regulate broadcast content and signal distribution. Similarly, the Telecommunications Act of 1996, created the South African Telecommunications Regulatory Authority (SATRA), which was mandated with regulating telecommunications in the public interest. This era brought about the separation of policy, regulation and implementation functions within the telecommunications market in South Africa.[22] The Ministry of Communications is therefore bestowed with the policy-making functions and also given certain powers in awarding licences and to veto regulations in the telecommunication sector.

Later on, the convergence of technologies and institutional resource constraints were put into cognizance in enacting the Independent Communications Authority of South Africa (ICASA) Act 2000, which merged the two agencies (IBA and SATRA). One of the cogent reasons for this merger was that SATRA was less independent of the government than IBA. Prior to the merger, SATRA was accountable directly to the Minister of Broadcasting, Post and Telecommunications, while IBA was accountable to the Parliament.[23] In this light, the IBA was considered as being more transparent and subjecting its activities to multi-party scrutiny as against the scrutiny of the ruling party.[24] Under the ICASA Act, Independent Communications Authority of South Africa (ICASA) was established as the sole regulator of the country's broadcasting and telecommunications sectors. In carrying out its objectives, the ICASA is guided by the broadcasting and the telecommunications legislations.[25] Moreover, ICASA Act only deals with the organisational structure of the merged bodies and arising rights and obligations.

In 2006 the ICASA Act 2000 was amended to reflect some changes or consolidations of the powers of the ICASA. The amendments in the 2006 Act,

21 International Telecommunications Union (ITU), 'Regulatory Implications of Broadband Workshop', Geneva-ITU New Initiatives Programme, 2–4 May 2001, Document 7, 29 April 2001.

22 *Ibid.*

23 Section 35(4) of the Telecommunications Act provides the Minister has power to grant key communications licences to successful candidates. In addition, sections 95 and 96 of the Act give the Minster power to approve all radio and general regulations. Whereas section 3 of the IBA Act provides that 'The Authority (IBA) shall function without any political or other bias or interference and shall and shall be wholly independent and separate from the State, the government and its administration or any political party, or from any other functionary or body directly or indirectly representing the interests of the State, the government or any other political party.' Thus, the independence of the regulatory bodies from interference and influence of the government and other political actors became unavoidable.

24 South African Media Law Briefing, 'The Merger of the IBA and SATRA', available at http://www.fxi.org.za/archive/Linked/update/febaprup/merger.htm (accessed 24 January 2014).

25 Note, however, that due to the blurring line between broadcasting and telecommunications the Electronic Communications Act 2005 was enacted as a convergence legislation to take care of this situation. Thus, section 2 of the ICASA Amended Act 2006 substituted Electronic Communications Act for IBA Act and Telecommunications Act in section 1 and other relevant sections of the old ICASA Act 2000.

among other things, were made in order to determine in greater detail the functions of the Authority; to consolidate certain powers and duties of the Authority; and to provide for inquiries by the Authority.[26] Under section 5 of the amended Act the Authority and chairperson must exercise the powers and perform the duties conferred and imposed upon it by this Act, the underlying statutes and any other law.[27] Note also that the ICASA Amended Act 2006 included the Postal services, previously regulated by the Postal Authority, into ICASA's mandate.

IV. ANALYSIS OF THE REGULATORY FRAMEWORKS OF TELECOMMUNICATIONS IN NIGERIA AND SOUTH AFRICA

The body responsible for the regulation of communications sector in Nigeria is the Nigerian Communications Commission (NCC), established by section 3 of the Nigerian Communications Act, (NCA) 2003. The functions of the Commission include, inter alia, the facilitation of investments in and entry into the Nigerian market for provision and supply of communications services, equipment and facilities;[28] preparation and implementation of programmes and plans that promote and ensure the development of the communications industry; and the provision of communications services in Nigeria.[29] The functions of the Commission also include the protection and promotion of the interests of consumers against unfair practices including but not limited to matters relating to tariffs and charges for and the availability and quality of communications services, equipment and facilities.[30]

The NCC is also given the responsibilities of promoting fair competition in the communications industry and protection of communication services and facilities providers from misuse of market power or anti-competitive and unfair practices by other service or facilities providers or equipment suppliers.[31] The commission performs the function of granting and renewing communications licences, whether or not the licences themselves provide for renewal in accordance with the provisions of this Act, and monitoring and enforcing compliance with licence terms and conditions by licensees.[32] The Commission ensures that licensees implement and operate at all times the most efficient and accurate billing system.[33]

Apart from the aforementioned functions, the Commission also has a quasi-judicial responsibility of examining and resolving complaints and objections filed by and disputes between licensed operators, subscribers or any other person involved in the communications industry, using such dispute-resolution methods

26 See the long title of the Independent Communications Authority of South Africa Amended Act No.3 2006.
27 Section 5 of the ICASA Amended Act No.3 2006.
28 Section 4 (1)(a) of the NCA 2003.
29 Section 4 (1)(q) of the NCA 2003.
30 Section 4 (1) b) of the NCA 2003.
31 Section 4(1) d) of the NCA 2003.
32 Section 4 (1)(e) of the NCA 2003.
33 Section 4 (1)(c) of the NCA 2003.

as the Commission may determine from time to time including mediation and arbitration.[34]

The NCC also performs advisory functions. The Commission has the mandate of advising the Minister responsible for Communications in Nigeria on the formulation of the general policies for the communications industry and generally on matters relating to the communications industry in the exercise of the Minister's functions and responsibilities under the NCA.[35] Aside from these, the Commission shall be responsible for implementation of the Government's general policies on communications industry and the execution of all such other functions and responsibilities as are given to the Commission under this Act or are incidental or related thereto.[36] However, before the formulation or review of the general policy for the Nigerian communications sector, the Minister shall cause the Commission to first carry out a public consultative process on the proposed policy formulation or modification on his behalf.[37] This shows a clear-cut demarcation between the policy-making function of the Minister and the purely regulatory function of the Commission so far as the communications sector is concerned.

There are three broad arms of regulation by the NCC, which are:

1. Economic regulations – this is concerned with the regulation of tariff, consumer affairs and competition issues.[38]
2. Technical regulations – standards, frequency issues, type approvals, numbering plan, and so on.[39]
3. Social regulations – content regulation.

The power or instrument for performing the regulatory functions is derived from the NCA, subsidiary legislations (in terms of the regulations), and the provisions of the licences, that is, terms and conditions contained in the licences. However, major criticism of the regulatory functions of the NCC is that there is lukewarm approach by the Commission in ensuring that the licensees or service providers are keeping up with the regulations reeled out by the Commission. In fact, a lot of consumer issues prevalent in the communication industry are not unconnected with the slow pace of ensuring compliance by the service providers with the regulations made by the Commission.

Moreover, the Nigerian Communications Commission, aside from the policy-making functions of the Minister of Communications, is more or less the sole body responsible for the governance of the communications sector in Nigeria. In other words, apart from the Minister of Communications who makes policies relating to communications on behalf of the executive government of the federation,[40] the

34 Section 4 (1)(p) of the NCA 2003.
35 Section 4 (1)(s) of the NCA 2003.
36 Section 4 (1)(t) of the NCA 2003.
37 See section 24(1) of the NCA 2003.
38 See Chapters VI and VII of the NCA.
39 See Chapter VIII of the NCA.
40 Though there is a council known as National Frequency Management Council, created under section 26 of the Nigerian Communications Act 2003, such a Council is established in the Ministry of Communication under the chairmanship of the Minister of Communications.

NCC is responsible for the regulatory functions of the sector. In a policy statement issued by the then Minister of Communications, the NCC is responsible for making decisions regarding licensing, tariff regulation, interconnection disputes, and any other matters directly affecting industry operators, in an impartial and independent manner.[41] It shall be guided by the overriding objectives of the National Telecommunications Policy, and considerations of fairness, equity, and transparency that shall not be directly influenced by Government or private industry.[42]

In practice, the NCC is responsible for facilitation of investments in and entry into the Nigerian market for provision and supply of communication services, equipment and facilities. It is also the duty of this Commission to promote and protect the interests of the consumers against unfair practices;[43] proposing and effecting amendments to licence conditions in accordance with the objective and provisions of the Nigerian Communications Act 2003; and the development and monitoring of 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.

In addition to the above listed functions of the NCC, it shall also be responsible for fixing and collecting fees for grant of communications licences and other regulatory services provided by the Commission. The management and administration of frequency spectrum for the communications sector is one of the duties of the NCC in addition to assisting the National Frequency Management (NFM) Council in developing a national frequency plan. Among other numerous responsibilities of the NCC are designing, managing and implementing the Universal Access strategy and programme in accordance with the Federal Government's general policy and objectives; advising the Minister of Information on the formulation of general policies for the communications industry; and advising generally on matters relating to the communications industry in the exercise of the Minister's functions and responsibilities under the Act.[44]

So far, the Nigerian Communications Commission (NCC) licensed several digital mobile operators, fixed cand recently, unified access operators. All these have had the collective effect of ensuring full competition in all segments of the telecommunications market. They have also had the effect of promoting rapid deployment of telecom services, resulting in exponential growth in the number of telephone lines in Nigeria.

On the other hand, the Independent Communications Authority of South Africa is the regulator of communication sector of the country. It is established by the ICASA Act and it enjoys its pride of place as the independent regulator of

41 Mohammed Arzika, National Policy on Telecommunications, May 2000.

42 National Policy on Telecommunications, May 2000.

43 Including, but not limited to, matters relating to tariff and charges for the availability and quality of communications services, equipment and facilities.

44 See generally the Nigerian Communications Commission website at http://www.ncc.gov.ng/index.php?option=com_content&view=article&id=56&Itemid=65 (accessed 24 January 2014).

communications in South Africa consequent to the membership of South Africa to the World Trade Organisation (WTO) and its accession to the Reference Paper to the Fourth Protocol on Basic Telecommunications, which sets out requirements for signatories' regulatory environments.[45]

As a matter of fact, the legislative regime for the communications sector of South Africa must comply with the Constitution of the Republic, which is the supreme law of the land, and the law from which the Parliament derives its power. The subordinate legislation (that is, regulations) must also be consistent with the principal legislation and the Constitution.[46] Thus, the primary legislation on regulation of communications is the Electronic Communications Act No. 36 2005 (as amended by Electronic Communications Amendment Act No.37 of 2007). The Act sets to promote convergence in the broadcasting, broadcasting signal distribution and telecommunications sector and to provide the legal framework for convergence of these sectors, and also provides the framework for the policy-making power of the Minister of Communications.[47] Hence, any regulations made by ICASA must be consistent with the Electronic Communications Act, other ancillary laws and the Constitution.

The Electronic Communications Act by its section 3(2) empowers the Minister of Communications to issue policy directives to the ICASA, who is obliged to carry out its functions in line with the directives.[48] Like the regulations made by ICASA, the policy directives issued by the Minister must also be consistent with the Electronic Communications Act and the Constitution of the Republic.[49] Apart from the Ministry of Communications headed by the Minister of Communications responsible for making policies for the communications sector, other ministries, including the Ministers of Trade and Industry, Justice and Constitutional Development, and Public Enterprises, are also involved in regulating certain aspects of the industry.[50]

The Electronic Communications Act sets out the fundamental rules for the telecommunications industry for the provision and licensing of telecommunication services, radio apparatus, spectrum services and planning, interconnection and facilities leasing, price regulation and universal service. It is good to establish a regulatory framework for the telecommunications sector because it aids effective competition and creates performance standards for telecom operators and suppliers of telecom services, which makes the consumers the better for it and; it is also important to set up substantive rules as those

45 Ellipsis Regulatory Solution, 'Overview of Electronic Communications Regulation in South Africa', available at http://www.ellipsis.co.za/wp-content/uploads/2012/03/Overview-of-Electronic-Communications-Regulation-in-South-Africa-2012.pdf (accessed 23 September 2003).

46 'Report of International Competition Network (ICN) Working Group on Communications Services', Appendix III Countries Studies (Jamaica, South Africa, Taiwan and Turkey), p. 97.

47 See the Preamble to the Electronic Communications Act No.36 2005.

48 Section 3(2) of the Electronic Communications ACT No. 36 2005.

49 'Report of International Competition Network (ICN) Working Group on Communications Services', *supra* note 46.

50 *Ibid.*

pertaining to interconnections, universal services, licensing, and so on, therefore liberalising the communication sector. The regulatory agency plays the role of a referee in enforcing rules between market players. It is therefore important that the regulator be independent from the communications service providers – this will ensure that there is no clash of interests between the regulator and the regulated or operators.

A. Role Players in the Regulation of Communications Sector

The emergent meaning of the independence of the regulator now encompasses three-tier-independence, which are independence from the operators, independence from policy makers and independence from interested parties.[51] The International Telecommunication Union (ITU) has defined independence as a term that variously refers to the separation of regulatory and operational functions, neutrality, insulation from external pressure, or simply the designation of an official publicly identified as having the regulatory responsibility and not subservient to the rest of the ministry.[52] Put another way, the regulator must be independent from the operators, other interested parties (such as industrial interests) and politically independent from actors like the ministers for its day-to-day activities.[53]

Although the independence of the regulator agencies is a good thing, it seems that all the powers pertaining to the regulation of every aspect regarding the industry in Nigeria are rested in the Nigerian Communications Commission therefore adopting a one-channel regulatory style. All the functions concerning the regulation of the telecommunications industry ranging from licensing, competition practices, regulation of disputes, interconnection, consumer affairs, tariff regulation, universal service provision, spectrum assignment and so on, are within the domain of the Nigerian Communications Commission. Moreover, the Nigerian Communications Act 2003 serves as the single law wherein all the functions and regulatory powers relating to telecommunications sector in Nigeria are contained. Therefore, it is a one-size-fits-all document.

Unlike Nigeria, which is at the top end of the scale as regards regulation of the telecommunication sector, the Republic of South Africa, on the other hand, has multiple agencies, apart from ICASA which is the principal regulator, responsible for the regulation of the communication sector. The key player in the regulation of communications is the Independent Communications Agency of South Africa (ICASA), which is governed by the ICASA Act. Its duties include making regulations for the industry; granting, renewal and other matters relating to licensing; ensuring that market players comply with accepted technical standards; and making sure there is efficient use of the radio frequency spectrum. The Commission also has the responsibility of promoting public interest objectives,

51 B. Guermazi, *supra* note 1, at 13.

52 ITU, 'The Changing Role of Government in an Era of Telecom Deregulation', Report of the colloquium held at ITU Headquarters, 17–19 February 1993.

53 B. Guermazi, *supra* note 1, at 13.

including attainment of universal service, protection of consumers and the promotion of ownership in the sector by the previously disadvantaged persons.[54]

Other role players in the South Africa's communication regulation include the Department of Communications (DoC), which is responsible for enacting electronic communication policies, overseeing the radio frequency spectrum and representing South Africa in international fora, such as the International Telecommunications Union (ITU).[55] The third agency is the Universal Service and Access Agency of South Africa (USAASA), whose continuous existence is ensured under the Electronic Communications Act and sets to promote universal service in the under-serviced area of South Africa.[56] In performing oversight function in the area of communications over the three agencies in South Africa, the Parliamentary Portfolio on Communications (PPCC) is bestowed with that oversight function and has power to conduct enquiries and subpoena documents. Moreover, the National Consumer Commission (NCC) is responsible for enforcing the consumers' rights under the Consumer Protection Act.[57]

As earlier noted, Electronic Communication Act No.36 2005 is the principal law regulating communications in South Africa. Apart from this Act, there are also other legislations that serve to regulate the communications sector of South Africa in one way or the other. These include, but are not limited to ICASA Act No.13 2000; ICASA (Amended) Act No.3 2006; Regulation of Interception of Communications and Provision of Communication-Related Information Act No.70 2002; Competition Act No.89 1998; Film and Publications Act No.46 of 1996; Broadcasting Amendment Act No.64 2002; and Electronic Communications and Transaction Act No.25 2002.

Generally, the main merit for having a single regulatory agency, apart from harmonisation of activities and prevention of overlap of functions, is the economic advantage it has over multi-regulatory approach. Operating a single regulatory approach will encourage less spending in running the agency compared to a multiple regulatory style. However, encumbering a single agency with the onerous task of regulating a wide spectrum of communications is a herculean one, which is not only laborious but could also lead to shoddy decisions because of lack of focus and expertise. One could be quick to say that it is also possible for there to be overlap of functions by various agencies who are actors in regulating the communications industry in South Africa against a sole regulator that is available in the Nigerian communications regulatory environment. For instance, there is no clear-cut boundary between the jurisdiction

54 ITU, *supra* note 21, at 18.

55 Ellipsis Regulatory Solution, 'Overview of Electronic Communications Regulation in South Africa', available at http://www.ellipsis.co.za/wp-content/uploads/2012/03/Overview-of-Electronic-Communications-Regulation-in-South-Africa-2012.pdf (accessed 23 September 2013).

56 Universal Service Agency was initially established under section 58 of the repealed Telecommunications Act and later changed to Universal Service and Access Agency of South Africa under the Electronic Communications Act. See section 80 of the Electronic Communications Act No. 36 2005.

57 Act 68 2008.

of the Competition Commission and the ICASA in carrying out their statutory duties. Note that based on the Supreme Court of South Africa's decision in the case of *Standard Bank Investment Corporation v The Competition Commission*, 2000 (2) SA 797 (SCA), while giving literal interpretation of section 3(1) of the Competition Act Cap 89 of 1998, which provided that 'This Act applies to all economic activity within or having an effect within the Republic, except (d) acts subject to or authorized by public regulation', and coming to the decision that the Act precluded the Competition Authority from exercising its jurisdiction upon all regulated sectors, the Parliament was swift to react to this judgment by amending section 3(1) and removing subsection (d) to establish a concurrent jurisdiction by the Competition Authorities and regulators of industries or sectors of industries where such are subject to the jurisdiction of the regulators. By virtue of this amendment there arose challenges of jurisdiction as regards the telecommunications sector, among others. Note, however, that prior to the enactment of Electronic Communications Act (ECA) 2006, ICASA (the telecoms regulator) was governed by the Telecommunications Act 1996, which came into force before the Competition Act and also included aspects of competition analysis to be conducted by the regulator. Despite the memorandum of understanding signed by these two regulators, firms still filed the same complaint with the Competition Commission and ICASA.[58]

The disadvantages of concurrent jurisdiction in the South African scenario include forum shopping, in which case industry players approach the authority they think will rule in their favour, therefore creating unhealthy rivalry between the authorities; duplication of resources; legal challenges on jurisdictional grounds; risk of issuing conflicting decisions; use of delaying tactics by industry players, and so on. With clear demarcation of roles in the enabling laws allocating powers, there will be avoidance of overlaps of functions by the regulators of different industries and sectors of the economy: professionalism will be encouraged and effective handling of matters without a waste of time, energy and resources will be fostered. In other words, proper delineation of roles for the actors in the regulatory environment will discourage role-overlap and ensure thorough treatments of matters falling within the jurisdictions of the authorities. Specialisation will be encouraged with the distribution of roles among various authorities responsible for regulation of sectors as each will be more focused in its duties and develop special skills in handling related matters.

In addition to this, there are also an avalanche of legislations dealing with communications in South Africa against a single Nigerian Communications Act. Adopting a multi-legislative approach to deal with various aspects of

58 Telkom (a telecom operator) challenged the Competition Commission's jurisdiction in a matter involving investigation of allegations of price discrimination and refusing to provide access to essential facilities among others, which it argued came under the jurisdiction of ICASA which had power to adjudicate on *ex-ante* and *ex-post* competition. (*The Competition Commission of South Africa v Telkom SA and Competition Tribunal of SA*, SCA case number 623/2008. On getting to the Supreme Court it held that the Competition Commission was properly seized of jurisdiction and the case was referred back to the Competition Tribunal to be heard on merit.)

communications will ensure thorough treatments of such areas involved in the spectrum in accurate details. Having each area guided by different agencies and also having well-developed laws in each area also help facilitate proper regulation of the communications sector.

B. Appointment of the Key Members of the Regulatory Bodies

Another issue worth discussing is the appointment of the commissioners[59] or councillors[60] of the principal regulatory bodies of the communications sector in Nigeria and South Africa, respectively. Under the Nigeria Communications Act a Board for the Nigeria Communications Commission has been established that exercises the functions of the Commission and is charged with the administration of its affairs.[61] The Board consists of nine commissioners, including a Chairman, a Chief Executive (who will also be the Executive Vice-Chairman and the Chief Executive of the Commission), two Executive Commissioners and five Non-executive Commissioners,[62] who are appointed by the President from all of the six geo-political zones in Nigeria, and such appointments are subject to confirmation by the Senate of the National Assembly.[63] The importance of the Executive Vice-Chairman of the NCC cannot be overlooked because section 5 of the Nigerian Communications Act 2003 places emphasis on the presence at all times of an Executive Vice-Chairman (Chief Executive) for the Commission.[64] Section 2 of the First Schedule to the Nigerian Communications Act 2003 also provides that the Chairman of the Commission shall preside over its meetings, but if not available the Executive Vice-Chairman will preside. Therefore, the importance of the Vice-Chairman as the Chief Executive of the Commission cannot be underestimated.

Under the ICASA Act, the Council consists of a chairperson and eight other councillors appointed by the Minister of Communications on the recommendation of the National Assembly.[65] The interesting twist in this method of appointment, compared to that under the Nigeria Communication Act, is that it is the National Assembly that recommends the people suitable for appointment as councillors to the Minister of Communications who subsequently makes the appointment. This method of appointment is to satisfy the fundamental principles of the participation of the public in the nomination process, providing transparency and openness in

59 As the members of the Board of the Commission are fondly called in Nigeria.

60 As the members of the Authority are fondly called in South Africa.

61 See section 5 of the Nigeria Communications Act.

62 See section 5(2) of the Act.

63 See section 8 of the NCA.

64 Section 5(3) NCA 2003 provides that 'outwithstanding any other provision of this Act, the President shall ensure at all times that there is a duly constituted Board of Commissioners and that there are a minimum of six serving Commissioner on the Board at any and all times, made up of (a) the Chief Executive (b) Two Executive Commissioner and (c) three Non-executive Commissioners'.

65 See section 7(a) of the ICASA Amendment Act 2006.

the mode of appointment.[66] This process is in line with the regulatory objective envisaged by ICASA of impartiality in its activities. To retain its impartial stance as regards regulation, the chairman of the Council is elected to hold office for a period of five years while the remaining councillors are elected to serve for four years,[67] and numerous provisions make provisions regarding the disqualification of councillors from regulatory duties, including evidence of bias.[68]

Another important observation regarding the method of appointment of the members of the Council in South Africa is the involvement of technical experts in the process of selection, evaluation and short listing of suitable candidates to be recommended by the National Assembly.[69] Yet another spectacular aspect of this appointment process is that the National Assembly draws a list of suitable candidate eligible for appointment of at least one and a half a time the number of candidates to be appointed after due consultation with the aforementioned technical experts.[70]

From the humble view of the author, the appointment approach adopted in South Africa is relatively laudable compared to Nigeria, especially in the areas of allowing technical experts a voice in the selection process of suitable councillors and providing a list of candidates up to at least one and a half of the number of candidates to be appointed. This will ensure that the best is selected for these sensitive posts. In addition, the list of suitable candidates sent to the Minister streamlines the crop of eligible and appointable candidates by the Minister to those contained in the list.

However, the problem with the appointment process is that the final appointment power is given to the Minister of Communications. By all means the Minister is the representative of the President, who is the chief executive of a state. In a truly democratic society the representatives of the people, in terms of the National Assembly, should have the determining powers to put a final seal of authority on certain acts of the state that can seriously affect the people they represent. It is opined that giving the Minister the final appointing authority after the recommendation of the National Assembly is like putting a cart before the horse and not a reflection of a true pro-people approach. In a situation like this the independence of the Commission will not be adequately guaranteed.

It can be argued that the provision of section 7(b) of the ICASA Amendment Act,[71] which provides that the Minister recommends from the shortlisted candidates to the National Assembly the person whom he or she proposes to

66 See section 5 of the ICASA Act 2000.

67 Section 10 of ICASA Act Amendment Act 2006.

68 See section 6 of the ICASA Act.

69 Section 7(b) of the ICASA Amendment Act 2006 gives the list of the technical experts to include a person with knowledge of or experience in the industry; a person with a legal background, knowledge of the ICT sector and competition related matters; an academic in the field of electronic communications; a representative from the labour sector; and a representative of consumers interest.

70 See section 7(b) of ICASA Amendment Act 2006.

71 The section amends section 5 of the ICASA Act 2000 by inserting new section 1B under section 5 of the 2000 Act.

appoint to serve on the Council, and gives the National Assembly the power to request the Minister to review his or her appointment if the National Assembly is not satisfied that the appointment complies with section 5 subsection (3) of the Act (2000), is like moving in a circle.

The provision of section 5(3) of the ICASA Act is to the effect of giving certain standards that must be complied with in the appointment of candidates to the Council.[72] It is strongly believed that the National Assembly, through the provision of section 7(b) of the ICASA Amendment Act, which gives them the power to make a list of suitable candidates to be recommended to the Minister for appointment on the Council, has already satisfied the requirements of section 5(3) of the ICASA Act 2000 if properly carried out, and with the help of technical experts as envisaged in section 7(b) of the ICASA Amendment Act. For the National Assembly to reject candidates appointed out of the list generated and supplied by them to the Minister is an aberration.

Another notable lacuna in the provision of the laws under which the ICASA derives its power is the failure to provide legislatively for the office of a vice-chairman of the Council who can act in absence of the chairperson. The chairperson of the Council is however, empowered under section 7(c) of the Amended Act to appoint in writing one of the councillors to perform his or her functions in case of their absence.[73] Where the chairperson is unable to make an appointment the remaining councillors must elect an acting chairperson from their number.[74] There is no provision in the Act as to how the selection of the suitable person to be put up for election into the post of acting chairperson is to be made. Given a situation like this, there is likely to be internal wrangle or conflict among the commissioners who may have personal interests in the post or have different people they are putting up for the post of acting chairperson.

Nigeria, on the other hand, makes provision for the post of vice-chairperson under the Nigeria Communications Act by stating that the president shall, on the recommendation by the Board of commissioners of a suitable candidate, appoint the Chief Executive who will act as the Executive Vice-Chairperson of the Commission (NCC).[75] To nip the problem in the bud that can ensue in determining the suitable persons who can hold the affairs of the Commission, there is provision for at least two Executive Commissioners under the Nigerian Communications Act.[76]

72 Section 5(3) of the ICASA 2000 provide that person that may be appointed on the Council must be persons who are committed to fairness, freedom of expression, openness and accountability, is a representative of a broad cross-section of the population of the Republic and possess suitable qualifications, expertise and experience in the appropriate field.

73 Section 7(c) of the ICASA Amended Act 2006.

74 *Ibid.*

75 See section 8(2) of the Nigeria Communications Act (NCA) 2003.

76 See sections 5(3) and 8(2) of the NCA, 2003. These executive commissioners are on full-time appointment unlike the non-executive commissioners who are only serving on part-time basis.

V. REGULATION OF COMPETITION IN THE COMMUNICATIONS INDUSTRY

It is without doubt that the role of regulatory body cannot be underestimated in the liberalisation of the communication sector. Economic of regulation has become very important due to the recent decline in direct state ownership of most utilities.[77] The regulatory body plays the role of a referee in enforcing rules between market players in the competitive market. It was noted earlier that the regulator of the communications sector in South Africa takes into cognizance the provisions of the Competition Act and the availability of a competition authority in performing its functions. Though under the Nigerian Communications Act there are provisions for regulating competition the practices of the licensees in the communication sector in Nigeria by the Nigerian Communications Commissions, there is no guiding law in the form of competition law, nor is there a competition authority specially dedicated with this area of responsibility as the South Africa's case.

Competition law can be described as legislations, regulations and court decisions that relate to agreement between communications licensees that restrict competition, abuse of a dominant position by the licensee and merger by the licensees. Competition law also serves to disabuse market monopoly, encourage even distribution of wealth and promote the welfare of small businesses. The purpose of creating competition law is to guard against restrictions and impediments to competitions that are not likely to be naturally corrected by competitive forces.[78] Market competition 'promotes efficiency, encourages innovation, improves quality, boosts choice, reduces cost, and leads to lower prices of goods and services'.[79] Thus, competition law could be used to service other policies ranging from social, employment, industrial, environmental or regional policies.[80]

For the development and sustenance of the economy, there should be a liberal market and a regulation of competition activities. To be precise, communication has become a generic word since the convergence of telecommunications, broadcasting, media and Information Technology and this presupposes that a single competition law will be adequate.[81] It is opined that a communications-specific regulator applying regulatory law should exist alongside a competition

77 M. Khosa, 'The Interplay of Sector Regulators and Competition Authorities in Regulating Competitions in Telecommunications: the South African Case', MA dissertation, submitted to the University of South Africa, April 2009, p. 23.

78 A. Jones, 'Regulating Telecommunications in Nigeria: the Challenges of Competition and Data Protection Laws', available at http://aitec.usp.net/ComBIT%20Africa%202009,%20Lagos,%203-4Nov2009/AdewaleJonesCombit2009Ashfield&BowmanAttorneys.pdf (accessed 11 October 2013).

79 L. Ani, 'ethinking Competition Law and Policy: Building a Framework for Implementiation in Nigeria', Nigerian Institute of Advanced Legal Studies – NIALS, *Journal of Business Law*, vol. 2, available at http://www.nials-nigeria.org/journals/Laura%2520Anibus.pdf (accessed 11 October 2013).

80 *Ibid.*

81 A. Jones, *supra* note 78.

authority with each functionally separate and competent within their respective spheres of competence.[82] In this case, the communications regulator has the responsibility for technical and economic issues and applies rules in this respect while the competition authority is left to apply competition law to the sector.[83]

There are over 23 heads of responsibilities imposed on the Nigerian Communications Commission with competition regulation inclusive. The question, however, is can this Commission carry out all these responsibilities without the aid of a competition authority and specific competition law?

The United States of America is the jurisdiction that first championed the need to have a specific competition law to regulate market competitiveness. The United States passed the Sherman Act in 1890, which remains in force today.[84] This statute was later supplemented by the Clayton Act 1914, the Federal Trade Commission Act 1914, the Robinson-Patman Act 1936, the Celler-Kefauver Act 1950 and the Hart-Scott-Rodino Antitrust Improvement Act 1976. This laudable trend in the United States was later followed by some other jurisdictions. Similarly, the Republic of South Africa has adopted the use of competition authority together with the sector-specific regulator in pursuit of its regulation of the communications sector.

The Competition Commission of South Africa was established under section 19 of the Competition Act 1999 to regulate competition activities, while there is also established under the same Act a Competition Tribunal to adjudicate on matters relating to conducts in the realm of the Competition Act.[85] The Independent Communications Authority of South Africa (ICASA) can be regarded as having an *ex-ante* regulatory power (meaning that it acts in order to prevent anti-competitive acts), while the Competition Commission and Competition Tribunal are said to have an *ex-post* powers (meaning they have powers to respond to specific complaints or instances of anti-competitive matters).[86] However, the ICASA and the Competition Commission are under memorandum of agreement to forestall jurisdictional conflicts.[87]

Nigeria, on the other hand, does not have any competition specific legislation, but ironically there have been reflections of regulation of market competitions in some of its laws passed to promote healthy competition, including the Competition and Practices Regulations 2007 made pursuant to Nigerian Communications Act 2003; the Public Enterprises (Privatisation and Commercialisation) Act 1999; the Nigerian Investment Promotion Commission Act 1999; and the Investments and Securities Act 2007.[88]

82 *Ibid.*
83 *Ibid.*
84 15 USC, 2 July 1890.
85 Section 27 of the Competition Act 1999.
86 Ellipsis Regulatory Solution, *supra* note 55.
87 A similar memorandum of understanding exists in the United States between the Anti-Trust Division of the Department of Justice (USDOJ) and the Federal Trade Commission (FTC) due to overlap of jurisdictions between these two competition authorities.
88 Note, however, that there have been some bills presented to the National Assembly of Nigeria to encourage the enactment of competition law. Among these bills is the Federal Competition

In the author's opinion, it is preferable for Nigeria to follow the example of South Africa, which has a combination of *ex-ante* and *ex-post* regulatory artilleries. Putting the regulation of the communications industry totally in the hands of a competition authority would not be appropriate neither would it be advisable for a sector-specific regulatory body to manage all aspects of the communication business. It is imperative to have, in Nigeria, a competition authority whose activities with the sector-specific authority must be better coordinated.

VI. CONCLUSION

It is obvious that Nigeria and South Africa have at various times undergone reforms in the telecommunications sector to eradicate monopoly thereby improving their economies. Without doubt, taking monopoly away from a single operator of telecommunication in the public sphere and giving other private sector operators opportunity to engage in communication services will definitely result in competitive behaviours.[89] The structures of regulation of the communication sectors in the two jurisdictions have been addressed. Moreover, the issue of having a separate competition authority to oversee competition matters in the sector has been identified. Regulation of competitive actions, which may have adverse effects on the small and medium-scale businesses or operators, who do not have the financial muscle or technical structure to compete favourably with giants in the sector, will prevent their businesses being jeopardised. This regulation will also protect the customers form unfair practices by communications operators.

From the above discussion it is evident that the importance of regulating the telecommunications sector cannot be overestimated. The various regulatory styles of Nigeria and South Africa have been adequately analysed in the preceding paragraphs. It has been revealed that there are some laudable measures adopted by both countries in regulating the communications sectors of their economies. At the same time, there are some vacuums discovered in each country's regulatory structure. To put it another way, the regulatory frameworks of these countries are not without some flaws, and these have been addressed. It is hoped that these two countries will share from the legal provisions of each other in order to augment their regulatory framework and enable the sector to thrive.

Bill 2002 (a bill for an Act to set up a Federal Competition Commission). Also, another bill was presented to the Senate of the National Assembly in 2002 by the Bureau of Public Enterprises as an executive bill but has not seen the light of the day. Similarly, a bill for an Act to provide for the establishment of the Nigerian Trade and Competition Commission and Other Matters was presented to the Senate, which passed through the first and second readings to the committee stage and yet nothing has been heard of the bill till today. A Competition Bill 2011 (A Bill for an Act to Encourage Competition in the Economy by Prohibiting Restrictive Trade Practices, Controlling Monopolies, Concentration of Economic Power and Prices and for Connected Purposes) was also presented to the law makers but nothing has come out of it till now.

89 A. A. Ijewere and E. C. Gbandi, "'Telecommunications Reforms in Nigeria: the Market Challenges', 10(2) *JORIND* (June 2012), available at http://www.transcampus.org/JORINDV10Jun2012/Jorind%20Vol10%20No2%20Jun%20Chapter29.pdf (accessed 11 October 201).