



## CRITIQUE OF THE JOINT TARIFF DESIGN POLICY OF THE NIGERIAN ELECTRICITY REGULATORY COMMISSION

- *Wale Irokosu*

This article will posit that the new tariff fixing policy for power distribution companies in Nigeria, known as the Joint Tariff Design Process (JTDP), amounts to an abdication of statutory duty by the Nigerian Electricity Regulatory Commission (NERC). Also, it will opine that the aforesaid policy will amount to unnecessary unionisation of consumers and create unnecessary bureaucracy in the power sector.

On 8th April, 2015, the Chairman of NERC announced a new policy

direction for the Nigerian Electricity Supply Industry (NESI). The JTDP stipulates that electricity tariff paid by consumers of electricity will be determined jointly by the Distribution Companies (DISCOs) and the consumers/end users. Thus, NERC will only play the role of an independent adjudicator in reviewing the tariff agreed upon between the DISCOs and consumers within the DISCO's concession area.<sup>1</sup>

By the said policy, the DISCOs are to come up with their costs of distributing

electricity power and will then propose a tariff based on the said costs. Their proposed tariff and cost plan will be presented to a session/panel of the DISCOs, consumers and representatives of NERC for deliberation and approval. After consultation with the consumers, the DISCOs will then forward the cost plan and proposed tariff to NERC for approval.<sup>2</sup>

It is pertinent to state that the central duty of an electricity regulator is to balance the interest of consumers with

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that of the providers of electricity. Essentially, the regulator is to ensure a fair balance between making electricity available to consumers at affordable rates and making the business of electricity profitable. The latter duty entails allowing suppliers of electricity recoup their investment and make reasonable returns. Also, the regulator is expected to ensure safety of power utilities, and ensure adequate competition in the sector. Furthermore, it should provide a regulatory regime that ensures universal access to electricity including for low-income households, protection of the environment, and investment in innovation. All three of these services are forms of social services, which markets on their own, are unlikely to supply in adequate levels.<sup>3</sup>

In Nigeria, the power to regulate electricity tariff in Nigeria is vested in NERC by virtue of Section 76 of the Electric Power Sector Reform Act (EPSRA) 2005. Section 76(1) of EPSRA 2005, stipulates that NERC has power to regulate distribution tariff in respect of which licenses are required under the EPSRA 2005.

According to Section 76 (2) of the EPSRA 2005:

"Prices for the activities referred to in subsection 1 of this section shall be regulated according to one or more methodologies adopted by the Commission (NERC) for regulating

electricity prices and such tariff methodologies shall:

- Allow a licensee that operates efficiently to recover the full costs of its business activities, including a reasonable return on the capital invested in the business;
- Provide incentives for the continued improvement of the technical and economic efficiency with which the services are provided;
- Provide efficiency for the continued improvement of quality of services;
- Give to consumers economically efficient signals regarding the costs that their consumption imposes on the licensee's businesses;
- Avoid undue discrimination between consumers and consumer categories; and,
- Phase out or substantially reduce cross subsidies."

Section 76(6) of the EPSRA 2005, also provides that prior to establishing a tariff methodology, NERC should give notice in the Official Gazette and in one or more newspapers with wide circulation, of the proposed establishment of the tariff methodology, indicating the period within which objections or representations may be made to

NERC in connection with the proposed methodology.

Further, by Section 76(7), in preparing a tariff methodology, NERC shall consider any representations made by the license applicants, other licensees, consumers, eligible customers, consumer associations, association of eligible customers and such other persons as it considers necessary or desirable. NERC shall also obtain evidence, information or advice from persons who in NERC's opinion, possess expert knowledge which is relevant in the preparation of the methodology.

The above provisions of the EPSRA, 2005 show that:

- NERC has the sole responsibility to prepare and approve tariff methodologies;
- It is the duty of NERC to give notice to the general public that it is preparing a tariff methodology, thereby asking for representations within a specific time;
- NERC is only mandated to consider representations from licensees as well as consumers.
- Licensees such as DISCO's are not statutorily authorised to prepare tariff methodologies like the JTDP

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## MTN'S PROPOSED ACQUISITION OF VISAFONE: IMPLICATION FOR COMPETITION IN NIGERIA TELECOMS SECTOR

- Lekan Dairo and Kevwe Okpobia.

The focus of this piece is on the implication of the proposed acquisition of Visafone by MTN, particularly its effect on competition in the telecommunication sector.

MTN is Africa's and Nigeria's largest telecommunications provider. Visafone, is the last major Code Division Multiple Access (CDMA) operator in Nigeria with a subscriber base of 2,031,802 (**Two Million and Thirty One Thousand, Eight Hundred and Two**), a category it shares with Multilinks Telkom, which has a subscriber base of 10,213 (**Ten Thousand Two Hundred and Thirteen**)<sup>1</sup>. It is noteworthy that CDMA technology is better in terms of the quality of calls. However, the GSM technology is more profitable for mobile telephone operators.

Although, a move of this nature was foreseeable considering the dwindling

fortunes of Nigeria's CDMA's, sub-sector of the telecoms industry. However, it is expected that the industry regulator, the Nigerian Communications Commission (NCC), would properly scrutinize the transaction.

In 2006, MTN acquired VGC Communications, a private telephone operator in Lagos. Prior to the acquisition, VGC Communications had laid extensive fibre optic cables and Internet service provision having been licensed to provide nationwide cabling and radiotelephone services by NCC<sup>2</sup> and was strategically posed to be a major player in the Nigeria Telecoms industry.

It is important to note that at the time of the said acquisition, VGC Communications boasted of a subscriber base of over 20,000 (Twenty

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# BOOK OF LEGAL JARGONS

## ELECTRIC POWER

**Base Bill:** A charge calculated by applying the rate charged from the appropriate class schedule to the level of consumption.

**Base Load:** The minimum amount of electric power delivered or required over a given period of time at a steady rate.

**Capacity Charge:** A component of a power tariff that comprises of the fixed cost of providing power determined by the rating of the main circuit breaker through which a premises is supplied with electricity and it is levied on a consumer's account whether electricity is consumed or not (e.g. cost of maintaining the power plant).

**Captive Generator:** A person who generates power exceeding 1 Mega Watt for personal consumption and does not sell to a third-party. This power is generated off the national grid.

**DISCO:** Distribution Company.

**Embedded Generator:** A person licensed to generate electricity that is directly connected to and evacuated through a distribution Network.

**Energy Charge:** A component of a power tariff that comprises of the variable cost (e.g. cost of fuel) of providing power. It is based on the actual energy consumed.

**Fossil-Fuel:** A deposit of hydrocarbon obtained from accumulated decayed plants and animals such as coal, petroleum, oil and natural gas.

**GENCO:** Generation Company.

**Grid Code:** Instructions, rules, procedures, guidelines, etcetera, for the operation and planning of an interconnected power system (the grid) and accounting requirements relating to the operation of the said interconnected power system.

**Kilowatt:** The standard unit for measuring electricity demand, equal to 1,000 watts.

**Lifeline Tariff:** A tariff set by the Commission for the benefit of a target consumer group, which incorporates cross subsidies by other customers based on a tariff regime fixed under section 76(5) of the Act.

**MYTO:** Multi Year Tariff Order refers to NERC's establishment of the regulated prices to be paid to licensed generation, transmission, distribution and retailing companies.

**NBET:** Nigeria Bulk Electricity Trading Plc. is a Federal Government owned company incorporated on 29th July, 2010. It is also known as the bulk trader. As the name implies, it has been set up to engage in the purchase and resale of electric power from independent power producers and successor generating companies.

**Off-Taker:** A person who has agreed with a resource producer, a captive generator to purchase future production of power.

**Power:** Current delivered at a given

voltage. It is measured by capacity and is usually expressed in watts, kilowatts or megawatts.

**Power Tariff:** A price approved by the Nigerian Electricity Regulatory Commission that specifies the prices, terms, and conditions under which electricity services are to be provided.

**PPA:** Power Purchase Agreement is an agreement between a power producer and the bulk purchaser and/or a distribution licensee and/or an eligible customer, for the purchase of power.

**REPS:** Renewable Energy Power System means a power system that generates power using energy sources that replenishes such as solar energy, biomass, small hydro and wind power.

**Transformer:** An electrical device that transfers electricity between two or more circuits and used for changing the voltage of alternating currents.

**Turbine:** A machine that uses a continuous turning wheel or motor to convert kinetic energy of fluids to mechanical energy for the production of constant power.

**Watt:** Electric unit of power, which measures the rate of energy conversion or transfer at one joule per second.

**Wheeling Service:** This refers to the movement of electricity from one system to another, over transmission facilities of intervening systems.



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would have it.

- It is not envisaged that a licensee comes up with tariff methodologies and structure, and then invites consumers to advocate for themselves on the sustainability of the tariff methodology and/or structure.

It therefore becomes clear that by the JTDP, NERC will be abdicating its statutory responsibility to regulate power tariff.

A major flaw of the JTDP is that the highly informed, sophisticated and profit oriented DISCOs are left to bargain tariff with (in most cases) a group of less informed consumers, who cannot understand the nuances of the complex power industry.<sup>4</sup> [It is opined that well-informed consumers may either not have the time or access to the cost structure of the licensee in order to query the methodology proposed by the latter.<sup>5</sup> More so, cost identification is usually a problem for regulators. Essentially, regulators often find it difficult to obtain full information on operators' costs and are therefore prone to making mistakes that either allow excessive returns or not allow sufficient return to encourage fresh investment. It is improbable that consumers or consumer advocacy groups would do a better job than the regulator. It is obvious that NERC is better placed to scrutinize the tariff due to its industry expertise, resources and access to the necessary information

[Secondly, the NERC, in line with the JTDP, now seeks to constitute consumer advocacy groups that will discuss with the DISCOs before a tariff is determined. The poser is: what will be the criteria for identifying and constituting the advocacy group as well as the process of determining their demographic spread?<sup>6</sup> Most importantly, it is opined that this will amount to creating consumer unions in the power sector and meetings with the DISCOs are bound to be confrontational, emotional and political. Unions in Nigeria have been known to carry out mob activities, which are rarely in the interest of the country.<sup>7</sup>

Furthermore, due to political visibility of power infrastructures, the industry has proved to be a particularly challenging

area to introduce market forces, as the government often intervenes if market forces deliver a politically inconvenient outcome.<sup>8</sup> This makes the sector, particularly the distribution segment, unattractive to investors, who are wary of their ability to earn an acceptable return on investment. The key challenge for regulators in developing countries has been the ability to muster the authority needed to protect the distribution companies against the monopsonistic<sup>9</sup> tendencies of politically organized consumers. It is said that the largest inefficiency and greatest difficulties lie in the distribution segment between the power system and politically influential retail customers.<sup>10</sup> JTDP further compounds the challenges of

*“In sum, the abdication by NERC of its duty to fix electricity tariff in Nigeria will be counterproductive to the development of the Nigerian Electricity Supply Industry. The Electricity Industry is in dire need of investments to increase power generation, improve the obsolete transmission and distribution infrastructure.”*

licensees/operators with the resort to consumers and consumer-groups in determining tariffs.

Nigeria being a nation of about 180 million people, and with her power-generating capacity fluctuating between the 3500MW to 4500MW mark, her power industry is not near functional at this stage and the quest for stable power may be elusive in the short term<sup>11</sup>. In the interim, there will be poor power supply hence, a reason to take to the streets. This unionisation may affect investments in the Power Sector.

In sum, the abdication by NERC of its duty to regulate electricity tariff in Nigeria, in the manner set down by the Act, will be counterproductive to the

development of the Nigerian Electricity Supply Industry. The Electricity Industry is in dire need of investments to increase power generation, improve the obsolete transmission and distribution infrastructure. This may be improbable with militant and organized consumer groups united against paying the going rate for electricity. The NERC is expected to be the bridge or stabilizing factor between the operators and the consumers. Thus, we recommend the following:

- NERC should assume its role as the body statutorily empowered to develop tariff methodologies for the industry;
- NERC should reverse the JTDP policy and in the alternative, come up with a policy that will enable NERC design the tariff structure after having consulted jointly with the DISCOs and sampled the opinions of the consumers. This will better meet the spirit of the EPSRA 2005;
- NERC should also take up the task of informing the consumers of how power tariffs are arrived at. That way, consumers will be enlightened without the need for confrontations that may arise from meeting with the DISCOs.

<sup>1</sup>“NERC Justifies the Joint Electricity Tariff Design Policy”, <http://businessnews.com.ng/2015/04/15/nercjustifies-joint-design-electricity-tariff/> accessed October 21, 2015.

<sup>2</sup>ibid.

<sup>3</sup>David Victor and Thomas C. Heller, (eds.), *The Political Economy of Power Sector Reform: The Experiences of Five Major Developing Countries*, (New York: Cambridge University Press, 2007), p. 28

<sup>4</sup>What really happens is that the Discos propose a tariff (based on the methodology/ies in the current MYTO), holds consultations with consumers and then make a rate case to NERC. NERC may approve the tariff or ask the Disco to amend.

<sup>5</sup> This problem is mostly for NERC (or well informed consumers).

<sup>6</sup>There are significant provisions in the Market Rules for consumer groups, including the Stakeholder Advisory Group.

<sup>7</sup>See: <http://punchng.com/consumers-kick-as-nerc-finalises-new-electricity-tariffs/> See also: <http://leadership.ng/news/475227/protesters-barricade-lagos-assembly-over-abnormal-electricity-tariff>

<sup>8</sup>ibid., p. 1

<sup>9</sup>A market similar to a monopoly except that a large buyer not seller controls a large proportion of the market and drives the prices down

<sup>10</sup>David Victor and Thomas C. Heller, op.cit., at p. 299

<sup>11</sup>South Africa, a nation of about 55 million people, with a power-generating capacity of over 35000MW is still rationing or shedding its power load



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Thousand)<sup>3</sup>, while presently, 9 (Nine) years after the acquisition, VGC/MTN has a subscriber base of 9,731 (Nine thousand Seven Hundred and Thirty One)<sup>4</sup>. Thus, from the aforesaid, it goes without saying that the acquisition of VGC Communications Limited by MTN, has dampened competition to a reasonable extent by eliminating a viable opposition of MTN at the early stage of its development and stifled its growth.

From the aforesaid statistics, it apparent that Visafone is the only existing competitor of MTN in the CDMA category. Consequently, if NCC endorses this transaction, the future of the CDMA technology driven mobile phones would be uncertain.

The importance of a healthy competition in a free market economy cannot be overemphasized. It facilitates innovation amongst businesses, creates jobs, lowers costs of goods and services, increases the choice for consumers, and improves quality of goods and services. In addition, competition guarantees trade freedom and checks abuse of market power in the economy. Thus, the impingement of competition in any economy, will lead to stunted development.

To better appreciate, the essence of competition in the telecoms industry, a few examples of the competitive and innovative approach of certain mobile phone operators (MNOs) provide a good understanding of the

discourse. For instance, Globacom's initiative of giving out sim cards for free, crashed the cost of sim cards. Additionally, the operation of per second billing today is largely due to its introduction by Globacom in 2003. Before the commencement of business by Globacom, the prevailing sentiment of the erstwhile industry players (MTN, ECONET and MTEL) was that per second billing was impractical and subscribers were billed per minute. Also, in 2014, Etisalat changed the dynamics of international calls by creating a platform, whereby its customers can receive calls for free abroad. The incumbent mobile network operators (MNOs) had to adopt the same approach, even though, the said companies had initially given the impression that it was





not commercial viable or unprofitable to offer such services.

NCC has a fundamental role to play in the impending acquisition of Visafone by (an already dominant player in the sector) MTN<sup>5</sup>. This transaction raises a lot of questions, with respect to the monopolistic status of MTN vis-a-vis other MNOs and whether the said acquisition will eliminate or substantially lessen competition in the telecoms industry.

The primary regulatory framework for competition in the telecoms industry is the NCC Act, 2003 ("**The Act**") and the Competition Regulation, 2007 ("**the Regulation**") issued by NCC. Section 3 of the Act establishes NCC with powers to regulate the industry<sup>6</sup>. In addition, NCC has the powers to make regulations, guidelines and directives for the purpose of regulating competition.<sup>7</sup>

Section 4(1) also provides that:

- 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; and,
- the promotion of fair competition in the communications industry and protection of communications services and facilities providers from misuse of market power or anti-competitive and unfair practices by other service or facilities providers or equipment suppliers.

By virtue of Section 90 of the Act, the Commission, notwithstanding the provisions of any other written law, has exclusive competence to determine, pronounce upon, administer, monitor and enforce compliance of all persons with competition laws and regulations, whether of a general or specific nature, as it relates to the Nigerian Communications Market.

Section 91 further prohibits licensees from engaging in any practice that has the purpose or effect of substantially lessening competition in any aspect of the Nigerian Communications Market. In furtherance of this, the Commission is empowered to publish from time to time guidelines or regulations, which clarify the meaning of "substantially lessening of competition".<sup>8</sup>

Section 91 (3) and (4) prohibits

licensees from entering into certain understanding, agreement or arrangement.<sup>9</sup>

NCC has the powers to determine that an operator in the sector has acquired a dominant position in the market and may direct such operator to cease a conduct that has or may have the effect of substantially lessening competition in the market and it may also apply

*“It can be inferred that Competition Law in Nigeria lacks uniformity. Attempts at unification of all these regulatory frameworks into a single legislation has given birth to different Competition Bills, that are still pending before the National Assembly since 2002 to date.”*

requisite remedies where necessary.<sup>10</sup>

By this transaction, MTN will acquire the license being held by Visafone for 800 MHz spectrum<sup>11</sup> which will enable MTN provide 4G LTE (Long Term Evolution) services in the country.<sup>12</sup> This transaction will increase MTN's dominance in the market by being the only MNO in the Nigerian market with access to this spectrum.<sup>13</sup>

Historically, this kind of acquisition is not the first by MTN Nigeria, as stated above.<sup>14</sup>

In furtherance of its pro-competition functions in the industry particularly under Section 91 of the Act, NCC in 2013, declared MTN the dominant operator in both the retail mobile voice and wholesale leased line markets.<sup>15</sup>

The implications of the proposed transaction is that it is likely that it would create a (near) monopoly, which may lead to higher prices and reduced quality of products and services for consumers, elimination of choice for consumers, significant barriers to entry

and unemployment.<sup>16</sup>

It must be reiterated that NCC has found that MTN is the dominant operator on two vibrant markets.<sup>17</sup>

With this level of dominance, MTN has already been engaging in anti-competitive activities to impugn other operators competing with it in the market. This point is affirmed by the directive of NCC stating that MTN has breached Regulation 25 by engaging in anti-competitive practices.<sup>18</sup> An instance is the issue of the differential between MTN Nigeria's on-net and off-net retail tariffs, which NCC directed MTN to collapse immediately to bring MTN's tariff for on-net calls at par with its tariff for off-net calls.<sup>19</sup>

By virtue of the Competitions Regulations 27 and 28, NCC has the powers to approve any transaction of this sort.<sup>20</sup>

Regulation 28 further stipulates that NCC must be notified of such transactions for approval.<sup>21</sup> It is unclear at the time of writing this article, if MTN has made such notification to NCC. In the event that it has, NCC must scrutinize the impending transaction to ensure that healthy competition is maintained in the industry before making a decision.<sup>22</sup>

In the event that NCC approves the transaction, it will definitely increase MTN's market share in telecoms industry and make it the largest mobile MNO in Nigeria both in data and voice services. Thus, making it difficult for its competitors to fairly compete in the industry.

It is recommended that NCC adopts the reasoning of the authority in the United States' case of AT&T's \$39billion dollars proposed takeover of T-Mobile, where the acquisition was blocked, as it was decided that the transaction would substantially lessen competition for mobile wireless telecommunications services across the United States, resulting in higher prices, poorer quality services, fewer choices and fewer innovative products for the millions of American consumers who rely on mobile wireless services in their everyday lives.<sup>23</sup>

It is clear that there are available statutory provisions prohibiting the transaction under the NCC Act and other Regulations. The said NCC Act and other Regulations, provide industry specific statutory provisions against anti competitive practices.

Whether these provisions are sufficient to deal with the ever-growing demands and challenges of the telecommunication industry in Nigeria is another issue entirely.

On thing is certain: there is a need for vibrant and active monitoring of this transaction and others of this nature, vis – vis the anti-competitive provisions of NCC Act and other existing Regulations. The enforcement of these existing laws has to be meticulously implemented by the Regulators.

In conclusion, it is our opinion that the proposed acquisition of Visafone by MTN constitutes a threat to competition within the mobile telephone market in Nigeria. It is advised that the NCC consider the implication of the transaction on the survival of the entire CDMA category in Nigeria; as well as its effect on competition, in general, within the telecommunication industry.

approved subject to "remedies" such as an obligation to divest part of the merged business or to offer licenses or access to facilities to enable other businesses to continue competing.

<sup>7</sup>Section 1 of the Act, provides that one of its objectives is to ensure fair competition among industry operators and participation of Nigerians in the industry.

<sup>8</sup>These guidelines are to be published with regard to or in response to a number of factors namely: global trends in the relevant market; the impact of the conduct on the number of competitors in a market and their market shares; the impact of the conduct on barriers to entry into the market; the impact of the conduct on the range of services in the market; the impact of the conduct on the cost and profit structures in the market; and any other matters which the Commission is satisfied are relevant.

<sup>9</sup>"any understanding, agreement or arrangement, whether legally enforceable or not, which provides for rate fixing; market sharing; boycott of another competitor; boycott of a supplier of apparatus or equipment; or boycott of any other licensee or from at any time or in any circumstance, making it a condition for the provision or supply of a product or service in a communications market that the person acquiring such product or service in the communications market is also required to acquire or not to acquire any other product or service either from himself or from another person."

<sup>10</sup>Section 92 of the Act.

<sup>11</sup>This will expand MTN services in Nigeria, to the broadband market.

<sup>12</sup><http://www.vanguardngr.com/2015/05/mtnvisafone-deal-this-acquisition-may-breed-monopoly/#sthash.StfaUEhh.dpuf>

<sup>13</sup><https://www.thecable.ng/averting-monopoly-nigerias-telecom-industry>

<sup>14</sup>MTN Acquires Visafone to put end to CDMA in Nigeria, IT & Telecom Digest, <http://www.ittelecomdigest.com/mtn-acquires-visafone-to-put-end-to-cdma-in-nigeria/>. It had previously in 2006 acquired VGC Communications, a private telephone operator in Lagos, which had laid extensive fibre optic cables and Internet service provided (licensed to provide nationwide cabling and radio telephone services by the Nigerian Communications Commission (NCC))

<sup>15</sup><https://www.thecable.ng/averting-monopoly-nigerias-telecom-industry>. Following the Determination of Dominance in Selected Communications Market (DDSM) and imposed specific obligations meant to ensure it balances competitive behaviour and also ensure the sustenance of long term competition in the telecommunications industry. These alongside other occurrences lend credence to how much influence MTN has in the Nigerian Telecommunication Industry.

<sup>16</sup>**Monopoly of the market:** This transaction is likely to create monopoly in the sector, even though, broadband is still at its infancy in Nigeria.

**Unemployment:** Following the boom in the telecommunication sector, the sector has become one of the largest employers of labour in Nigeria. With the disheartening unemployment situation in Nigeria, the worst thing this country needs is the collapse of companies in the telecommunication sector; same will lead to massive lay-off of workers. This dreadful situation will be inevitable if the regulators ignore MTN's acquisition of Visafone.

**Significant barrier for entry:** Just as the acquisition will lead to massive exit of many network providers from the telecommunication sector, it will also discourage new entrants and new investors in the sector.

**Elimination of Choice:** The effect of this will be systemic elimination of alternatives. In the absence of alternatives, the consumers lose their status as the

center of attraction and allows for the dominant player rather than market forces to determine price and even quality of service on offer in the market. Nigerians will in the long run be left with only MTN and their services without any alternative to choose from.

<sup>17</sup>This was arrived at by NCC under, Regulation 20 of the Competition Practices Regulation's which stipulates that any Licensee whose gross revenues in a specific communications market exceed forty per cent (40%) of the total gross revenues of all Licensees in that market, is in a dominant position in that market. MTN was found to have 44% share of market subscribers and to be dominant in two sectors of the market.

<sup>18</sup><http://www.opinionnigeria.com/before-nigeria-descends-into-telecoms-monopoly-by-jare-oladunmoye/>

<sup>19</sup><http://businessdayonline.com/2015/08/analysis-of-the-competition-regime-in-the-nigerian-telecommunicationsindustry/>

<sup>20</sup>Regulation 27 makes any transaction that involves acquisition of more than 10% shares of the Licensee or change in control of a licensee or direct or indirect transfer or acquisition of any individual license previously granted by the Commission subject to the approval of NCC.

<sup>21</sup>The transaction pending between MTN and Visafone requires the approval of the Commission.

<sup>22</sup>As canvassed above, allowing this transaction to pull through without proper investigation might have enormous consequences on the nation's economy, as the transaction will make MTN dominant in a third category of telecoms service (that is, in the data market). In a recent telecoms merger in the United Kingdom involving BT's takeover of EE, the Competition and Markets Authority (CMA) considered whether the takeover would substantially lessen competition in any market in the U.K by looking at a number of factors including market structure, market position, strength of other players, closeness of competition between the merging parties e.t.c. CMA came to the conclusion that both companies operated in largely separate areas, BT strong in fixed-line telephones, broadband and pay TV and EE in mobile, with limited overlap. Whilst, in the United States the purchase of T-Mobile by AT&T for \$39billion dollars was blocked by the authorities, as the proposed purchase will give AT&T a 43% market share of mobile phones in the United States, hence, making it the largest mobile phone company in the United States, making AT&T significantly larger than any of its competitors. Available at <http://news.sky.com/story/1577469/bts-12-5bn-takeover-of-ee-cleared-by-cma>. Also, BskyB bid for Manchester United was blocked by the Authority, after investigation by the Monopolies and Mergers Commission revealed that it would be anti-competitive, against the public interest and would damage the quality of British football if the takeover was approved.

<sup>23</sup><http://www.justice.gov/opa/pr/justice-department-files-antitrust-lawsuit-block-att-s-acquisition-t-mobile>

<sup>1</sup>Rise and fall of CDMA in Nigeria <http://www.ittelecomdigest.com/rise-and-fall-of-cdma-in-nigeria/>

<sup>2</sup>MTN Acquires Visafone to put end to CDMA in Nigeria, IT & Telecom Digest, <http://www.ittelecomdigest.com/mtn-acquires-visafone-to-put-end-to-cdma-in-nigeria/>

<sup>3</sup><http://www.balancingact-africa.com/news/en/issue-no-337/money/mtn-concludes-70-mil/en>

<sup>4</sup>Base on operator data by the Nigerian Communication Commission (NCC), accessed at [http://www.ncc.gov.ng/index.php?option=com\\_content&view=article&id=70&Itemid=67](http://www.ncc.gov.ng/index.php?option=com_content&view=article&id=70&Itemid=67)

<sup>5</sup>In the case of Gencor Ltd V. Commission [1999] ECR II-753 the Court held that merger control is there "to avoid the establishment of market structures which may create or strengthen a dominant position and not need to control directly possible abuses of dominant positions".

<sup>6</sup>Competition laws are usually enacted for the promotion or maintenance of fair market competition among businesses by checking there anti-competitive conducts, through regulatory control. Competition law is known as antitrust law in the United States and European Union, and as anti-monopoly law in China and Russia. In previous years it has been known as trade practices law in the United Kingdom and Australia. [www.en.wikipedia.org](http://www.en.wikipedia.org) last checked 11/11/2015. Competition law, or antitrust law, has three main elements:

- prohibiting agreements or practices that restrict free trading and competition between business. This includes in particular the repression of free trade caused by cartels.
- banning abusive behavior by a firm dominating a market, or anti-competitive practices that tend to lead to such a dominant position. Practices controlled in this way may include predatory pricing, tying, price gouging, refusal to deal, and many others.
- supervising the mergers and acquisitions of large corporations, including some joint ventures. Transactions that are considered to threaten the competitive process can be prohibited altogether, or





### 1. Nigerian Electricity Management Services Authority Act 2015;

On 27th May 2015, President Goodluck Ebele Jonathan signed the Nigerian Electricity Management Services Authority (NEMSA) Bill into law.

The Nigerian Electricity Management Services Authority (NEMSA) was established with the intent of taking over the management of the Electricity Management Services Limited (the EMSL). NEMSA is an independent agency charged with the responsibilities of maintaining technical competence, safety and security while ensuring regular power supply, testing and certification of electrical materials/equipment and all electrical installations in the country.

#### Highlights

- Conferring NEMSA with powers to conduct inspections and certifications in the Nigerian Electricity Supply Industry and the enforcement of technical electrical standards, codes and regulations.
- Establishment of a governing board to oversee the affairs of NEMSA which includes remuneration of its staff, making standard policies etc.
- Granting NEMSA unrestricted access to premises and records of establishments in furtherance of their objects.
- Reserving the Authority with power to serve notice on any institution of its choice requiring information as regards their electrical paraphernalia, its performance and standards.

Although there seems to be a great overlap with the functions and duties of

the Nigerian Electricity Regulatory Commission (NERC), its establishment is viewed to reduce the monopoly of NERC which serves as the industry regulator, inspector, certifier, prosecutor, investigator, fact-finder, judicial officer and judgment enforcer.

### 2. Equipment Leasing Act 2015

On 26th May, 2015, The Equipment Leasing Bill was signed into law. This is the first legislation enacted in relation to equipment leasing business in Nigeria. It will make for a more structured and convenient business of equipment leasing which in turn will facilitate economic growth and development.

#### Highlights

- Participants in the business of equipment leasing will be incorporated as a limited liability company in Nigeria with the business incorporated into its memorandum of association.
- Leases were categorized into: financial, operating and variants of financial and operating leases.
- An Authority was established for equipment leasing registration and provides for the registration of lease agreements within fourteen days after which a certificate of registration will be issued.

#### Implications of the Act

- i. Unregistered leases will be invalidated such that legal enforcement of such relationships will be impossible rendering it unable to protect rights and interests of the parties involved.
- ii. A registered business name cannot carry on the business of equipment leasing.

### 3. The Cybercrimes (Prohibition, Prevention Etc.) Act

The Cybercrimes (Prohibition, Prevention Etc.) Bill was signed by the president on 15th May, 2015. The Act seeks to maintain cyber security through the prohibition, detection and prosecution of cybercrimes and other related matters. It seeks to ensure the protection of networks, intellectual property, critical national information, computer systems and electronic communications.

#### Highlights

- It caters for the protection of Critical National Information Infrastructure being computers, networks and information considered vital to Nigeria's security and provides for the criminal liability of anyone who contravenes any provision relating thereto.
- It prohibits any unauthorized access to any computer system for the purposes of alteration, deletion, transmission, damage and suppression of data vital to national security or for fraudulent purposes.
- The Act imposes a duty on financial institutions to its customers to establish an effective check for cybercrimes and ensure proper verification of customers prior to carrying out electronic financial transactions. Failure of such verification is an offence for which the institution/organization is liable to fine.
- It mandates that any unauthorized debit on the account of a customer must be reversed within 72 (Seventy Two) hours the failure of which is an offence liable on conviction to restitution of the debit and fine.
- The Act mandates service providers to retain records, traffic data and subscriber information for two years and at the request of relevant authority, release any information required to be retained.
- It empowers a judge to order a service provider to intercept, collect, record content data or traffic data associated with specified communication on the basis of information on oath for the purpose of a criminal proceeding or investigation.

- It established the Cybercrime Advisory Council for recommendations on cyber security and the National Cyber Security Fund domiciled with the Central Bank of Nigeria into which 0.005 of all electronic transactions will be paid by businesses listed in Schedule 2 of the Act and all other monies, grants and gifts that may accrue to the fund.

### 5. Standard Organisation of Nigeria Act 2015

On 27th May 2015, Standard Organisation of Nigeria Amendment bill was passed into law. It repealed the Standard Organisation of Nigeria Act Cap. S9 Laws of the Federation of Nigeria, 2004. The Act expands the regulatory functions and powers of the Standards Organisation of Nigeria which will gear towards improving global competitiveness and safety of consumers through ensuring the availability of standard products in compliance with relevant statutes.

#### Highlights

- The Council's powers have been extended to:
  - i. Evaluation of quality assurance activities
  - ii. Establishment of mandatory conformity assessment programme for locally manufactured products in Nigeria.
  - iii. Nigerian Industrial Standards and import and export product surveillance etc.
- The Act has reasonably reviewed financial liability to N1,000,000 as opposed to N50,000 being the maximum financial limit of the previous Act.
- It increased the imprisonment term for offences liable on conviction to between nine months and one year and extends the application of its provisions to corporate bodies.

This structure of increased liability is believed to be able to discourage counterfeits and importation of fake and sub-standard products. The Act however does not make provisions for fines relating to offences by corporate bodies.

### 6. Asset Management Corporation of Nigeria (Amendment) Act 2015

On 26th May, 2015, the erstwhile President of the Federal Republic of Nigeria, His Excellency, President Goodluck Ebele Jonathan signed the Asset Management Corporation of Nigeria (Amendment) Bill into Law.

#### Highlights

- The Act mandates that quarterly report of its operations be submitted to the National Assembly. This is undoubtedly in order to ensure transparency and accountability.
- It Created the Banking Sector Resolution Cost Fund to facilitate the Corporation in meeting its obligations. The fund is domiciled with the CBN and exempted from taxes.
- The CBN is expected to appropriate a sum to the Fund coupled with an annual levy imposed on eligible financial institutions.
- The Act makes each financial institution responsible for the computation of the amount payable to the BSRC fund and where the amount is decreased, the final and conclusive figure will be that computed by the Board of Trustees.
- A defaulting financial institution shall be liable to N1,000,000,000 for each act of default or non-compliance if found guilty.
- The Act vests eligible bank assets and assignment of contracts relating thereto in the Corporation in spite of the existence of pending suits in respect of the eligible bank asset.
- The Corporation is empowered to take over existing action from an eligible financial institution before acquiring assets forming subject matter of the suit.

### 7. Violence against Persons (Prohibition) Act 2015

On 25th May 2015, the erstwhile President of the Federal Republic of Nigeria, His Excellency, President Goodluck Ebele Jonathan, signed the Violence against Persons (Prohibition) Bill into law. The Act promotes the long,

structured concepts of Human Rights through the prohibition and elimination of violence in his or her public and private life.

#### Highlights

- It prohibits a range of activities, which may compromise human physical, mental, psychological or physical balance.
- It defines rape as penetration of mouth, anus and vagina without consent or if consent is derived by any means of intimidation or threat.
- Recognising that women can rape as well, it punishes rape by life imprisonment. In furtherance of this, the law mandates that an open and accessible register of sex offenders shall be maintained.
- The law makes liable with the option of jail term or fine anyone who wilfully inflicts physical injury on another, incites or aids another to commit a violent act, coerce another to engage in self-detrimental acts and wilfully places another in fear of physical injury.
- It prohibits female circumcision and punishes an attempt to commit it.
- It further prohibits deprivation of a person's liberty, emotional, verbal and physical abuse on another, abandonment of children, spouse and other dependents without sustenance, subjecting a widow to harmful traditional practices, incest, indecent exposure, forceful ejection or eviction of a spouse or one from his or her home and causing mischief with an intent to cause distress.
- It establishes a commission to ensure its full implementation and a trust fund for catering to the needs of the victims.
- The Act cannot act in vacuum hence the need to make a complaint to the appropriate authorities. Perhaps the mitigation of the strictness of this provision is that the Act provides that a third party can make a complaint.

### 8. Immigration Act 2015

On 25th May 2015, the erstwhile President of the Federal Republic of Nigeria, His Excellency, President Goodluck Ebele Jonathan, signed the Immigration bill into law. This Act



repealed the Immigration Act of 1963. In effect, a lot of changes reflecting modern trends in immigration issues have been incorporated into this Act and they are highlighted below:

#### Highlights

- The Head of Immigration Service is designated as “Comptroller General.”
- The Comptroller General of Immigration is empowered to approve and issue temporary work permits and Combined Expatriate Residence Permit and Aliens Card (CERPAC).
- Commercial airliners are to ensure their passengers have correct documents prior to travel and are liable if in default.
- Approval of the CGI must be obtained prior to foreign nationals' change of employment within Nigeria; failure of which may make the person liable to deportation.
- Alteration of existing travel documents renders the holder liable with an option of Two Million Naira fine or three years imprisonment.
- Companies/employers are to ensure strict compliance of foreign nationals to Immigration laws in Nigeria failure of which will render them liable.
- Immigration Courts have been established at Ports of Entry for speedy resolution of Immigration matters. An offender may be remanded for a maximum of 21 days in custody at first instance but the total period of remand must not exceed three months.
- Failure to renew Expatriate Quota positions or submit its monthly returns will attract a fine of three million naira. The responsible officer will be liable on conviction for a year or to a fine of one million naira. Expatriates shall be liable to a maximum of 12 months imprisonment or maximum of three million naira fine upon failure of renewal of residence permit, renew business, transit, visitor's pass or temporary work permit.
- Officers are empowered to detain any expatriate deemed to be in contravention of the Act.

- If a person is guilty of an offence for which no general punishment has been specified, the person is liable for a fine of one hundred thousand naira or one year imprisonment or both.

#### 9. Administration of Criminal Justice Act

On 13th May, 2015, the erstwhile president of the Federal Republic of Nigeria, His Excellency, President Goodluck Ebele Jonathan signed the Administration of Criminal Justice Bill into law. As its name implies, the Act makes provisions for the Administration of Criminal Justice and related matters in all Federal Courts in Nigeria and the courts of the FCT. The purpose of the Act is the regulation of the Criminal Justice System, protection of the society from crime and protecting rights and interests of the victim, suspect and defendant.

The provisions of the Act apply to criminal trials for offences contained in any Act of the National Assembly and those punishable within the Federal Capital Territory without prejudice to the provisions of Parts 8-30 therein unless express provision is made in respect of any particular court or form of trial or proceeding. It does not also apply to a Court Martial.

The Act repeals the operation of:

- i. The Criminal Procedure Act, cap C41 LFN 2004;
- ii. Criminal Procedure (Northern States) Act cap C42 LFN 2004; and,
- iii. The Administration of Justice Commission Act, Cap A3 L-FN 2004.

#### Highlights

- The suspect is entitled to information as to the reason for arrest.
- The suspect is entitled to be informed of his/her right to remain silent and consultation of a lawyer.
- The Act prohibits the arrest of innocent persons in the stead of suspects for a civil wrong or a breach of contract.
- It provides that confessional statements be recorded electronically to eliminate the incidences of objection to tendering of confessional statements.

- It also prohibits handcuffing a suspect unless there is an apprehension of violence or attempt to escape.

#### 10. National Tobacco Control Act

On 26th May 2015, The National Tobacco Control Bill was signed into Law by President Goodluck Jonathan. The National Tobacco Control Act 2015 repealed the Tobacco Smoking (Control) Act, Cap. T6, LFN 2004. The Act will ensure effective regulation and control of production, manufacture, sale, labelling, advertising, promotion and sponsorship of tobacco and tobacco products in Nigeria.

#### Highlights

- The Act prohibits smoking in public places and imposes a duty of any person who owns or is in control of public places to display a “no smoking” sign and take reasonable steps to ensure compliance with the provisions of the Act.
- It prohibits tobacco advertisement, promotion and sponsorship excluding application to manufacturers, wholesalers, retailers and any consenting person of 18 years and above.
- It prohibits access to tobacco products and sale to any person 18 years and below.
- It requires that a manufacturer or an importer of tobacco submits a report on tobacco product contents and emissions as may be prescribed by Standard Organisation of Nigeria.
- It mandates that the package of tobacco products shall contain health warnings in English language and in a manner not calculated to deceive or create a false impression about the product and its hazards.
- It prohibits the industry from making voluntary contributions to any political party, government institution or public office holder.

# WEIRD CASES



1. A brother and sister who fought a High Court battle over plans for their mother's funeral have accepted a compromise that will include the congregation joining in a rendition of If You Were the Only Girl in the World.

Iris Freud, who was born into the Church of England but married a practising Jew, died aged 92 last month. Her funeral was delayed because Susanna Levrant, her daughter, and David Freud, her son, disagreed over where she should be buried. Mrs Levrant, 66, wanted a C of E service, with familiar hymns and the singing of If You Were the Only Girl in the World, a hit for Perry Como in 1946 that their father used to sing to their mother. While Mr Freud, 67, wanted a more austere service to fit in with his desire to observe traditional Jewish mourning.

After a two-day hearing at the High Court at which Mr Justice Arnold said he would not relish exercising the "judgment of Solomon" and forcing a compromise on the siblings, the pair

had to come to an agreement.

Mrs Freud will be buried in consecrated ground at Mortlake cemetery, near Putney, west London, where she lived for 66 years<sup>20</sup>.

2. It is often said during marriage ceremonies, that "till death do us part". This vow seems to be said without significance. However, the significance of same was met with reality in a recent case at the High Court of Lagos State Nigeria. A woman who had fought tooth and nail for dissolution of her marriage as well as custody of her child passed away on the same day that Judgment was delivered dissolving the marriage and granting her custody.

She was confirmed to have passed away at around 1pm of the said date, whereas, Judgment was delivered at around 3pm of the same date. Death indeed parted them before the court could.

<sup>20</sup> The Times: UK News

## EDITOR'S NOTE

"Probitas Partners Journal is published to provide insight into topical issues of law, business and policies.

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## CARTOON

**Client:** What is your most basic fee?

**Lawyer:** N500,000 to answer three questions.

**Client:** Whoa! That's pretty expensive isn't it?

**Lawyer:** Yes, now what is your third question?

